

IV. Civil Procedure and Jurisdiction

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A. Introduction

This survey period saw major changes in the Trial Rules by supreme court amendment. The Supreme Court of Indiana upon recommendation of the court's standing Committee on Rules of Practice and Procedure amended the following rules effective January 1, 1980: Trial Rules 5(B)(1); 59; 60; 62(B); 79(14), (15) and (16); and 80. Appellate Rules 8.1 and 8.3 and Criminal Rule 13(12) were also amended.

Each of these amended rules was supported by committee notes which explained the amendments. Several of the amendments and their notes are discussed in this Article, with particular emphasis given to Trial Rule 59 because it is a critical motion which must be made before an appeal of a final judgment or order can be made. The discussion which is presented appears as each subject area arises.

Additionally, one statutory change is discussed.¹ It provides for the payment of interest on a judgment rendered against a governmental entity measured from the date of settlement or judgment if the judgment remains unpaid 180 days after settlement or judgment.

B. Jurisdiction, Process, Venue, Standing, and Claims in General

1. *Jurisdiction.*—Two cases decided by the United States Supreme Court during this survey period are extraordinarily important. Factually, they relate (a) to products liability litigation, and (b) to the acquisition of jurisdiction by a method known as "quasi-in-rem" judicial power.

Their conceptual bases, however, are much broader than those factual patterns, and the cases deserve careful attention. They appear to hold that (a) an adequate association or contact must exist between the defendant and the state or forum which asserts judicial power over the defendant, *and* (b) an adequate association or contact must exist between the "litigation facts" and the state or forum which asserts jurisdiction or judicial power to render judgment on

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¹Act of Mar. 3, 1980, Pub. L. No. 198, 1980 Ind. Acts 1630 (amending IND. CODE § 34-4-16.5-17 (1976)). See note 77 *infra* and accompanying text.

those facts. "Litigation facts" may be defined as those facts which form the basis of the claim asserted by the plaintiff against the defendant; this does not refer to any particular theory of action which those facts might generate. The main thought is that the "litigation facts" must also have an association with the jurisdictional court in addition to the defendant's association. Of course, there must also be adequate service of process or notice of the action.

In *World-Wide Volkswagen Corp. v. Woodson*,² a claim arose from an automobile accident which occurred in the state of Oklahoma. The plaintiffs were traveling through Oklahoma when their car was struck in the rear causing its gas tank to explode. The plaintiffs brought a personal injury suit alleging a defective gas tank and fuel system and joined as defendants: (1) the automobile's manufacturer, (2) the importer for Volkswagen in the United States, (3) the regional distributor of Volkswagen, and (4) the retail dealer in New York. The regional distributor and the retail dealer entered a special appearance in the Oklahoma state court and claimed that Oklahoma's exercise of jurisdiction over them offended the due process clause of the fourteenth amendment.

The regional distributor, World-Wide, and the retail dealer, Seaway, did no business of any kind in Oklahoma. They did not ship or sell any product in Oklahoma, nor did they have an agent to receive process there. They did not purchase advertising in any media calculated to reach Oklahoma. There was no showing that any automobile sold by World-Wide or Seaway ever entered Oklahoma with the exception of the plaintiff's automobile involved in this case.

The Supreme Court of Oklahoma sustained a finding of personal jurisdiction over the defendants upon the statutory basis that an Oklahoma "court may exercise personal jurisdiction over a person . . . causing tortious injury in this state by an act or omission outside this state if he regularly does or solicits business or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed"³ in Oklahoma. The state court did not assert jurisdiction upon the grounds that a person is subjected to Oklahoma jurisdiction when he causes tortious injury in the state by an act or omission out of the state of Oklahoma.⁴ The Supreme Court of the United States granted certiorari to resolve a dispute between that state supreme court and four other state supreme court deci-

²444 U.S. 286 (1980).

³OKLA. STAT. tit. 12, § 1701.03(a)(4) (1961), quoted in 444 U.S. at 290 n.7.

⁴See 444 U.S. at 290 n.7.

sions which were inconsistent in their interpretation of the due process clause of the fourteenth amendment.⁵

The Court reversed, holding that there was no jurisdiction in the state courts of Oklahoma.⁶ Noting the familiar "contacts test," the Court stated that there was a total absence in the record of any affiliating circumstances between the moving defendants and the state of Oklahoma.⁷ "[T]he fortuitous circumstance that a single Audi automobile, sold in New York to New York residents, happened to suffer an accident while passing through Oklahoma"⁸ was insufficient to sustain the exercise of Oklahoma's jurisdiction. The Court stated that its decision was consistent with the case of *Shaffer v. Heitner*,⁹ in which the Court overturned the proposition "that the interest of a creditor in a debt could be extinguished or otherwise affected by any State having transitory jurisdiction over the debtor."¹⁰ The Court stated that the element of "foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State."¹¹ Rather, the Court said, "it is that the defendant's conduct and connection with the forum State are such that [the defendant] should reasonably anticipate being haled into court"¹² in the forum state. Thus the Court said that "[w]hen a corporation 'purposefully avails itself of the privilege of conducting activities within the forum State' . . . it has clear notice that it is subject to suit there, and can act"¹³ accordingly insofar as the possibility of future litigation is concerned.

There was no discussion concerning the manufacturer or the national importer of the Audi, and it appears that neither raised any question before the Supreme Court. The opinion is thus limited to the New York dealer's and the northeastern regional distributor's jurisdictional immunity from suit in Oklahoma.

