The Proper Standard to Apply Under Indiana Trial Rule 41(B): Motion for Involuntary Dismissal

I. Introduction

The focus of this Note concerns the controversial interpretation of Indiana Trial Rule 41(B)[1] by the Indiana Court of Appeals. Under

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[1]After the plaintiff or party with the burden of proof upon an issue, in an action tried by the court without a jury, has completed the presentation of his evidence thereon, the opposing party, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that *considering all the evidence and reasonable inferences therefrom in favor of the party to whom the motion is directed, to be true, there is no substantial evidence of probative value to sustain the material allegations of the party against whom the motion is directed.* The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff or party with the burden of proof, the court, when requested at the time of the motion by either party shall make findings if, and as required by Rule 52(A). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision or subdivision (E) of this rule and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, operates as an adjudication upon the merits.

Ind. R. Tr. P. 41(B) (emphasis added).

The above emphasized language was inserted into the rule by the Indiana legislature. *See* Act of Mar. 13, 1969, ch. 191, § 1969 Ind. Acts 546, 622. This language was substituted for the language proposed by the Civil Code Study Commission, which had stated that the defendant could move for a dismissal upon the ground that "upon the facts and the law there has been shown no right to relief." R. Townsend, Indiana Rules of Civil Procedure 166 (1968). The proposed rule contained the same language as is found in Federal Trial Rule 41(b), but the form of the rule as amended by the Indiana legislature is peculiar to Indiana. See Annot., 55 A.L.R.3d 272, 287 n.24 (1974) for a discussion of the Indiana rule and a survey of how various states treat a defendant's motion to dismiss under their applicable rules of civil procedure.

The language inserted into the rule by the legislature is similiar to words applied by the Indiana courts when ruling on a motion for a directed verdict. On a motion for directed verdict the court may view only the evidence favorable to the plaintiff. *See* Huff v. Travelers Indem. Co., 266 Ind. 414, 363 N.E.2d 985 (1977); Hendrix v. Harbelis, 248 Ind. 619, 230 N.E.2d 315 (1967); McCague v. New York, C. & St. L. R.R., 225 Ind. 83, 71 N.E.2d 569 (1947); Mamula v. Ford Motor Co., 150 Ind. App. 179, 275 N.E.2d 849 (1971). However, as will be discussed later, Indiana Trial Rule 41(B) directs the trial court to consider *all* the evidence. *See* text accompanying notes 89-94 *infra*. While the motions for directed verdict and involuntary dismissal serve similar purposes, the standards under each should not be the same because they are applicable in different contexts, Trial Rule 50 in jury trials and Trial Rule 41(B) in non-jury actions. *See* text accompanying notes 101-06 *infra*.

Trial Rule 41(B) a defendant[2] in an action before the court[3] may move for involuntary dismissal at the conclusion of the plaintiff's case. A controversy exists concerning what standard the trial court shall use to determine whether the motion should be granted.

The Indiana Court of Appeals has held that a motion to dismiss raises questions of law, but not questions of fact.[4] Only the legal sufficiency of the plaintiff's case is at issue under a motion to dismiss according to the appellate court's interpretation of Trial Rule 41(B). Under this interpretation, a trial court must determine whether or not the plaintiff has demonstrated a prima facie right to relief. To ascertain whether the plaintiff's evidence is sufficient to meet this prima facie standard, a trial court is required to engage in a *subjective*[5] analysis of the evidence. The court can consider only the evidence and reasonable inferences therefrom which are most favorable to the plaintiff. Evidence favorable to the defendant must be ignored. If the plaintiff's evidence, being viewed in this favorable light, appears sufficient to support a judgment, the plaintiff has made out a prima facie case. The defendant's motion to dismiss under Trial Rule 41(B) must be denied when the plaintiff's case in chief shows such a prima facie right to relief.

An authority[6] on Indiana trial practice has criticized this interpretation of Trial Rule 41(B). One objection is that the prima facie standard prevents a trial court in a nonjury action from exercising its power as the trier of facts. The critic argues that the trial court should be able to dispose of an unmeritorious but prima facie claim at the conclusion of the plaintiff's case. In the critic's opinion, the proper interpretation of Trial Rule 41(B) would allow the trial court to *objectively weigh all* the evidence, and dismiss the action if the plaintiff has failed to preponderate.

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[2]Trial Rule 41(B) provides that the opposing party may move for a dismissal against the party who has the burden of proof. Hereafter, the opposing party will be referred to as "defendant" and the party with the burden of proof as "plaintiff."

[3]In a jury trial the proper motion would be one for judgment on the evidence (directed verdict) under Trial Rule 50(A).

[4]*See* text accompanying note 13 *infra*.

[5]The analysis is *subjective* in the sense that the trial court must view the evidence in a biased fashion. The evidence supporting the plaintiff must be considered only in the light most favorable to him. A trial court cannot *objectively* view the evidence; that is it may not look at the evidence in total. In essence, the rule forces the court to view the evidence in a biased manner rather than view it in total and *objectively*.

[6]*See* 3 W. HARVEY, INDIANA PRACTICE 13-15 (Supp. 1980); Harvey, *Civil Procedure and Jurisdiction, 1979 Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 57, 76-78 (1980) [hereinafter cited as Harvey, *1979 Survey*]; Harvey, *Civil Procedure and Jurisdiction, 1978 Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 42, 54-55 (1979) [hereinafter cited as Harvey, *1978 Survey*].

This Note will consider the case law in which the Indiana Court of Appeals has determined that a Trial Rule 41(B) motion raises only issues of law. The decisions in these cases will be analyzed, with an emphasis on ascertaining the underlying rationale for applying a prima facie standard. The points of contention raised by those authorities critical of the appellate court's interpretation will be reviewed and analyzed. Also, Indiana Trial Rule 41(B) will be compared to Federal Rule of Civil Procedure 41(b), upon which the Indiana rule is based. An argument will then be made as to which interpretation of Indiana Trial Rule 41(B) is proper, and which interpretation is more procedurally desirable in Indiana trial practice.

II. Indiana Case Law Under Trial Rule 41(B)

A. The Precedent

The 1971 case of *Ohio Casualty Insurance Co. v. Verzele*[7] afforded an appellate court the opportunity to determine the standard applicable to a Trial Rule 41(B) motion to dismiss. The plaintiff, Ohio Casualty, had brought suit for damages allegedly caused by the wrongful recovery of its insured, Eazsol. The insurance policy contained a clause excluding coverage of business property or business enterprises. The plaintiff in its case in chief attempted to prove that the defendant was injured in a business related activity and accordingly was not entitled to recover under the policy. Before presenting his rebutting evidence, the defendant filed a "motion for finding against the [plaintiff] . . . ."[8] The trial court granted the motion, finding that the plaintiff had failed to satisfy "the burden of proof that was imposed upon him . . . ."[9] Ohio Casualty appealed on the ground that its evidence was sufficient to state a cause of action.

Upon review, the appellate court determined that the trial court had improperly engaged in a weighing of the plaintiff's evidence. In arriving at this determination the court first stated that the critical language in Trial Rule 41(B) relevant to the case at bar was:

> [The defendant] may move for a dismissal on the grounds that considering all the evidence and reasonable inferences therefrom in favor of the party to whom the motion is directed, to be true, there is no substantial evidence of probative value to sustain the material allegations of the [party] against whom the motion is directed.[10]

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[7]148 Ind. App. 429, 267 N.E.2d 193 (1971).

[8]*Id.* at 430, 267 N.E.2d at 193.

[9]*Id.* at 436, 267 N.E.2d at 197.

[10]*Id.* at 434, 267 N.E.2d at 196 (quoting Ind. R. Tr. P. 41(B)).

The court construed this language to mean that

> a party moving for a finding at the close of the plaintiff's evidence raise[s] the same question of a motion for a directed verdict at the same time in a jury case. . . .
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> . . . .
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> Even in a case tried by the court, on a motion for a finding at the end of the plaintiff's case, 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.[11]

Under this interpretation of the rule, the appellate court reviewed the evidence in a light most favorable to the plaintiff. The court concluded that as a matter of law the plaintiff had shown a cause of action sufficient to preclude an involuntary dismissal. As a consequence, the trial court's finding in favor of the defendant was reversed and the case was remanded for further proceedings.[12]

The effect of the decision reached in *Ohio Casualty* was that the trial court could not dismiss a prima facie case.[13] Accordingly, on a motion to dismiss, the question was not whether the plaintiff had met his burden of proof. Rather, at the close of the plaintiff's case in chief, the trial court could only determine a question of law: had the plaintiff made a prima facie case? Under Trial Rule 41(B) the court was not empowered to determine whether the plaintiff had proved his right to relief by a preponderance of the evidence, which was a question of fact.