The opinion is consistent with Indiana's Trial Rule 4.4,¹⁴ and

⁵*Id.* at 291 & n.9.

⁶*Id.* at 299.

⁷*Id.* at 295.

⁸*Id.*

⁹433 U.S. 186 (1977), discussed in Harvey, *Civil Procedure and Jurisdiction, 1977 Survey of Recent Developments in Indiana Law*, 11 IND. L. REV. 51, 51-52 (1978) [hereinafter cited as Harvey, *1977 Survey*], and in Harvey, *Civil Procedure and Jurisdiction, 1979 Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 57, 57-58 (1980) [hereinafter cited as Harvey, *1979 Survey*].

¹⁰444 U.S. at 296.

¹¹*Id.* at 297.

¹²*Id.*

¹³*Id.* (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

¹⁴IND. R. TR. P. 4.4(A) establishes seven bases of jurisdiction for Indiana trial courts. These bases contemplate that jurisdiction over a person or entity shall arise, along with the litigation, from an act or acts done in Indiana or which impact into In-

should be carefully noted in jurisdictional questions in all types of litigation.

The case of *Rush v. Savchuk*,¹⁵ is of major significance concerning the assertion of jurisdiction by a state court over a nonresident defendant upon a set of facts which developed outside the state in which suit is brought.

In *Rush*, a motor vehicle accident occurring in Indiana involved two Indiana residents in a single-car event. The injured plaintiff-appellee Savchuk was a passenger in the car driven by defendant-appellant Rush. The car was owned by Rush's father and was insured by State Farm Mutual Automobile Insurance Company (State Farm). Indiana's guest statute¹⁶ would have barred a claim by the plaintiff if the action had been brought in an Indiana court.

The plaintiff moved to Minnesota in 1973, and instituted an action against Rush in the Minnesota state courts. Rush had no association with Minnesota which could justify in personam jurisdiction over him. The plaintiff attempted to assert quasi-in-rem jurisdiction by garnishing State Farm's duty under the insurance policy to defend and indemnify Rush in connection with such a suit. State Farm did considerable business in Minnesota. The defendant was served personally in Indiana.

State Farm and Rush moved to dismiss in the Minnesota trial court. The motion was denied and the Supreme Court of Minnesota affirmed the trial court's decision.¹⁷ That decision was vacated by the United States Supreme Court,¹⁸ and on remand the Minnesota Supreme Court determined¹⁹ that the assertion of quasi-in-rem jurisdiction through garnishment of the insurer's obligation to an insured did not offend the due process standards enunciated in *Shaffer v. Heitner*.²⁰ The Minnesota Supreme Court stated²¹ that its decision was supported by the rule stated in *Seider v. Roth*,²² to the effect "that the contractual obligation of an insurance company to its insured under a liability insurance policy is a debt subject to attach-

diana. See *Oddi v. Mariner-Denver, Inc.*, 461 F. Supp. 306 (S.D. Ind. 1978) (denial of personal jurisdiction where none of the acts, bug bites in a hotel in Denver, Colorado, which formed the basis for the litigation were done or performed in Indiana).

¹⁵444 U.S. 320 (1980).

¹⁶IND. CODE § 9-3-3-1 (1976).

¹⁷*Savchuk v. Rush*, 311 Minn. 480, 245 N.W.2d 624 (1976), vacated 433 U.S. 902 (1977).

¹⁸433 U.S. 902 (1977).

¹⁹*Savchuk v. Rush*, 311 Minn. 480, 502, 272 N.W.2d 888, 891-92 (1978), reversed, 444 U.S. 320 (1980).

²⁰433 U.S. 186 (1977). See also note 9 *supra*.

²¹311 Minn. at 501, 272 N.W.2d at 891.

²²17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966).

ment under state law if the insurer does business in the State."²³

The Supreme Court framed the issue in this way: "This appeal presents the question whether a State may constitutionally exercise *quasi in rem* jurisdiction over a defendant who has no forum contacts by attaching the contractual obligation of an insurer licensed to do business in the State to defend and indemnify him in connection with the suit."²⁴

The Court effectively rejected the sufficiency of the *Seider* rationale, stating that "the mere presence of property in a State does not establish a sufficient relationship between the owner of the property and the State to support the exercise of jurisdiction over an unrelated cause of action."²⁵

The Court also noted that there was no significant contact between the forum (Minnesota), and the place where the litigation arose (Indiana), and it accorded no jurisdictional significance to the insurer's obligation to defend Rush.²⁶

The gist of this holding was that there must be sufficient contacts between the forum state, the defendant, *and* the body of the litigation. In *Rush*, the facts which gave rise to the litigation, all of which occurred in Indiana, had no association with the forum state, Minnesota. Furthermore, the insurer's duty to defend the insured, and the insurer's association with the state of suit could not be attributed to the defendant, Rush. "The requirements of [*International Shoe Co. v. Washington*]²⁷ must be met as to each defendant over whom a state court exercises jurisdiction."²⁸

The case is obviously a leading decision in the entire area of jurisdiction. It does not adversely affect Indiana Trial Rule 4.4,²⁹ which has always required an association between the body of the litigation and the jurisdictional act which sustains the trial court's assertion of authority. It does, however, clearly affect Indiana Trial Rule 64(B)(2),³⁰ and if there is no other association between the in-

²³444 U.S. at 325.