In *Building Systems, Inc. v. Rochester Metal Products, Inc.*,[14] the appellate court followed the precedent set in *Ohio Casualty*. The defendant had made a motion to dismiss; the trial court weighed the evidence and granted the motion. On appeal the plaintiff asserted that evidence introduced during its case in chief entitled it to some recovery. The appellate court determined that the issue on appeal from such a motion was whether the nonmoving party's evidence, when viewed in the light most favorable to him, was sufficient to support a recovery.[15] The court found that, viewed in a favorable light, the plaintiff's evidence was of substantial probative value. As a consequence, the trial court's dismissal was reversible error. The

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[11]148 Ind. App. at 434, 267 N.E.2d at 196.

[12]*Id.* at 436, 267 N.E.2d at 197.

[13]A prima facie case represents that stage in trial "where the proponent, having the first duty of producing some evidence in order to pass the judge to the jury, has fulfilled that duty, satisfied the judge, and may properly claim that the jury be allowed to consider his case." 9 J. WIGMORE, LAW OF EVIDENCE § 2494 (3d ed. 1940).

[14]168 Ind. App. 12, 340 N.E.2d 791 (1976).

[15]*Id.* at 14, 340 N.E.2d at 793.

cause was "remanded to the trial court for a full trial of all the issues."[16]

Indiana Trial Rule 52(A) empowers the trial court to make special findings of fact upon the request of a party.[17] Although the court determines such facts, the court must view them in a light most favorable to the plaintiff upon a motion to dismiss according to the case of *Board of Aviation Commissioners v. Schafer*.[18] The plaintiff in *Schafer* had requested a special finding of fact prior to the introduction of any evidence. At the close of the plaintiff's evidence, the defendant had moved for an involuntary dismissal. The trial court weighed the evidence and granted the motion to dismiss.

The plaintiff appealed on the ground that such weighing was in error. The defendant contended that the prima facie standard generally applicable under Trial Rule 41(B) was waived where the court had made special findings of fact. The appellate court found that the weighing at the trial level was reversible error. Relying substantially on the analysis of Trial Rule 41(B) in *Building Systems*, the court determined that even the finding of fact had to be viewed in the light most favorable to the plaintiff.[19] After reviewing the record, the court concluded "the evidence most favorable to the Board shows that the Board had a prima facie right to obtain [the relief sought]."[20]

Briefly, in a nonjury action the trial court cannot dismiss a prima facie case under Trial Rule 41(B). In determining whether the plaintiff has a prima facie case, the court must look at the evidence in the light most favorable to the plaintiff. The evidence cannot be weighed. No credence can be given to evidence contradicting the plaintiff's claims for relief. This prima facie standard is deemed so essential under Trial Rule 41(B) that even findings of fact made by the court must be viewed in a light most favorable to the plaintiff.

B. The "Harmless Error" Exception

The Indiana Court of Appeals has not deviated from the determination in *Ohio Casualty* that weighing of the evidence by a trial

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[16]*Id.* at 17, 340 N.E.2d at 795.

[17]In the case of issues tried upon the facts without a jury or with an advisory jury, the court shall determine the facts and judgment shall be entered thereon pursuant to Rule 58. Upon its own motion, or the written request of any party filed with the court prior to the admission of evidence, the court in all actions tried upon the facts without a jury or with advisory jury . . . shall find the facts specially and state its conclusions thereon.

IND. R. TR. P. 52(A).

[18]366 N.E.2d 195 (Ind. Ct. App. 1977).

[19]*Id.* at 197.

[20]*Id.* at 199.

court is improper when the defendant moves for a dismissal. However, the appellate courts have upheld such weighing, even though improper, as harmless error under Trial Rule 61.[21] Weighing of the evidence is not necessarily prejudicial when the party moving for dismissal has testified in the plaintiff's case in chief. Accordingly, the judgment will not be reversed upon appeal for such error.

The doctrine of "harmless error" was first construed in *Powell v. Powell*.[22] In *Powell* a husband had brought an action for absolute divorce and had sought to have the wife enjoined from trespassing on his premises. The trial court had ordered the wife to appear and show why the temporary injunction should not issue.[23] The trial court, erroneously believing that the burden of proof was on the wife, directed her to present her evidence first.[24] The plaintiff then moved for a judgment on the evidence.[25] After weighing the evidence the trial court granted the motion and issued the injunction from which the wife appealed.[26] The court of appeals found that, although the initial burden of proof had been on the husband, the wife had suffered no prejudice by presenting her evidence first. The appellate court affirmed the dismissal because both parties had testified; consequently, neither party had been injured by the weighing of the evidence by the trial court.

Although a motion under Trial Rule 41(B) was inapplicable in *Powell*, the court stated in dicta that a motion for dismissal raised the "same question as would be presented by a motion for judgment on the evidence in a jury trial."[27] The court further stated that regardless of which motion was procedurally correct, the trial court, "in paying strict adherence to the requirements of the test [that the plaintiff's evidence be viewed in a light most favorable to it],"[28] could not properly have granted the husband's motion. The court concluded:

> Although the trial court erred in granting the husband's improper motion, appellant does not show in what manner, if any, she was prejudiced by such error. The record indicates that both husband and wife testified. The husband made his motion after the wife had rested her case. The wife had no more evidence to present and it was then solely the pre-

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[21]"No error . . . or defect in any ruling . . . is ground . . . for setting aside a verdict or for . . . reversal on appeal, unless refusal to take such action appears to the court inconsistent with substantial justice." IND. R. TR. P. 61.

[22]160 Ind. App. 132, 310 N.E.2d 898 (1974).

[23]*Id.* at 133-34, 310 N.E.2d at 900.

[24]*Id.* at 134, 310 N.E.2d at 900.

[25]*Id.*

[26]*Id.*

[27]*Id.* at 137, 310 N.E.2d at 902 (citing Ohio Cas. Ins. Co. v. Verzele, 148 Ind. App. 429, 267 N.E.2d 193 (1971)).

[28]160 Ind. App. at 137, 310 N.E.2d at 902.

> rogative of the husband to introduce additional evidence if he desired. In effect, the wife could do no more than await the trial court's final determination. At this stage of the proceedings the trial court committed no prejudicial error in weighing the evidence which had been adduced. . . . It must be considered that the granting of the husband's motion was harmless and, therefore, subject to the mandate of Ind. Rules of Procedure, Trial Rule 61 . . . .[29]

In *Fielitz v. Allred*,[30] this doctrine of "harmless error" was affirmed in an action before the court. The plaintiff had appealed from a dismissal, contending that the judge had improperly weighed the evidence in finding for the defendants.[31] Finding no substantive evidence of probative value in the record to support the plaintiff's claim for relief, the court of appeals affirmed the dismissal.[32]

As an alternative basis for its finding, the appellate court concluded:

> [E]ven if the trial court weighed the evidence, such error would be harmless in the case at bar. [The plaintiff] called [the defendant] as one of the witnesses in his case-in-chief and she testified as to her version of the facts. Both parties thus testified and the motion came after the appellant had rested his case. It was then [the defendant's] sole prerogative to introduce additional evidence. Thus even if the trial court weighed the evidence which had been adduced, there is no showing how [the plaintiff] was prejudiced.[33]

Briefly, the general rule is that the trial court cannot properly weigh the evidence when considering a motion for involuntary dismissal. However, where the defendant has testified in the plaintiff's case in chief, both versions of the facts are supposedly before the court. The weighing of the evidence in this situation is still improper, but can be treated as harmless error, especially when the plaintiff cannot demonstrate prejudice to himself.[34]

C. "Shedding the Shackles of 41(B)"

Where the preponderance of evidence lies is not an issue raised by a motion to dismiss under Indiana practice. The only question before the court is whether the plaintiff has made a prima facie

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[29]*Id.*

[30]364 N.E.2d 786 (Ind. Ct. App. 1977).

[31]*Id.* at 787.

[32]*Id.* at 789.

[33]*Id.* at 789-90.