²⁴*Id.* at 322.

²⁵*Id.* at 328.

²⁶*Id.* at 329.

²⁷326 U.S. 310 (1945).

²⁸444 U.S. at 332.

²⁹IND. R. TR. P. 4.4.

³⁰IND. R. TR. P. 64(B) provides in part:

Attachment or attachment and garnishment shall be allowed in the following cases in addition to those where such remedies prior to judgment are now permitted by law:

(1) It shall be a cause for attachment that the defendant or one of several defendants is a foreign corporation, a nonresident of this state, or a person whose residence and whereabouts are unknown and cannot be determined after reasonable investigation before the commencement of the action.

sured, the litigation, and Indiana, it would be unconstitutional on the facts of *Rush* to assert jurisdiction over a nonresident individual solely because an insurance company licensed to do business in Indiana has a duty to defend him. The language of the rule, though, clearly permits attachment of the insurer's obligation to secure satisfaction of an otherwise valid judgment.³¹

2. *Power and Duty To Entertain Complaint.*—In *Colvin v. Bowen*,³² a prison inmate brought an action in state court under 42 U.S.C. § 1983,³³ which the trial court dismissed for lack of jurisdiction. The court of appeals, however, noted that the action was brought under a federal statute for the enforcement of a civil rights claim and that the Indiana court had concurrent jurisdiction with the federal district court to rule on that claim. The court held that there was a duty to entertain a claim growing out of a valid federal statute.³⁴

In another decision concerning 42 U.S.C. § 1983, *Thompson v. Medical Licensing Board*³⁵ (*Thompson II*), the plaintiff questioned

(2) Any interest in tangible or intangible property owned by the defendant shall be subject to attachment or attachment and garnishment, as the case may be, if it is subject to execution, proceedings supplemental to execution or any creditor process allowed by law. Wages or salaries shall not be subject to attachment and garnishment

³¹Note, however, that the procedure under IND. R. TR. P. 64(B)(2) for attaching the insurer's duty to defend an insured is limited to the enforcement of a judgment. It would also appear to be unconstitutional, on the holding in *Rush*, to assert jurisdiction over an insurer solely because the insurer has a duty to defend a resident individual if there is no further association between the insured, the "litigation facts" and the state.

³²399 N.E.2d 835 (Ind. Ct. App. 1980). The trial court had dismissed under Trial Rule 12(B)(1) and Trial Rule 12(B)(6), and the appellate court also noted that if the trial court was correct in dismissing for the absence of jurisdiction (which it was not) then it could not also rule upon the Trial Rule 12(B)(6) motion because such a dismissal is an assertion of the trial court's jurisdiction. 399 N.E.2d at 838.

³³42 U.S.C.A. § 1983 (West Supp. 1980) provides in part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

See *Monell v. Department of Social Serv.*, 436 U.S. 658 (1978) (analysis of legislative history regarding statute's application to local government and officials).

³⁴399 N.E.2d at 837. See also *Martinez v. State*, 444 U.S. 277, 283-84 n.7 (1980). "We have never considered . . . whether a state *must* entertain a claim under § 1983. We note that where the same type of claim, if arising under state law, would be enforced in the state courts, the state courts are generally not free to refuse enforcement of the federal claim." *Id.*

³⁵398 N.E.2d 679 (Ind. Ct. App. 1979), *cert. denied*, 49 U.S.L.W. 3289 (U.S. 1980) [hereinafter referred to as *Thompson II*].

whether he must exhaust his state administrative remedies before an action could be brought. He pointed out that under federal law exhaustion of administrative remedies is not a condition precedent to the commencement of a § 1983 claim in the federal district court.

The court of appeals held that federal law concerning exhaustion of administrative remedies bound only the federal courts. Indiana state law requires exhaustion, and even a federal claim brought in an Indiana state court cannot proceed until the exhaustion requirement is met.³⁶

3. *Dismissal for Failure to Exhaust Administrative Remedies.*— In this author's view, the court of appeals in *Thompson II* goes too far, and its disposition is open to serious question. The first opinion in that case, *Thompson v. Medical Licensing Board*³⁷ (*Thompson I*), affirmed the trial court's dismissal of the action.³⁸ The plaintiff had brought the action seeking declaratory and injunctive relief challenging the role of the Board itself and the manner in which it functions. The court in *Thompson I* did not discuss the available remedy under 42 U.S.C. § 1983.³⁹ *Thompson II* arose only because the plaintiff petitioned for a rehearing.⁴⁰

The court in *Thompson II* concluded that the assertion of the federal statutory remedy must await the exhaustion of the state administrative remedy.⁴¹ The court in *Thompson I*, however, had determined that there was *no remedy* in the trial court until the administrative remedy was first expended.⁴²

The doctrine that an administrative remedy must be pursued and exhausted before bringing a court action is well established in Indiana.⁴³ A challenge to the agency's function or its Constitutional legitimacy, however, is quite distinguishable from a challenge to the correctness of the administrative determination. Exhaustion is obviously appropriate in the latter situation. Litigation might add

³⁶*Id.* at 680.

³⁷389 N.E.2d 43 (Ind. Ct. App. 1979) [hereinafter referred to as *Thompson I*].

³⁸*Id.* at 51.

³⁹*See id.* at 46-51.

⁴⁰398 N.E.2d at 679.

⁴¹*Id.* at 680.

⁴²389 N.E.2d at 48.

⁴³*See, e.g., State ex rel. Paynter v. Marion County Superior Court*, 264 Ind. 345, 353, 344 N.E.2d 846, 851 (1976). *See also Indiana Dep't of State Revenue v. Indiana Gamma Gamma of Alpha Tau Omega, Inc.*, 394 N.E.2d 187 (Ind. Ct. App. 1979) (Indiana courts lack jurisdiction to entertain an action for declaratory relief with respect to tax liability, when a statute prescribes pursuance of an administrative remedy to completion prior to suit). *But see Schoffstall v. Failey*, 389 N.E.2d 361 (Ind. Ct. App. 1979) (collateral attack on prior judgment alleging failure of the defendant to exhaust administrative remedy failed where the defendant had alleged and the court had found as a fact that the remedy had been exhausted).

years of delay to the process, and that precise reasoning was used to support exhaustion as a requirement in *Thompson I*.⁴⁴ Nevertheless, if a claim is made alleging violation of a civil right, such as Dr. Thompson's claim that the Board's function is itself unconstitutional, then a better disposition of the matter would have been for the trial court to retain jurisdiction but not exercise it until the administrative remedy was exhausted.⁴⁵

The rationale which supports elimination of needless delay, though, should exempt the assertion of a Constitutional right from the exhaustion of remedies requirement. By not requiring exhaustion of the claim, needless years of litigation in the administrative agency might be avoided. If a claim is to be subjected to the exhaustion requirement, which was the holding in *Thompson II*, then the Indiana trial court should not hold the claim to be beyond the subject matter jurisdiction of the court. Rather, it is suggested, the Indiana trial court should be instructed to retain jurisdiction but to abstain from its exercise, unless sufficient facts are alleged to demonstrate that it should go forward with the suit immediately.

4. *Standing in the Form of Determining Whether a Party Can Invoke the Court's Jurisdiction.*—The decision in *Lutheran Hospital, Inc. v. Department of Public Welfare*,⁴⁶ continued the doctrine that standing requires a showing of injury or harm. Without that showing, a party cannot raise an issue or question which is said to flow from the conduct or act adverse to that party.⁴⁷ In this case, the

⁴⁴The court said:

Allowing the Declaratory-Judgment Act to be used as a vehicle to bypass the administrative process created by statute can seriously weaken the effectiveness of that process. Obviously years can be added to the administrative process before an administrative determination is made. Review of the process becomes piecemeal, an undesirable state of affairs resulting in unnecessary delay and duplication in a court system already burdened with demands exceeding its capacity to respond.

389 N.E.2d at 51. The question is, however, whether that kind of characterization is applicable at all to a constitutional claim which, if successful, will either reform the administrative process or bypass it completely.

⁴⁵That assumes, of course, that the doctrine of exhaustion of administrative remedies is even applicable to civil rights or constitutional claims. See *id.* at 51-52 (Sullivan, J., concurring).

⁴⁶397 N.E.2d 638 (Ind. Ct. App. 1979).

⁴⁷The absence of standing will result in a complete denial of subject matter jurisdiction. See *Aikens v. Alexander*, 397 N.E.2d 319 (Ind. Ct. App. 1979). The court of appeals also interpreted IND. R. TR. P. 17(A)(1) in this context in *Aikens*. That rule requires, generally, that the real party in interest bring the action. Thus standing, if absent, will close the court entirely to a plaintiff's suit; and it will prevent, as in *Lutheran Hospital* a defendant from raising or litigating an issue.

An additional restriction is found in *Volkswagenwerk, A.G. v. Watson*, 390 N.E.2d 1082 (Ind. Ct. App. 1979). A declaratory judgment action was brought in an In-

hospital brought suit against the Allen County Department of Public Welfare for reimbursement for certain medical treatment which it had rendered to persons in that area. The hospital claimed that the Department had a statutory duty to transmit or provide those funds.⁴⁸ In view of the predominantly religious nature of the hospital, the Department attempted to raise certain constitutional questions, namely that the statute contravened the first amendment establishment clause of the United States Constitution, and article 1, section 6 of the Indiana Constitution.

The court of appeals noted that the Department had not alleged any injury and the record revealed none. The Department had no interest in the outcome of the litigation in that respect and therefore "lack[ed] the requisite standing to raise this constitutional argument."⁴⁹

This aspect of standing must be distinguished from questions concerning the status of a plaintiff as an aggrieved party and whether that question affects the subject matter jurisdiction of a court. The distinction was made in *Wildwood Park Community Association v. Fort Wayne City Plan Commission*⁵⁰ in which the following language appears:

The legal capacity of a party to prosecute its claim is a matter which affects the trial court's *jurisdiction over the particular case*—not its jurisdiction over the subject matter. . . . Unlike subject matter jurisdiction, which cannot be waived by a party and may be raised, *sua sponte*, by the court, jurisdiction over the particular case may be waived by the failure to make a specific and timely objection.⁵¹

Therefore, while a plaintiff must certainly allege status as an aggrieved party, failure of the defendant to challenge the allegation may constitute a waiver.