[34]*See* text accompanying notes 95-100 *infra* for a discussion of the propriety of this "harmless error" exception.

case. A denial of the motion to dismiss, however, is not necessarily an indication by the court that the plaintiff has established a right to relief. A trial court may be convinced that the plaintiff has not met the requisite quantum of proof to preponderate. Yet, the plaintiff's evidence, viewed in the light most favorable to him, may establish a prima facie case.[35] In this situation, Indiana precedent dictates that the trier of the facts, the court, must deny the motion to dismiss. The defendant then is compelled to present a purposeless defense before a court which has already decided *objectively* against the plaintiff. Such judicial deference to an unmeritorious claim is contrary to the mandate in Indiana Trial Rule 1 that the rules "shall be construed to secure the just, speedy and inexpensive determination of every action."[36]

The recent Indiana Court of Appeals decision in *Ferdinand Furniture Co. v. Anderson*,[37] clearly demonstrates this anomaly. The decision also demonstrates a somewhat unusual mode of procedure by which this anomaly can be abrogated. The plaintiff had alleged at trial that Anderson's heating company had defectively installed a drying oven in the plaintiff's building. A fire which destroyed the building was attributed to the alleged faulty installation of the oven. The action sought damages upon three counts: negligence, strict liability, and breach of implied warranty. At the close of the plaintiff's case in chief, the defendant Anderson moved for involuntary dismissal pursuant to Trial Rule 41(B). The trial record indicated that the action was commenced after the statute of limitations had run on all three counts.[38] The trial court denied the motion "but advised Anderson that if he rested his case, judgment would be entered"[39] in his favor. The defendant availed himself of this advice and rested. The court then entered the judgment for the defendant based on the expiration of the statute of limitations.[40]

The plaintiff appealed, arguing that (1) the defendant had the burden to plead the affirmative defense of the running of the statute of limitations and (2) a denial of a motion to dismiss precluded the court from "entering judgment for the defendant when the defendant presented no evidence."[41]

The appellate court held that "[i]f the evidence presented during

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[35]*See, e.g.*, Building Sys., Inc. v. Rochester Metal Prods., Inc., 168 Ind. App. 12, 340 N.E.2d 791 (1976). Judge Garrard, in a concurring opinion noted that "[h]ad the trial court been entitled to weigh the evidence, [the dismissal] should clearly have been sustained in deciding the plaintiff had failed to meet its burden of proof." *Id.* at 18, 340 N.E.2d at 195 (Gerrard, J., concurring).

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

[37]399 N.E.2d 799 (Ind. Ct. App. 1980).

[38]*Id.* at 802.

[39]*Id.* at 801.

[40]*Id.*

[41]*Id.* at 801-02.

the plaintiff's case in chief disclosed that the statute of limitations has run, to require the defendant to present essentially the same evidence during his 'side' of the case would be to exalt form over substance."[42] Although the defendant had elected to rest without offering any evidence, the plaintiff had proved himself out of court.

On the second issue raised in the appeal, the court of appeals determined that the trial court has the same right as the jury to enter judgment against a party who establishes a prima facie case.[43] The court "may reconcile, reject or accept, and weigh the evidence and determine the credibility of witnesses" after the defendant rests his case.[44] The appellate court recognized that Indiana precedent prohibits the trial court from weighing the evidence upon a motion to dismiss.[45] The appellate court determined, however, that by advising the defendant to rest, the trial judge "could shed the shackles of TR 41 (B) and don the mantle of the trier of fact, . . . free to weigh the evidence and determine in which direction it preponderated."[46]

Consequently, to dispose of a prima facie, but unmeritorious, claim at midtrial and still comply with Indiana case law, the court must deny the motion to dismiss, advise the defendant to rest, and upon the defendant's compliance, enter a judgment in his favor. Only where the defendant rests may the court make its ultimate fact determination at midtrial.

III. An Analysis of Indiana Appellate Court Decisions Interpreting Trial Rule 41(B)

A. Introduction

The Indiana Court of Appeals has determined that a Trial Rule 41(B) motion to dismiss is functionally equivalent to a Trial Rule 50(A)[47] motion for judgment on the evidence.[48] Under Indiana prac-

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[42]*Id.* at 802.

[43]*Id.* at 805.

[44]*Id.* (citing Pepka v. Branch, 155 Ind. App. 637, 294 N.E.2d 141 (1973); General Elec. Co. v. Fuelling, 142 Ind. App. 74, 232 N.E.2d 622 (1968); Newton v. Cecil, 125 Ind. App. 416, 124 N.E.2d 713 (1955)).

[45]399 N.E.2d at 804 (citing Ohio Cas. Ins. Co. v. Verzele, 148 Ind. App. 429, 267 N.E.2d 193 (1971)).

[46]399 N.E.2d at 805.

[47]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. Ind. R. Tr. P. 50(A).

[48]*See, e.g.*, Board of Aviation Comm'rs. v. Shafer, 366 N.E.2d 195 (Ind. Ct. App. 1977); Fielitz v. Allred, 364 N.E.2d 786 (Ind. Ct. App. 1977); Building Sys., Inc. v.

tice, both motions raise only the question of whether, as a matter of law, the plaintiff's evidence establishes a prima facie case. This interpretation of the function of Trial Rule 41(B), although repeatedly challenged and criticized, has prevailed in the courts.[49] *Ohio Casualty* and its progeny were affirmed by the court of appeals in the most recent case on the issue, *Ferdinand Furniture Co. v. Anderson*.[50] The Indiana Supreme Court has not dealt with the issue of what the applicable standard under Trial Rule 41(B) should be. As a consequence the interpretation in *Ohio Casualty* stands as the precedent equating a motion to dismiss with a motion for a directed verdict. The decisions in *Ohio Casualty* and its progeny will be analyzed to ascertain whether such reliance is justified.

B. Criticism of the Opinions in Ohio Casualty *and* Building Systems

1. The Applicable Standard.—In *Ohio Casualty* the court of appeals ruled that Trial Rule 41(B) was not intended to change Indiana practice in any substantial regard from the procedure followed prior to the adoption of the new rules.[51] Under the old rules, a defendant in an action before the court could "move for a finding in his favor, and thereby raise the same question as is raised by a motion to direct a verdict in a jury case."[52] The standard applied was the same, regardless of whether the trial was by jury or before the court. In the court's opinion, a motion for involuntary dismissal was essentially a new label for an old procedural form, a motion for finding on the evidence, where the trial court could not weigh the evidence.[53]

In arriving at this determination, the court analyzed the "substantial evidence of probative value" language of Trial Rule 41(B). The comments of the Civil Code Study Commission pertaining to Trial Rule 41(B)[54] were also taken into consideration and quoted

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Rochester Metal Prods., Inc., 168 Ind. App. 12, 340 N.E.2d 791 (1976); Powell v. Powell, 160 Ind. App. 132, 310 N.E.2d 898 (1974); Ohio Cas. Ins. Co. v. Verzele, 148 Ind. App. 429, 267 N.E.2d 193 (1971).

[49]*See* note 6 *supra*.

[50]399 N.E.2d 799 (Ind. Ct. App. 1980).

[51]148 Ind. App. at 434, 267 N.E.2d at 196.

[52]*Id. See* 2 F. WILTROUT, INDIANA PRACTICE § 1637 (1967).

[53]2 F. WILTROUT, *supra* note 52, § 1637.

[54]The applicable Civil Code Study Commission Comments are located in R. TOWNSEND, *supra* note 1, at 169.

> Rule 41(b). This subdivision provides for an involuntary dismissal upon motion of the opposing party after the plaintiff or party with the burden of proof upon an issue has completed presentation of his evidence, on the ground that upon the facts and the law he has shown no right to relief. This fulfills the function of a motion for a directed verdict in a jury case (a motion

extensively by the court.[55] Both the court's interpretation of the rule's language and the court's reliance on the Study Commission comments are susceptible to criticism.

2. Dissent Within the Court.—One adamant critic sharply contesting the appellate court's interpretation is Judge Staton of the Third District Court of Appeals. Judge Staton contends that the proper interpretation of the rule would permit the court to weigh the evidence and make ultimate determinations of fact upon a motion to dismiss at midtrial. This appellate judge has concluded that the Indiana cases holding that weighing is improper are "void of rationale."[56] In *Puckett v. Miller*,[57] Judge Staton expressed his conviction:

> [W]eighing is permissible (and proper) *in all cases* where the TR. 41(B) motion is made after the plaintiff has rested. Weighing is mandated under the federal rules; and weighing

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for judgment on the evidence under Rule 50). It will not modify present Indiana practice to any degree. In Indiana, a defendant may move for a finding in his favor at the conclusion of the plaintiff's evidence without reserving the right to proceed with his evidence in the event the motion should be denied. He is not precluded from introducing his evidence if he timely requests the right to do so after his motion is overruled. Smith v. Markun, 124 Ind. App. 535, 119 N.E.2d 899 (1954) (where the plaintiff presented his evidence in attempting to get an injunction against defendants to stop them from picketing, the defendants then moved for a finding in their favor without reserving in their motion the right to proceed with their evidence, the court upheld this right due to the timely request).

It has been held that oral motions for peremptory findings have the same force and effect as written motions, and that it need not be stated wherein there was a failure of proof, or assign reasons for the motion. Ellis v. Auch, 124 Ind. App. 454, 118 N.E.2d 809 (1954).

Under present Indiana law the standard to determine if plaintiff has shown some right to relief is basically the same as under the new rule. Garrett v. Estate of Hoctel, 128 Ind. App. 23, 142 N.E.2d 449 (1957), where the court held that in ruling on a motion for judgment at the conclusion of plaintiff's case, the motion is tested by the same rules of law as is a request for a peremptory instruction to a jury and the court may consider only the evidence and reasonable inferences which may be drawn therefrom most favorable to the plaintiff. If there is any evidence from which it may be reasonably inferred the plaintiff was entitled to such relief, it is error to sustain such motion. This decision would also be on the merits as under the new rule. Contrary to the federal version of this rule, findings are required only if either party so requests at the time the motion for dismissal is made—*i.e.*, in cases where the dismissal is made because the plaintiff has failed to establish a right to relief by the evidence.