5. *Standing in the Form of Authorization to Represent the*

diana state court, seeking a determination that *Evans v. General Motors Corp.*, 359 F.2d 822 (7th Cir. 1966), was still sound Indiana law, despite the fact that *Evans* had been overruled by *Huff v. White Motors Corp.*, 565 F.2d 104 (7th Cir. 1977). The Indiana Court of Appeals noted that a declaratory judgment would not terminate the litigation because the parties would still return to the federal court. The court stated: "The determinative factor is whether the declaratory action will result in a just and more expeditious and economical determination of the entire controversy." 390 N.E.2d at 1085. The court held declaratory relief to be inappropriate and affirmed the trial court's dismissal. *Id.* at 1086.

⁴⁸See IND. CODE §§ 12-5-1-1 to -17 (1976).

⁴⁹397 N.E.2d at 646.

⁵⁰396 N.E.2d 678 (Ind. Ct. App. 1979).

⁵¹*Id.* at 681 (citations omitted).

State.—In *Banta v. Clark*,⁵² the plaintiff brought suit for the refund of a tax payment. The defendant Department of Revenue hired outside counsel to represent it with the written permission of the Attorney General. The court of appeals held that under section 4-6-5-3,⁵³ the Attorney General had the exclusive right and power to represent the State of Indiana and its agencies and officers, and that those agencies and officers may not utilize outside counsel unless the Attorney General has consented in writing to that employment.⁵⁴ In view of the Department's compliance with the statutory requirements, the attorney's appearance was proper.

6. *Jurisdiction to Discipline Attorneys*.—In *McQueen v. State*,⁵⁵ the Indiana Supreme Court held that a superior court did not have the power to discipline an attorney by ordering that the attorney be suspended from the practice of law for a period of ninety days.⁵⁶ The court held that the authority to suspend attorneys from practice, once exercised in Indiana by circuit and superior courts, was completely abolished and that exclusive authority is found in the supreme court.⁵⁷ Additionally, the court held that suspension from practice was not one of the trial court's available punishments for contempt.⁵⁸ The court remanded the case with instructions to expunge from the trial court's records any order of suspension.⁵⁹

7. *Claims in General*.—In *Thrasher v. Van Buren Township*,⁶⁰ the plaintiffs alleged that a township trustee failed to comply with a mandate to perform a statutory duty and asserted a claim for damages. The court of appeals recognized the damage claim for that failure, separate and distinct from the damages available in a mandate action.⁶¹

The damages claimed in this action arose following the mandate action and the contempt citation issued for the failure to follow the

⁵²398 N.E.2d 692 (Ind. Ct. App. 1979).

⁵³IND. CODE § 4-6-5-3 (1976).

⁵⁴398 N.E.2d at 693.

⁵⁵396 N.E.2d 903 (Ind. 1979).

⁵⁶*Id.* at 906.

⁵⁷*Id.* at 905.

⁵⁸*Id.* at 906. See IND. CODE § 34-4-7-6 (1976).

⁵⁹396 N.E.2d at 906.

⁶⁰394 N.E.2d 215 (Ind. Ct. App. 1979).

⁶¹*Id.* at 222. See IND. CODE § 34-1-58-4 (1976) which provides:

Said action for mandate shall stand for issue and trial, and issues of law and fact may be joined, and amendments, continuances and appeals granted therein, as in other civil actions; and in rendering final judgments in said actions, if the finding and judgments be for the plaintiff, the court shall grant and adjudge to the plaintiff such relief, and such only, as he may be entitled to under the law and facts in such action, together with damages as in actions for false returns, and costs shall be awarded as the court may direct.

mandate. Because these damages were not litigated between the parties in the mandate proceeding, the action could not be dismissed under Trial Rule 12(B)(8).⁶²

The recognition of a claim was denied, however, in *Winchell v. Aetna Life & Casualty Insurance Co.*⁶³ where the plaintiff alleged that she had a fiduciary relationship with the defendant insurance company because she was insured under a policy. She attempted to extend that alleged relationship to a lawsuit which the plaintiff had brought against another defendant who happened to be insured by the same insurance company. She asserted that Aetna's failure to settle the second suit breached the alleged fiduciary relationship.

The court of appeals held that no such fiduciary relationship, if existent, could possibly extend to the plaintiff's unrelated lawsuit. The court of appeals affirmed⁶⁴ the trial court's dismissal under Trial Rule 12(B)(6).⁶⁵

a. Second suit to enforce judgment.—The decision in *Ice v. State*⁶⁶ arose in a civil contempt suit filed to enforce an injunction which the Board of Dental Examiners had obtained in an earlier action proscribing the defendant's unauthorized practice of dentistry. The court of appeals held that the action would lie and that the injunction was enforceable in that manner.⁶⁷ The decision in *Martin v. Indianapolis Morris Plan Corp.*⁶⁸ upheld a second suit in which the creditor filed a complaint seeking recovery of a sum due on an unpaid judgment.⁶⁹

Those two actions alone show that this writer's earlier comments concerning Trial Rule 69(E)⁷⁰ are of doubtful validity, and that

⁶²IND. R. TR. P. 12(B)(8) allows a dismissal when the same action is "pending in another state court of this state." The trial court reasoned that the same action was pending in another state court; the court of appeals held that the second action was not identical to the pending action. 394 N.E.2d at 220.

⁶³394 N.E.2d 1114 (Ind. Ct. App. 1979).

⁶⁴*Id.* at 1118.

⁶⁵IND. R. TR. P. 12(B)(6) allows dismissal for "[f]ailure to state a claim upon which relief can be granted . . ."

⁶⁶397 N.E.2d 1041 (Ind. Ct. App. 1979).

⁶⁷*Id.* at 1043.

⁶⁸400 N.E.2d 1173 (Ind. Ct. App. 1980).

⁶⁹*Id.* at 1176.

⁷⁰This writer had speculated:

Rule 69(E) is couched in permissive terms. Argument therefore may be made that proceedings supplemental to execution by a separate action is still possible as it was before the Rule. However, the term "may" in this rule could very well be read as "shall" in terms of where the remedy is initiated. As an ancillary remedy to the judgment, much inconvenience ordinarily will be avoided by allowing proceedings supplemental to continue in the original case. If an independent proceeding is allowed, and if change of venue in such cases is permitted, no real over-all advantage will be gained by allowing the

the rule was not intended to and did not foreclose a second action to enforce a judgment.

b. Notice of claim under the Indiana Tort Claims Act.—In *Lawrence County Commissioners v. Chorely*,⁷¹ the court held that the notice provisions of the Tort Claims Act,⁷² are applicable to a claim in a small claims court or proceeding, and that consistent with *Delaware County v. Powell*,⁷³ substantial compliance with the notice requirements was sufficient.⁷⁴ The *Powell* case is a leading decision on notice to a municipality or a county under the Act. In *Chorely*, as in *Powell*, the defendant had actual knowledge of the accident, agreed to pay the damages, investigated the claim, accepted estimates and told the plaintiff to bring suit, and the plaintiff did commence the action. The court held those facts to constitute more than sufficient actual notice, and therefore *Chorely* had substantially complied with the notification requirements under the Tort Claims Act.⁷⁵

c. Interest on judgments against a governmental entity.—Section 34-4-16.5-17⁷⁶ of the Indiana Code was amended by House Enrolled Act Number 1473⁷⁷ to clarify the provisions with respect to in-

independent action in the county of the judgment debtor's residence as it must be under the proceedings supplemental statutes. See Burns §§ 2-4401, 2-4402.

4 W. HARVEY & R. TOWNSEND, INDIANA PRACTICE 475 (1971).

⁷¹398 N.E.2d 694 (Ind. Ct. App. 1979).

⁷²IND. CODE §§ 34-4-16.5-6, -7 (1976).

⁷³393 N.E.2d 190 (Ind. 1979).

⁷⁴398 N.E.2d at 698.

⁷⁵*Id.*

⁷⁶IND. CODE § 34-4-16.5-17 (Supp. 1980).

⁷⁷Act of March 3, 1980, Pub. L. No. 198, 1980 Ind. Acts 1630 provides:

SECTION 1. IC 34-4-16.5-17 is amended to read as follows: Sec. 17. A claim or suit settled by, or a judgment rendered against, a governmental entity shall be paid by it not later than one hundred eighty (180) days after *the date of settlement or judgment*, unless there is an appeal, in which case not later than one hundred eighty (180) days after a final decision is rendered. If payment is not made within one hundred eighty (180) days *after the date of settlement or judgment*, the governmental entity is liable for interest from the date of settlement or judgment at an annual rate of eight percent (8%). *The governmental entity is liable for interest at that rate and from that date even if the case is appealed, provided the original judgment is upheld.*

SECTION 2. (a) Notwithstanding the conflicting provisions of IC 34-4-16.5-17, for any case on appeal on the effective date of this act upon which a final decision has not been rendered or a final settlement has not been reached, any interest required to be paid by IC 34-4-16.5-17 accrues and accumulates only from the effective date of this act.

(b) Because an emergency exists, this act takes effect upon passage.

The italicized portions show additions to the text of the previously existing section.

In a somewhat related matter concerning attorneys fees, the supreme court has

terest on a settlement with, or judgment against, a governmental entity. The statute requires that the amount be paid not later than 180 days after the date of the settlement or the judgment. If a judgment is appealed, the amount must be paid within 180 days after the final decision is rendered. The new provision clarifies that the liability for interest arises if a settlement or judgment is not paid within 180 days from the date of the settlement or original judgment regardless of whether a judgment is appealed.

The calculation period for the interest runs from the date of the settlement or the judgment to the date of payment. Although the government may delay payment until 180 days after the final appellate decision is rendered, the interest liability is still calculated from the date of the original adverse judgment if that judgment is upheld on appeal.

d. Suits under Trial Rule 60 and the 1980 amendment to Trial Rule 60.—The opinion in *Anderson v. Anderson*⁷⁸ contains an excellent discussion of Trial Rule 60⁷⁹ from the perspective that a motion or complaint made under that rule is in fact a separate claim. The motion or complaint is usually made to set aside another judgment or final order of some kind, or to correct a mistake in a judgment or order.

In *Anderson*, an action was brought by Mrs. Anderson against her former husband, an attorney, alleging generally that her former husband had failed to give adequate advice to her when their marriage was dissolved.

The court of appeals held that this action was premature because the dissolution of marriage action contemplates two distinct rulings by the trial court; the first ruling decrees that the marriage is dissolved, and the second ruling accomplishes a division of property.⁸⁰ The latter had not occurred when this complaint was filed.