[55]148 Ind. App. at 433-34, 267 N.E.2d at 195-96.

[56]Fielitz v. Allred, 364 N.E.2d 786, 790 (Ind. Ct. App. 1977) (Staton, J., dissenting in part).

[57]381 N.E.2d 1087 (Ind. Ct. App. 1978).

> is the only logical purpose for the rule in Indiana. . . . [The court then quoted the pertinent part of the rule.] Cases construing this rule in the past have either misquoted the rule or have incorrectly equated TR. 41(B) with TR. 50. . . . In a trial to the court, it is nonsense (and a waste of judicial time) to require a judge to sit through a presentation by the defendant when the plaintiff has failed to present a convincing case.[58]

A motion to dismiss, Judge Staton has contended, is a procedural device designed to expedite the trial process.[59] As a consequence, the court in a nonjury action, upon a motion to dismiss, should be able to exercise its power to determine the facts in order to dispose of the case at the earliest opportunity.[60] By equating a Trial Rule 41(B) motion with the old motion for a finding on the evidence,[61] the court in *Ohio Casualty* misconstrued the procedural function which Judge Staton contends the motion to dismiss was intended to perform.[62]

3. Grounds for Criticism.—In deciding which interpretation of Trial Rule 41(B) is correct, several facts should be taken into consideration. First, the court in *Ohio Casualty* relied upon the Civil Code Study Commission comments[63] as authority for its determination that Indiana practice should not be changed by Trial Rule 41(B).[64] The court, however, failed to note that the comments were directed at the rule only as originally proposed, but not the rule as finally enacted by the General Assembly and adopted by the Indiana Supreme Court.[65] The Civil Code Study Commission had originally proposed that Trial Rule 41(B) provide that a defendant might "move for a dismissal on the ground that upon the *facts and the law*

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[58]*Id.* at 1091 (footnotes omitted).

[59]*See* Miller v. Griesel, 297 N.E.2d 463 (Ind. Ct. App. 1973), *aff'd on other grounds*, 261 Ind. 604, 308 N.E.2d 701 (1974).

> TR. 41(B) and TR. 50 actually run parallel to one another. TR. 50 applies to jury trials and TR. 41(B) applies to court trials. However, their scope and purpose are identical: to reject from the judicial process those claims that are entirely without merit and to prevent such unmeritorious claims from overburdening the judicial system. The test to be applied in one should not be confused or intermingled with the other. They are different. Basically, the trial court determines the sufficiency of the evidence in Rule TR. 50 motions while the trial court determines the facts in a TR. 41(B) motion.

Id. at 467.

[60]*Id.*

[61]*See* note 52 *supra* and accompanying text.

[62]*See also* note 6 *supra.*

[63]*See* note 54 *supra.*

[64]148 Ind. App. at 434, 267 N.E.2d at 196.

[65]Act of Mar. 13, 1969, ch. 191, § 1, 1969 Ind. Acts 546, 622.

there has been shown *no right to relief.*"[66] The comments quoted by the court in *Ohio Casualty* were directed at the rule in this form. However, this portion of the rule was substantially modified by the Indiana legislature.[67] The language in the proposed rule quoted above was deleted. The rule was revised by the legislature to read that the defendant might

> move for a dismissal on the ground that considering all the evidence and reasonable inferences therefrom in favor of the party to whom the motion is directed, to be true, there is no substantial evidence of probative value to sustain the material allegations of the party against whom the motion is directed.[68]

If viewed alone this language might be interpreted to mean that a trial court could not weigh the evidence, but such a standard is certainly not mandated by the legislative revisions. To the contrary, when this language is read in conjunction with the second sentence of the rule, which states that "[t]he court as trier of the facts may then determine them and render judgment . . .,"[69] Indiana Trial Rule 41(B) arguably authorizes a trial court to survey "all the evidence," ascertain the "reasonable inferences therefrom" and determine the facts.[70] If this interpretation were followed a trial court, at the close of a plaintiff's case in chief, would be empowered to weigh the evidence and make ultimate determinations of fact.

Indiana practice under the above suggested interpretation would be consistent with the federal practice under a motion for involuntary dismissal. Federal Rule 41(b) provides that the defendant "may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff . . . ."[71] Federal practice has unequivocally established that the trial court is empowered to weigh the evidence upon a motion to dismiss and render a judgment on the merits in favor of the defendant.[72]

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[66]R. TOWNSEND, *supra* note 1, at 166 (emphasis added).

[67]*See* note 65 *supra.*

[68]IND. R. TR. P. 41(B).

[69]*Id.*

[70]*See* note 1 *supra* and text accompanying notes 89-94 *infra.*

[71]FED. R. CIV. P. 41(b).

[72]*See, e.g.*, Emerson Elec. Co. v. Farmer, 427 F.2d 1082 (5th Cir. 1970); Ellis v. Carter, 328 F.2d 573, 577 (9th Cir. 1964). *See also* 5 MOORE'S FEDERAL PRACTICE ¶ 41.13[4], at 41-193 to -194 (2d ed. 1979) [hereinafter cited as MOORE'S]; 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 2371, at 225 (1971) [hereinafter cited as WRIGHT & MILLER].

> In rendering that judgment, the court is not as limited in its evaluation of plaintiff's case as it would be on a motion for directed verdict. The court is not to make any special inferences in the plaintiff's favor nor concern itself with whether plaintiff has made out a prima facie case. Instead it is to weigh the evidence, resolve any conflicts in it, and decide for itself where the preponderance lies.[73]

Federal Rule 41(b) directs a trial court to view the "facts and the law" in determining whether the "plaintiff has shown no right to relief."[74] Indiana Trial Rule 41(B) states that the trial court will consider "all the evidence"[75] and accept as true the reasonable inferences in favor of the nonmoving party. The Indiana rule does not prohibit the trial court form weighing such reasonable inferences against any probative evidence in favor of the defendant. Rather, the following sentence empowers "[t]he court as trier of the facts"[76] to *determine* the facts and render judgment if it so chooses. While the Indiana and federal rules differ semantically, no substantive distinction exists. An Indiana trial court should be able to fully exercise its power to determine the facts as a federal trial court may do on a motion to dismiss.

If the Indiana legislature had enacted the Study Commission's version of Trial Rule 41(B), the Indiana practice probably would have followed the federal approach. The comment to Trial Rule 1 states that "[i]t has long been settled in this state that when the legislature adopts a federal statute . . . it adopts also the construction which the [federal] courts . . . have placed on the statute."[77] Yet, the Study Commission comments stated the Indiana practice under Trial Rule 41(B) would be the same as under the prior practice, where a motion for a finding on the evidence was made.[78] A motion for a finding on the evidence raised the same question as was raised by a motion for a directed verdict: had the plaintiff made a prima facie case?[79] To the contrary, in federal practice a motion to dismiss raises the question of whether the plaintiff has met his burden of proof by a preponderance, not whether he has merely made a prima facie case.[80]

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[73]9 WRIGHT & MILLER, *supra* note 72, § 2371 at 224-25 (footnotes omitted).

[74]FED. R. CIV. P. 41(b).

[75]IND. R. TR. P. 41(B).

[76]*Id. See* Harvey, *1979 Survey*, *supra* note 6, at 76-78.

[77]R. TOWNSEND, *supra* note 1, at 1.

[78]*Id.* at 169.

[79]*See* note 52 *supra* and accompanying text.

[80]*See* note 73 *supra* and accompanying text.

In the Study Commission's proposed rule, the grounds upon which the defendant might move for a dismissal were identical to those in Federal Rule 41(b), where the court *may weigh* the evidence. Yet, the comments of the Study Commission appear to equate the proposed Indiana Trial Rule 41(B) with a motion for a finding on the evidence, where the court *could not weigh* the evidence. The proposed rule and the comments are, in essence, contradictory. As the author of the authoritative treatise on Indiana civil procedure, Professor Harvey, has noted, "[t]he conclusion is clear that either the advisory committee note could not have been correctly addressed to the committee's proposal to adopt Federal Rule 41(b), or the federal rule was plainly misunderstood by the advisory committee."[81]

In light of the confusion surrounding the comments and their inapplicability to the final form of Trial Rule 41(B) that was enacted by the legislature, any substantial reliance upon the comments seems ill-advised. The court in *Ohio Casualty* treated the comments as indicative of the procedural function Trial Rule 41(B) was intended to perform. Actually, the comments quoted by the court do not pertain to Trial Rule 41(B), as revised by the legislature and adopted by the Indiana Supreme Court. As a consequence, the decision in *Ohio Casualty* should be reviewed with this consideration in mind.

4. The Court as Trier of Facts.—The court in *Ohio Casualty* also ignored the import of the second sentence of Trial Rule 41(B). This sentence prescribes that "[t]he court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence."[82] The mandate to weigh the evidence and determine the facts is clear; the court's power to determine whether the plaintiff has preponderated is delineated in this second sentence.[83] A critical portion of the procedure prescribed by the rule was disregarded by the appellate court which, arguably, placed unwarranted credence on the Study Commission comments to the proposed rule[84] rather than reading the rule in its proper context. As Judge Staton has noted:

> If the rule had not intended that the trial judge weigh the evidence in ruling upon a TR. 41(B) motion, we cannot comprehend why the rule utilizes so many judgment words ("reasonable," "substantial," "probative") and especially

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[81]Harvey, *1979 Survey*, *supra* note 6, at 78 n.167.

[82]IND. R. TR. P. 41(B).

[83]*See* text accompanying notes 70-77 *supra*.

[84]*See* text accompanying notes 64-70 *supra*.

designates the court as "trier of the facts" who is to "determine them." Determine means weigh and decide.[85]

The court in *Ohio Casualty*, faced with the task of interpretating an important procedural aspect of the new code, should have assessed Trial Rule 41(B) in its total form, rather than considering only the first sentence out of context. Also, the court should have looked to the federal rules, upon which the Indiana rules are based, for guidance. Federal Rule 41(b)[86] contains the same language as found in the second sentence of Indiana Trial Rule 41(B). This language was added by the United States Supreme Court in 1946 to clarify that under a federal motion to dismiss the court may weigh the evidence and make ultimate determinations of fact.[87] This language is an essential component of the federal rule and should be treated as such in the Indiana rule.

Assuming that the first sentence did preclude the trial court from weighing the evidence, the second sentence gives the trial court the authority to act as the "trier of the facts." A trier of facts under Indiana practice "must weigh the evidence, draw any reasonable inferences, resolve conflicts in the evidence, determine the credibility of witnesses and decide in whose favor the evidence preponderates."[88] The indisputable conclusion is that the two sentences of the rule are in direct conflict if a nonweighing standard is dictated by the first sentence as the appellate courts have held. To the contrary, though, if the approach espoused by Professor Harvey and Judge Staton is followed, the rule is internally consistent and conclusively allows the court to weigh the facts upon a motion to dismiss. Logic would seem to require that a statute be construed in a manner that makes it consistent and functional, rather than self-contradictory and void of purpose.

5. The Court Shall Consider All The Evidence.—In *Ohio Casualty* the appellate court inappropriately relied on the Study Commission comments to support the premise that on a motion to dismiss the court cannot weigh the evidence. Also, the import of a fundamental portion of the rule, the second sentence, was disregarded by the court. In *Building Systems, Inc. v. Rochester Metal Products, Inc.*[89] the appellate court added to the controversy surrounding Trial Rule 41(B) by misreading the rule. The appellate court followed the determination in *Ohio Casualty* that Trial Rule 41(B) was equivalent

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[85]Puckett v. Miller, 381 N.E.2d at 1091.

[86]FED. R. CIV. P. 41(b).

[87]5 MOORE'S, *supra* note 72, § 41.13[4], at 41-189 to -198; 9 WRIGHT AND MILLER, *supra* note 72, § 2371, at 222-25.

[88]Ferdinand Furniture Co. v. Anderson, 399 N.E.2d at 805.

[89]168 Ind. App. 12, 340 N.E.2d 791 (1976).

to a motion for a directed verdict. The court acknowledged that this interpretation of the rule placed Indiana procedure at odds with the procedure followed in federal practice. The court, however, maintained that Trial Rule 41(B) "requires the trial court to consider *only* the evidence and inferences most favorable to the nonmoving party" rather than to weigh all the evidence.[90] Nevertheless, Trial Rule 41(B) states that the court shall consider "*all* the evidence and reasonable interferences therefrom in favor of the [non-moving party]."[91] The appellate court in *Building Systems* substituted *only* for *all*, and, as a consequence, inappropriately restricted a trial court's scope of review when considering a motion to dismiss.[92]

Although the standard in *Building Systems* is the proper one to follow when the motion is for a judgment on the evidence (directed verdict) under Trial Rule 50(A), it is not the standard enunciated in Trial Rule 41(B). As the rule reads, the trial court on a motion to dismiss is to consider *all* the evidence, not just the evidence most favorable to the nonmoving party. The court is not restricted to considering *only* the evidence and inferences most favorable to the nonmovant. The reasonable inferences in favor of the plaintiff must be accepted as true. Once a court has reviewed the evidence and ascertained what inferences are reasonable, such inferences are probative evidence supporting the party which they favor and cannot be disregarded by the trial court.

The court, having viewed the total evidence and determined what reasonable inferences may be made in favor of the plaintiff, may weigh such evidence against any probative evidence in favor of the defendant. As Professor Harvey has affirmed, the above quoted language which was added by the legislature to the rule,[93]

> merely directs the trial court's attention to the body of evidence, which under this trial rule must be considered. It did not deny to the trial court the competency to *find the facts*, after considering that evidence. That is the meaning of the very next sentence in Trial Rule 41(B): "The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence."[94]

The court in *Building Systems* failed to appreciate the directive of Trial Rule 41(B) that a trial court consider all the evidence. "All

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[90]*Id.* at 13-14, 340 N.E.2d at 793 (emphasis added). *See* Fielitz v. Allred, 364 N.E.2d at 790 n.1 (Staton, J., dissenting in part).

[91]IND. R. TR. P. 41(B) (emphasis added).

[92]*See* note 6 *supra* and accompanying text.

[93]*See* note 1 *supra.*

[94]Harvey, *1979 Survey, supra* note 6, at 78 n.167.

the evidence" means that the court survey the total amount of evidence, including the reasonable inferences therefrom, to decide whether a dismissal should be granted. Requiring that the court consider only the evidence in favor of the nonmovant is contrary to the directive of the rule and creates an unnecessary burden on the trial process.

C. Criticism of the "Harmless Error" Exception

The internal contradictions in a prima facie case cannot be weighed on a motion to dismiss under Indiana practice.[95] However, if the defendant has testified in the plaintiff's case in chief, weighing by the trial court is sometimes considered harmless error.[96] This holding that such weighing is harmless error seems inconsistent with the requirement that the "trial court may consider only the evidence and inferences favorable to the non-moving party in ruling upon a motion for involuntary dismissal."[97] If strict adherence to this rule is followed, the trial court must ignore any evidence unfavorable to the plaintiff, especially if it is elicited from the defendant. The court in *Powell* acknowledged that the trial court, in arriving at its judgment in favor of the husband, had not conformed to the directives of the rule.[98] If the wife's evidence had been viewed in a light most favorable to her, the injunction would not have issued. The fact that the defendant has testified in the plaintiff's case in chief should not afford any basis for relaxing the standard that the judge cannot weigh the evidence. As Judge Staton argued in *Fielitz v. Allred*: If one accepts the holding of the majority that weighing of the evidence is impermissible in ruling on a TR. 41(B) motion, then it is axiomatic that the weighing is *harmful* where, as here, the plaintiff has presented *some* evidence to support his complaint."[99]

Rather than creating an exception to the rule that the trial court cannot weigh the evidence on a motion to dismiss, Trial Rule 41(B) should be interpreted to allow the trial court to weigh the evidence in all situations where the plaintiff has rested.[100] To preserve the rule in its present form is detrimental to the truth-seeking process. A plaintiff will be at an advantage if he does not call the defendant because his prima facie case will not be susceptible to improper, but harmless, weighing by the trial court. Accord-

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[95]*See* text accompanying note 48 *supra.*

[96]*See* text accompanying notes 21-34 *supra.*

[97]Building Sys., Inc. v. Rochester Metal Prods., Inc., 168 Ind. App. at 14, 340 N.E.2d at 793

[98]Powell v. Powell, 160 Ind. App. at 137, 310 N.E.2d at 902.

[99]Fielitz v. Allred, 364 N.E.2d at 790 (Ind. Ct. App. 1977) (Staton, J., dissenting in part). *See also* Shaw v. Onulak Chain Corp., 398 N.E.2d 1356, 1358 (Ind. Ct. App. 1980).

[100]*See* Puckett v. Miller, 381 N.E.2d at 1091.

ingly, the truth-seeking process is hindered because the plaintiff will hestitate to call the defendant who might produce the true facts.