However that may be, the court held that the complaint by the wife pursuant to Trial Rule 60(B) did constitute a direct attack upon the dissolution decree, and that rules concerning former adjudication or res judicata were inapplicable.⁸¹ The court said that an "independent action to avoid a judgment because of fraud in the procurement is an equitable proceeding and, as such, it is subject to the

held that under IND. R. TR. P. 60.5, where the judge institutes the action in his official capacity, not for his personal reward but for the purpose of meeting the operational needs of the court, a reasonable attorney fee must be paid by the county. *Levco v. Auditor of State*, 393 N.E.2d 749 (Ind. 1979); *Hale v. Smith*, 390 N.E.2d 645 (Ind. 1979).

⁷⁸399 N.E.2d 391 (Ind. Ct. App. 1979).

⁷⁹IND. R. TR. P. 60(B). For a discussion of the rule and the 1980 amendment, see the text accompanying notes 88-90 *infra*.

⁸⁰399 N.E.2d at 401.

⁸¹*Id.* at 400.

rules of equitable discretion."⁸² One of those rules denies equitable relief when a legal remedy is available, and in *Anderson*, the wife had not yet obtained a decree on the division of the marital property. The court noted that when that issue is litigated, the wife could raise the question of the husband's alleged concealment or misrepresentation concerning the marital property. Hence, this action under Trial Rule 60(B), an independent action to set aside a judgment procured by fraud, was premature.⁸³

The court came to the same conclusion concerning the allegation of legal malpractice, and observed that "[t]he law is well settled in Indiana that an attorney may be held liable to his client for damages resulting from his failure to exercise ordinary care, skill, and diligence."⁸⁴ In this instance, however, the claim for legal malpractice had likewise not yet ripened because there had been no division of property. Accordingly this claim also was premature.⁸⁵

In *James v. Board of Commissioners*,⁸⁶ the appellate court held that Trial Rule 60(B) was not available to attempt to perfect a review of a nonappealable interlocutory order.⁸⁷ The holding in *James* was called into question by the 1980 amendment to Trial Rule 60(B),⁸⁸ because of the language found in that amendment, and the very expansive interpretation which it might be given.

⁸²*Id. In re Marriage of Jones*, 389 N.E.2d 338 (Ind. Ct. App. 1979), contains an extensive discussion of the interrelationship of the various criteria found in Trial Rule 60(B) and the equitable discretion which the trial court holds, provided of course that the complaint is timely made under the rule and the evidentiary burden which the plaintiff carries is met. "TR. 60(B) is directed to relief on equitable as opposed to legal grounds, except insofar as permitted under TR. 60(B)(2)." *Id.* at 340. See also *Pacurar v. Hernly*, 611 F.2d 179 (7th Cir. 1979) (successful attack on a void judgment under the federal counterpart of the Indiana rule).

⁸³399 N.E.2d at 401.

⁸⁴*Id.*

⁸⁵*Id.* at 402.

⁸⁶396 N.E.2d 429 (Ind. Ct. App. 1979).

⁸⁷*Id.* at 433.

⁸⁸The full text of the 1980 amendments to Trial Rule 60, is as follows:

Typing Code

The words in *this style type* are additions to the rule. The words in ~~this style type~~ are deletions from the rule. Sections or subsections of the rule that have been repositioned are stylized according to this typing code.

Trial Rule 60

RELIEF FROM JUDGMENT OR ORDER

(A) Clerical mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the *trial* court at any time *before the record is filed on appeal* of its own initiative or on the motion of any party and after such

One purpose of the 1980 amendment was to extend Trial Rule 60(B) relief to the entry of a default judgment in addition to a judg-

notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the court on appeal, and thereafter while the appeal is pending may be so corrected with leave of the court on appeal.

(B) Mistake—Excusable neglect—Newly discovered evidence—Fraud, etc. On motion and upon such terms as are just the court may relieve a party or his legal representative from a final judgment, order, default or proceeding *an order, entry of default, proceeding, or final judgment, including a judgment by default, for the following reasons:*

(1) mistake, surprise, or excusable neglect;

(2) any ground for a motion to correct error, including without limitation newly discovered evidence, which by due diligence [*sic*] could not have been discovered in time to move for a motion to correct errors under Rule 59;

(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(4) *entry of default or judgment by default* was entered against such party who was served only by publication and who was without actual knowledge of the action and judgment, order or proceedings;

(5) except in the case of a divorce decree, the record fails to show that such party was represented by a guardian or other representative, and if the motion asserts and such party proves that

(a) at the time of the action he was an infant or incompetent person, and

(b) he was not in fact represented by a guardian or other representative, and

(c) the person against whom the judgment order or proceeding is being avoided procured the judgment with notice of such infancy or incompetency, and, as against a successor of such person, that such successor acquired his rights therein with notice that the judgment was procured against an infant or incompetent, and

(d) no appeal or other remedies allowed under this subdivision have been taken or made by or on behalf of the infant or incompetent person, and

(e) the motion was made within ninety [90] days after the disability was removed or a guardian was appointed over his estate, and

(f) the motion alleges a valid defense or claim;

(6) the judgment is void;

(7) 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; or

(8) any other reason justifying relief from the operation of the judgment, other than those reasons set forth in subparagraphs (1), (2), (3), and (4).

The motion shall be made filed within a reasonable time, — and for reasons (1), (2), (3), and (4) (5), (6), (7), and (8), and not more than one [1] year after the judgment, order or proceeding was entered or taken for reasons (1), (2), (3), and (4). A motion under this subdivision (B) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judg-

ment upon default, as shown by the Rules Committee comment.⁸⁹ However that may be, the court of appeals pointed out in *Pathman*

ment, order or proceeding or for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

(C) Appeal—Change of venue. A ruling or order of the court denying or granting relief, in whole or in part, by motion under subdivision (B) of this rule shall be deemed a final judgment, and an appeal may be taken therefrom as in the case of a judgment. No change of venue in such cases shall be taken from the judge or county except for cause shown by affidavit.