D. Functions of the Court in Jury and Nonjury Trials

In a jury trial the functions of the court and jury are fundamentally different. The court's only function is to determine issues of law. The determination of the issues of fact is solely within the domain of the jury. Generally speaking, in a jury trial the court may neither weigh the evidence nor decide the facts. To do so would be an invasion of the province of the jury, depriving the plaintiff of his traditional right to a jury trial.[101] In a nonjury action, however, the consideration is different. The court is both the arbiter of the *law* and the arbiter of the *facts*.[102] No inherent separation of functions exists in a nonjury action. The Indiana Court of Appeals, however, has interpreted Trial Rule 41(B) to require an *artificial* separation of functions when the court considers a motion to dismiss. At midtrial the court cannot exercise its power to determine ultimate issues of fact. In contrast, at the close of the evidence the court "may reconcile, reject or accept, and weigh the evidence, and determine the credibility of witnesses."[103] Indiana case law requiring the court to defer weighing until the close of all the evidence appears to prefer form over substance.[104] As a consequence of the procedural inability to unite both functions in nonjury actions, Indiana trial courts are deprived of the ability to dispose of an unmeritorious claim at the earliest opportunity.[105]

The procedure presently followed under Trial Rule 41(B) seems inconsistent with the Trial Rule 1 mandate that the rules "shall be construed to secure the just, speedy and inexpensive determination of every action."[106] Certainly the speedy and inexpensive determination of litigation is not promoted by denying the court the right to determine the facts upon a motion to dismiss. Although a plaintiff with an unmeritorious claim will have an advantage, requiring a

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[101]*See* Mamula v. Ford Motor Co., 150 Ind. App. 179, 275 N.E.2d 849 (1971).

> Directing a verdict against a plaintiff at the close of his evidence deprives him of a jury decision. He may well feel robbed of what he considers a sacred right of his American heritage. . . . [W]henever there is *any* evidence allowing reasonable men to differ, a plaintiff should be given the benefit of the doubt, even though he has not *substantially* supported his allegations.

Id. at 184, 275 N.E.2d at 852.

[102]*See, e.g.*, note 6 *supra* and accompanying text.

[103]Pepka v. Branch, 155 Ind. App. 637, 667, 294 N.E.2d 141, 158 (1973).

[104]*Accord*, 3 W. HARVEY, *supra* note 6, ¶ 41.2.

[105]*See* Miller v. Griesel, 297 N.E.2d 463 (Ind. Ct. App. 1973), *aff'd on other grounds*, 261 Ind. 604, 308 N.E.2d 701 (1974).

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

defendant to bear the expense of a purposeless defense is unfair. A modification or different interpretation of the rule may remedy this unfairness.

The interpretation given to Trial Rule 41(B) by the appellate courts negates the procedural service a motion to dismiss was intended to perform. In recognition of the role of the court in a non-jury action, the rule's purpose was to permit the trier of facts to decide at the earliest opportunity whether plaintiff had preponderated. The motion to dismiss, as a procedural device, was not intended to prolong the court life of an unmeritorious claim. A motion for finding on the evidence did *unnecessarily* draw out litigation because it precluded the court from exercising its power to determine the facts at the conclusion of the plaintiff's case. A motion for involuntary dismissal under Trial Rule 41(B) is not merely a new label for an old practice. It was designed to be an innovation in the civil procedure code, to save precious court time and save a defendant the cost of producing a purposeless defense where the plaintiff had failed to preponderate in his case in chief.

IV. The Federal Approach to Involuntary Dismissal

A. Introduction

The Civil Code Study Commission, in preparing the current Indiana trial rules, used the federal rules as a model.[107] Two of the main reasons for doing so were the availability of "an established body of case law to aid in interpretation and the possibility of relative uniformity between state and federal practice."[108]

The Indiana Court of Appeals has determined that Indiana Trial Rule 41(B) is procedurally different from Federal Rule 41(b). However, Judge Staton and Professor Harvey adamantly contend that no distinction should exist between the Indiana and federal rules allowing for dismissal. In their opinion the Indiana cases holding otherwise are "void of rationale"[109] and "consistently incorrect."[110] Because the Indiana rules are based on the federal rules and because of the continuing controversy surrounding Indiana Trial Rule 41(B), the federal experience with a motion for involuntary dismissal will be reviewed. Comparisons will be made between the Indiana and federal rules in order to demonstrate the different results obtained under the two rules, with an emphasis on the procedural advantages found under the federal practice.

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[107]R. Townsend, *supra* note 1, at vii.

[108]*Id.* at viii.

[109]Fielitz v. Allred, 364 N.E.2d at 790 (Ind. Ct. App. 1977) (Staton, J., dissenting in part).

[110]3 W. Harvey, *supra* note 6, ¶ 41.2 (Supp. 1979).

B. History

Prior to the Federal Rules of Civil Procedure, a defendant in a nonjury action could move for an involuntary nonsuit. The United States Supreme Court treated this motion as functionally equivalent to a motion for a directed verdict in a jury trial.[111] A federal trial court was required to consider only the legal sufficiency of a plaintiff's evidence; that is, had the plaintiff made out a prima facie case? In essence, the motion for nonsuit raised only a question of law.[112]

The motion for findings on the evidence in Indiana practice prior to the new code also raised only questions of law.[113] Indiana Trial Rule 41(B) has been equated with both a motion for directed verdict and a motion for judgment on the evidence and has been determined to raise only questions of law.[114] As a consequence, Indiana practice today under a motion to dismiss is in harmony with the federal practice prior to the adoption of the Federal Rules of Civil Procedure.

Adopted in 1936, Federal Rule 41(b) provided that a defendant might "move for a dismissal on the ground that upon the facts and law the plaintiff has shown no right to relief."[115] After the rule was adopted, the Third Circuit adhered to the procedure followed prior to 1936, ruling that a motion to dismiss was equivalent to a motion for a directed verdict.[116] However, other federal circuits interpreted Trial Rule 41(b) to be an innovative procedural device. The Sixth, Seventh, and Ninth Circuits determined that Trial Rule 41(b) allowed the court, as the trier of the facts, to weigh the plaintiff's evidence.[117] The Sixth Circuit in *Bach v. Friden Calculating Machine Co.*[118] stated:

> [I]t would be a refinement of technicality to say that such evidence and all reasonable inferences to be drawn therefrom must be viewed in the light most favorable to the [plaintiff] . . . . The sensible course to be followed in the trial . . . is that if, at the close of plaintiff's proof, his case has not

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[111]Central Transp. Co. v. Pullman's Palace Car Co., 139 U.S. 24, 39 (1891); 5 MOORE'S, *supra* note 69, ¶ 41.13[3].

[112]United States v. Jefferson Elec. Mfg. Co., 291 U.S. 386, 407 (1934); Maryland Cas. Co. v. Jones, 279 U.S. 792, 795 (1929).

[113]*See* note 52 *supra* and accompanying text.

[114]*See* text accompanying note 45 *supra*.

[115]FED. R. CIV. P. 41(b). This phrase is also part of the first sentence found in the proposed version of Indiana Trial Rule 41(B). R TOWNSEND, *supra* note 1, at 166.

[116]Federal Deposit Ins. Corp. v. Mason, 115 F.2d 548, 551 (3d Cir. 1940).

[117]Bach v. Friden Calculating Mach. Co., 148 F.2d 407, 410 (6th Cir. 1945); Gary Theatre Co. v. Columbia Pictures Corp., 120 F.2d 891, 892 (7th Cir. 1941); Young v. United States, 111 F.2d 823, 825 (9th Cir. 1940).

[118]148 F.2d 407 (6th Cir. 1945).

> been made out by a preponderance of evidence, the action should be dismissed, which makes the question one of fact.[119]

As a consequence, diametric approaches to interpreting Federal Rule 41(b) were followed in the circuits. The Third Circuit's standard applicable under the rule was identical to the procedure followed under Indiana Trial Rule 41(B) today. The motion to dismiss was denied if the evidence would have been sufficient in a jury trial to carry a plaintiff's case to the jury. The denial was mandatory, "even though the evidence was conflicting or involved questions of credibility and the court as trier of facts would [have found] against the plaintiff on the evidence."[120]

The decision in *United States v. United States Gypsum Co.*,[121] although a district court action, presented the reasons why the Sixth, Seventh, and Ninth Circuits determined that a trial court should be able to weigh the evidence. According to the holding in *United States Gypsum:*

> [A] court should dispose of a case at the first opportunity which is appropriate under the rules and in accord with the rights of the parties. . . . It is not reasonable to require a judge, on motion to dismiss under Rule 41(b), to determine merely whether there is a *prima facie* case . . . when there is no jury—to determine merely whether there is a *prima facie* case sufficient for the consideration of a trier of the facts *when he is himself the trier of the facts.*[122]

In 1946 the United States Supreme Court amended Federal Rule 41(b) in order to confirm the interpretation of the rule followed by the Sixth, Seventh, and Ninth Circuits. The amendment, since verbally altered but not substantially changed, provided that "the court as the trier of the facts may then determine [the facts] and render judgment against the plaintiff."[123] This language is also an integral part of Indiana Trial Rule 41(B), but has been disregarded by the Indiana appellate courts.[124] However, Judge Staton has advocated that

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[119]*Id.* at 411.

[120]5 MOORE'S, *supra* note 72, ¶ 41.13[4], at 41-189 to -190.

[121]67 F. Supp. 397 (D.D.C. 1946), *rev'd on other grounds*, 333 U.S. 364 (1948). On the issue of whether the court could weigh the evidence on a motion to dismiss, the Supreme Court said, "We do not stop to consider those rulings. They are not of importance in this case as we think the preponderance of the evidence . . . indicated a violation of the Sherman Act." 333 U.S. at 388.

[122]67 F. Supp. at 417-18.

[123]5 MOORE'S, *supra* note 72, ¶ 41.13[4], at 41-191; 9 WRIGHT AND MILLER, *supra* note 72, § 2371, at 222-27.

[124]*See* text accompanying notes 82-88 *supra.*

this language allows the court to weigh the evidence.[125] In this regard Judge Staton is in accord with the United States Supreme Court, while the Indiana Court of Appeals has ignored a substantive component of Indiana Trial Rule 41(B).

C. Rights of Plaintiff

1. Substantive and Procedural Rights are not Jeopardized.—A plaintiff has a right to his day in court. A federal trial court cannot grant the motion to dismiss until the plaintiff has had a full and fair opportunity to present his case.[126] The plaintiff also has a corresponding duty to show his right to relief by proving in his case in chief that he has preponderated. In a nonjury action the federal courts will not prolong a trial to allow a plaintiff "to strengthen [his] presentation by cross-examination of defendant's witnesses or in the alternative by inferences from their failure to take the stand."[127]

In *Porter v. Wilson*,[128] the United States Supreme Court determined that a plaintiff has no substantive due process or procedural right to demand presentation of the defendant's case.[129] The Supreme Court affirmed the constitutionality of an Oklahoma statute permitting the court on a demurrer to the evidence to weigh the evidence and determine the rights of the parties. Thus, a plaintiff does not have a guaranteed right to enhance the weight of his case by cross-examining witnesses which the defendant *might* call. It follows then that a defendant has a right to rest his case at the conclusion of the plaintiff's evidence. As the court stated in *United States Gypsum*:

> A plaintiff who has had full opportunity to put on his own case and has failed to convince the judge, as trier of the facts, of a right to relief, has no legal right under the due process clause of the Constitution, to hear the defendant's case, or to compel the court to hear it, merely because the plaintiff's case is a *prima facie* one in the jury trial sense of the term.[130]

2. Fairness to the Parties.—The argument has been made that for the sake of fairness to the plaintiff a prima facie case should not be dismissed. The Supreme Court of Florida in *Tillman v. Baskin*[131]

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[125]Puckett v. Miller, 381 N.E.2d at 1091.

[126]5 MOORE'S, *supra* note 72, ¶ 41.13[1], at 41-173.

[127]Global Commerce Corp. v. Clark-Babbitt Indus., Inc., 255 F.2d 105, 107 (2d Cir. 1958); *see* Ellis v. Carter, 328 F.2d 573, 577 (9th Cir. 1964).

[128]239 U.S. 170 (1915).

[129]*Id.* at 172-74.

[130]67 F. Supp. at 418.

[131]260 So. 2d 509 (Fla. 1972).

determined that "fairness and justice demand"[132] a denial of a motion to dismiss when the plaintiff has made a prima facie case.[133] The traditional midpoint testing for a prima facie case has been advocated as a "necessary safeguard of justice, as much in court cases, as in those tried before a jury"[134] instead of being a "refinement of technicality."[135] However, the quantum of proof necessary to show a prima facie case in a nonjury action is greater than in a jury trial. In a nonjury action the evidence produced in the plaintiff's case in chief is subject to the scrutiny of the court acting as the *trier of facts*. In a jury trial the court functions only as the trier of the *law*. The court decides only whether, as a matter of law, the plaintiff's evidence is sufficient to support a judgment by the trier of facts, the jury. As the court in *White v. Abrams*[136] stated,

> [a] prima facie case . . . consists of sufficient evidence *in that type of case* to get plaintiff past a motion for a directed verdict in a jury case or motion to dismiss pursuant to Fed. R. Civ. P. 41(b) in a nonjury case. It is the evidence necessary to require a defendant to proceed with his case.[137]

In a nonjury action the defendant must proceed with his case only where the plaintiff has shown a rebuttable right to relief upon the facts and the law. If a plaintiff cannot produce sufficient evidence demonstrative of a right to relief, he suffers no inequity by having his case dismissed at the earliest opportunity by the trier of facts.[138]

Briefly, in federal practice the courts are empowered to dispose of an unmeritorious, but prima facie, claim at the earliest possible opportunity, the close of the plaintiff's case.[139] Because the defendant cannot be forced to produce witnesses for cross-examination, a dismissal at midtrial does not impinge upon any substantive or procedural right of the plaintiff.

D. The Prima Facie Case Under Federal Practice

A federal judge, empowered to weigh and consider the evidence, may "sustain defendant's motion [to dismiss even] though plaintiff's evidence establishes a prima facie case that would have precluded a

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[132]*Id.* at 511.

[133]*Id.*

[134]Steffen, *The Prima Facie Case In Non-Jury Trials*, 27 U. CHI. L. REV. 94, 126 (1959).

[135]*Id.* (quoting Bach v. Friden Calculating Mach. Co., 148 F.2d at 411).

[136]495 F.2d 724 (9th Cir. 1974).

[137]*Id.* at 729.

[138]*See* text accompanying note 130 *supra*.

[139]Indiana practice requires that the defendant rest his case before the court may determine the facts. *See* text accompanying notes 37-46 *supra*.

directed verdict for defendant in a jury case."[140] However, Federal Rule 41(b)[141] also provides the court with the discretion to deny the motion even though it appears that the plaintiff has failed to meet his burden of proof. In *Weissinger v. United States*,[142] the court delineated the discretionary power of a federal judge:

> The trial judge may conclude . . . that it is inadvisable to sustain the defendant's motion midway in the trial and that the trial should be completed. The denial amounts to no more than a refusal to enter judgment at that time, a tentative and inconclusive ruling on the question of the plaintiff's proof. It does not preclude the trial judge from making, at the conclusion of the case, findings and determinations at variance with his prior tentative ruling.[143]

The court in *White v. Abrams*[144] described such a situation where sustaining a motion to dismiss is inadvisable "even though technically the plaintiff may not have yet developed sufficient evidence for a final judgment . . . ."[145] In *White*, the plaintiff sought damages for the violation of securities laws.[146] The court speculated that the defendant possessed much of the evidence needed for the plaintiff to recover. "In such cases where the evidence is fairly close, . . . as the defendant proceeds with his case, the plaintiff may well on cross-examination be able to develop points that will strengthen his case."[147] As a consequence, the granting of a motion would neither be fair to the plaintiff nor the most expeditious procedural route because the dismissal might be reversed on appeal.

The Fifth Circuit Court of Appeals, in *White v. Rimrock Tidelands, Inc.*,[148] believing that the plaintiff had put on a sufficient case, reversed the district court's dismissal and remanded the proceeding to allow the defendant to present his case.[149] The court of appeals stated that if the district court had carried the defendant's motion until the close of the case, "[n]ot much time would have been lost, and if one or both of the parties had sought appellate review, the entire case would have come before this Court at one time

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[140]5 MOORE'S, *supra* note 72, ¶ 41.13[4], at 41-193 to -194 (footnote omitted). *See* Emerson Elec. Co. v. Farmer, 427 F.2d at 1086.

[141]FED. R. CIV. P. 41(b).

[142]423 F.2d 795 (5th Cir. 1970).

[143]*Id.* at 797-98.

[144]495 F.2d 724 (9th Cir. 1974).

[145]*Id.* at 730.

[146]*Id.* at 724.

[147]*Id.* at 730.

[148]414 F.2d 1336 (5th Cir. 1969).

[149]*Id.* at 1340.

rather than in a piecemeal fashion."[150] Because there is a partial trial, a subsequent appeal and reversal, followed by a second trial, with perhaps another appeal, "[f]rom an administrative standpoint, this process of disposition under F.R.Civ.P. 41(b) is patently unsatisfactory."[151] As a consequence, in a close case the district court should have the defendant present his evidence so that all the facts will be before the appellate court. The inconvenience and the waste of court time is greatly reduced where the trial court avoids the "promiscuous use"[152] of Federal Rule 41(b) dismissals.

The opposite situation arises when the plaintiff fails to demonstrate the potential to meet his burden of proof and the evidence preponderates against him. In *Motorola, Inc. v. Fairchild Camera & Instrument Corp.*,[153] the district court granted a motion to dismiss, finding the "plaintiff's case demonstrate[d] *affirmatively* a lack of liability and lack of damages . . . chargeable to the defendants . . . ."[154] When the plaintiff has proved himself out of court, an involuntary dismissal expeditiously and fairly disposes of the action.

The evidentiary situation in *Motorola* may be compared to the analogous problem faced by the Indiana Court of Appeals in the recent case of *Ferdinand Furniture Co. v. Anderson*.[155] The evidence produced by the plaintiff in *Anderson* openly demonstrated that the statute of limitation had run on all the counts in the action. In his own case the plaintiff had established he could not preponderate. The Indiana trial court, however, denied the defendant's motion to dismiss because the plaintiff had made a prima facie case. Under Indiana Trial Rule 41(B) an involuntary dismissal is precluded if the plaintiff's evidence, when viewed *subjectively*[156] in the light most favorable to it, establishes a prima facie case. The trial court, convinced that the plaintiff had no right to relief, advised the defendant to rest his case so that a judgment would be entered in the defendant's favor. With the facts in *Anderson* before it, a federal court, being empowered to weigh the evidence upon a motion to dismiss, could have *objectively*[157] viewed the plaintiff's evidence and made ultimate determinations of fact. To dispose of an unmeritorious, but prima facie case, the federal court is able to avoid the involved procedural process followed by the Indiana appellate court in *Anderson*. This difference in procedures demonstrates the anomaly in Indiana

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[150]*Id.*

[151]*Id.*

[152]Riegel Fiber Corp. v. Anderson Gin Co., 512 F.2d 784, 793 n.19 (5th Cir. 1975).

[153]366 F. Supp. 1173 (D. Ariz. 1973).

[154]*Id.* at 1190 (emphasis added).

[155]399 N.E.2d 799 (Ind. Ct. App. 1980); *see* text accompanying notes 34-43 *supra*.

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

[157]*Id.*

practice that the trier of facts cannot find against a prima facie case on a motion to dismiss, but that the court may do so after the defendant rests his case, regardless of whether the defendant produces any evidence. Federal courts do not engage in such artificiality, and no substantive reason exists for requiring an Indiana trial court to do so. When the plaintiff has clearly failed to demonstrate a right to relief in a nonjury action, the trial court should be empowered to dismiss the action.

In summary, when the plaintiff in federal court has demonstrated a *substantial* prima facie case which approaches proof by a preponderance, the better and most expeditious procedure is for a trial court to require the defendant to present his evidence. All the facts will then be before the appellate court, regardless of which party is claiming error in the final judgment of the trial court. Even though the plaintiff has a prima facie case when viewed subjectively, the trial court *may* sustain the motion to dismiss if the plaintiff's action, considered objectively, clearly shows a failure to preponderate.

E. Prima Facie Case Based on Unimpeached Testimony— A Presumption of Preponderance

A federal judge is empowered to dismiss a prima facie case if the plaintiff has failed to preponderate in his case in chief. However, the dismissal cannot be based solely on the doubts and conjectures of the trial judge. In *Benton v. Blair*,[158] the plaintiff had presented an uncontradicted and unimpeached case in chief. The trial judge granted a motion to dismiss because he was "simply unable to accept as true the plaintiff's version"[159] of the facts.

On appeal the Fifth Circuit Court of Appeals verified that on a motion to dismiss the trial judge "must weigh and evaluate the evidence in the same manner as if he were making findings of fact at the conclusion of the entire case."[160] The appellate court, after reviewing the record, concluded that the trial judge had erred in disregarding the plaintiff's evidence. In the appellate court's opinion, "uncontradicted, unimpeached and not inherently improbable or suspicious testimony"[161] of a plaintiff could not be rejected by a trial court. To decide whether the plaintiff has preponderated, the trial court must have before it evidence that can be weighed against the plaintiff's evidence. The evidence damaging to the plaintiff's case may be intrinsic; the facts produced by the plaintiff may be inconsistent

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[158]228 F.2d 55 (5th Cir. 1956).

[159]*Id.* at 58 (quoting the trial court).

[160]*Id.*

[161]*Id.* at 61.

and may show a lack of probative value. Also, the defendant may produce evidence which rebuts the plaintiff's claim for relief. However, if the plaintiff's evidence stands "uncontradicted *either* by inconsistencies within itself or conflicting evidence from the defendant,"[162] no cause exists for a dismissal because no fault can be found with the plaintiff's case. The plaintiff's evidence, even though viewed objectively without special inferences in the plaintiff's favor, demonstrates a substantial claim for relief. An involuntary dismissal would be improper, not because the plaintiff has shown a prima facie case per se, but because the court has no evidence before it to weigh against the plaintiff's.

In an often cited case, *Rogge v. Weaver*,[163] the Alaska Supreme Court determined that the granting of a dismissal was error when the "plaintiff had shown a *prima facie case based on unimpeached testimony*."[164] In effect, the supreme court was declaring that a trial court should exercise its discretion under Alaska Civil Rule 41(b)[165] and decline to render any judgment until the close of all the evidence.[166] In fact, the Alaska Supreme Court felt that the plaintiff had produced a case "sufficiently strong to warrant a judgment in his favor"[167] and ordered such judgment to be entered by the trial court "if the defendants decline[d] to offer any evidence"[168] after the remand. When the plaintiff's case in chief is uncontradicted and unimpeached, the prima facie claim for relief is aided by a presumption of preponderance.[169] The defendant may have a judgment entered against him if he fails to produce rebutting evidence.[170]

The language added to Trial Rule 41(B) by the Indiana legislature incorporates the rationale of *Benton* and *Rogge*. If *all* the evidence produced by the plaintiff is unimpeached and uncontradicted, it is axiomatic that the "reasonable inferences therefrom" should be accepted as true by the trial court. Consequently, the plaintiff has shown a prima facie case enhanced by a rebuttable

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[162] *Id.* (emphasis added).

[163] 368 P.2d 810 (Alaska 1962).

[164] *Id.* at 813 (emphasis added).

[165] ALASKA R. CIV. P. 41(b).

[166] 368 P.2d at 813.

[167] *Id.* at 816.

[168] *Id.*

[169] *Id.*

[170] [T]he term [prima facie] is thus applied to the stage . . . where the proponent, having the burden of proving the issue . . . , has not only removed by sufficient evidence the duty of producing evidence to get past the judge to the jury, but has gone further, and, either by means of a presumption or by a general mass of strong evidence, has entitled himself to a ruling that the opponent should fail if he does nothing more in the way of producing evidence. 9 J. WIGMORE, LAW OF EVIDENCE § 2494 (3d ed. 1940).

presumption of preponderance. The court as the trier of facts could not dismiss such an action because *all* the facts favor the plaintiff. No basis would exist for dismissal in favor of the defendant.

Briefly, a plaintiff's case in chief cannot be summarily labeled prima facie and, as a consequence, dismissed. Even though federal, and some state, trial courts are empowered to dismiss a prima facie case on a Trial Rule 41(B) motion, evidence contrary to the interests of the plaintiff must be present for the court to weigh and determine that the plaintiff has not preponderated.

V. Conclusion

The Indiana Court of Appeals has determined that a motion to dismiss under Trial Rule 41(B) raises the same question as does a motion for judgment on the evidence (directed verdict) under Trial Rule 50(A). Upon either motion the trial court's function is to consider the evidence in a light most favorable to the plaintiff in order to ascertain whether the plaintiff has made a prima facie case. If the trial court so finds, a dismissal or directed verdict is precluded and the defendant is required to present a defense. In a jury trial this procedure is necessary to ensure that a plaintiff has his right to relief determined by the trier of facts, the jury. In an action before the court, however, the trial judge will ultimately decide whether the plaintiff has preponderated. To require the trial court to delay this determination until the close of all the evidence artifically separates the functions of a trial judge.

Precluding the trial court from determining the facts at the earliest opportunity allows unmeritorious claims to unnecessarily consume court time while crowded trial dockets hinder the judicial process.

Experience in federal practice has shown that a plaintiff's rights are adequately protected where the judge may weigh the evidence and make ultimate determinations of fact upon a motion to dismiss. The United States Supreme Court has determined that the plaintiff has no substantive or procedural right to have a defendant present rebutting evidence. In fact, the Supreme Court amended Federal Rule 41(b) to ensure that a trial court could weigh the evidence when a defendant moves for dismissal.

The Indiana rule as revised by the legislature differs semantically from the federal rule, but arguably no substantive difference exists. Indiana Trial Rule 41(B) directs a trial court to consider *all* the evidence on a motion to dismiss. As a consequence, a trial court should be empowered to weigh the evidence and make ultimate determinations of fact at midpoint in a nonjury trial. By a somewhat convoluted procedure, the trial court in *Ferdinand Furniture Co. v.*

Anderson was able to dismiss a prima facie case by advising the defendant to rest at the conclusion of plaintiff's case in chief. If a trial court may "shed the shackles of Trial Rule 41(B)"[171] by following this procedure, little rationale exists for prohibiting a trial court from directly exercising its power as trier of facts upon a motion to dismiss. A trial court's power to weigh the evidence should not hinge upon whether the defendant decides to rest his case. Rather, the trial court's power to weigh the evidence upon a motion to dismiss should be judicially recognized and accepted as the proper procedure. Indiana procedure under Trial Rule 41(B) should follow the federal approach because: (1) The intent of the drafters was that it do so, (2) the language of Indiana Trial Rule 41(B) so dictates, (3) the separation of the functions of the judge in a nonjury trial is artificial and unnecessary, and (4) the federal approach is overall the most expeditious and fair.

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[171]399 N.E.2d at 805.