(D) Hearing and relief granted. In passing upon a motion allowed by subdivision (B) of this rule the court shall hear any pertinent evidence, allow new parties to be served with summons, allow discovery, grant relief as provided under Rule 59 or otherwise as permitted by subdivision (B) of this rule.

(E) Infants, incompetents, and governmental organizations. Except as otherwise provided herein, this rule shall apply to infants, incompetents, and governmental organizations. The time for seeking relief against a judgment, order or proceeding allowed or recognized under subdivision (B) of this rule or any other statute shall not be tolled or extended as to such persons.

SUPREME COURT ADVISORY COMMITTEE ON REVISION OF RULES OF PROCEDURE AND PRACTICE, RECOMMENDATIONS FOR RULE CHANGES (Proposed Final Draft 1979) [hereinafter cited as COMMITTEE NOTE] (available from: Rules Committee Secretary, 323 State House, Indianapolis, Indiana 46204).

⁸⁹The full text of the Committee's comment on Trial Rule 60 follows:

The Rule in its revised form accomplishes a dual purpose:

(1) The first change is intended to dispel any suggestion in the present Rule, Trial Rule 60(A), that a trial court might effect correction of a clerical error after filing of the record in the appellate tribunal, without leave of the appellate court.

(2) The second change is intended to comply with a direct request from the Supreme Court to bring Trial Rule 60(B) in conformance with the decision of the First District Court of Appeals in *Pounds v. Pharr*, (1st Dist. 1978) Ind.App., 376 N.E.2d 1193. The latter case held; citing *Henline Inc. v. Martin*, (2nd Dist. 1976) Ind.App., 348 N.E.2d 416, that entry of default (as distinguished from the judgment upon default) was subject to a Motion made pursuant to Trial Rule 60(B) and that accordingly, denial of such a Trial Rule 60 Motion was directly appealable.

It may be noted that in this regard the effect of the Rule change is to nullify the contrary holding of *Green v. Karol*, (3rd Dist. 1976) Ind.App., 344 N.E.2d 106.

Pounds v. Pharr, *supra*, [held] that a Trial Rule 60(B) motion for relief from an entry of default which, although specifically alleging cause for relief pursuant to Trial Rule 60(B)(8), is based upon facts which may arguably constitute "excusable neglect" must be considered a Motion pursuant to Trial Rule 60(B)(1) rather than pursuant to Trial Rule 60(B)(8) and thus must be filed within the one-year time limitation applicable to Trial Rule 60(B)(1), (2), (3) and (4). To the same effect is *H & A, Inc. v. Gilmore*, (3rd Dist. 1977) Ind.App., 359 N.E.2d 259 (reversing Trial Rule 60(B)(8) relief from a judgment entered on default).

The Rule change implements the thrust of *Pounds v. Pharr*, *supra*, and

Construction Co. v. Drum-Co Engineering Corp.,⁹⁰ that the 1980 amendment would allow an interpretation which would extend complaints or motions under Trial Rule 60 to any order, whether final or not.⁹¹ The court correctly concluded that such an expansive interpretation was not the intention of the 1980 amendment, and that a Trial Rule 60(B) request for relief must still be directed to final judgments or orders⁹² or the entry of a default order and a judgment upon default.⁹³

8. *Service of Process.*—In *Gemmer v. Anthony Wayne Bank*,⁹⁴ the appellant had moved to quash two “alias” summons which were procured by the plaintiff’s attorney after it became apparent that the post office had lost the initial summons issued by the clerk at the filing of the complaint. The appellant alleged that the two summons had been obtained by plaintiff’s attorney approximately two to three months after the first summons, and that the delay was unreasonable. The trial court had denied the motion.⁹⁵

The appellate court affirmed the denial, holding that there was nothing in the last sentence of Trial Rule 4(B)⁹⁶ which imposed a time limit for the issuance of an alias or additional summons, and that there was no unreasonable delay in procuring the issuance of the two summons.⁹⁷

In *Munden v. Munden*,⁹⁸ a dissolution of marriage by default was obtained by the appellee, whose wife was a voluntary commitment patient at a mental health center. The record did not show that ser-

H & A, Inc. v. Gilmore, *supra*, with respect to the one-year time limitation. It therefore, casts doubt upon the continued validity of the holding in *Fitzgerald v. Brown*, (1st Dist. 1976) Ind.App., 344 N.E.2d 309 and upon dictum in *Sheraton Corp. of America v. Korte Paper Co.*, (3rd Dist. 1977) Ind.App., 363 N.E.2d 1263.

COMMITTEE NOTE, *supra* note 88, reprinted in 1 1980 Ann. Ind. Code Serv. 369-70 (West).

⁹⁰402 N.E.2d 1 (Ind. Ct. App. 1980).

⁹¹*Id.* at 6 n.4.

⁹²The court in *In re Estate of Garwood*, 400 N.E.2d 758 (Ind. 1980), restated the traditional proposition that a trial court’s order is final and appealable when it determines all of the merits of the entire case among the parties, even if there are incidental acts or ministerial forms of relief remaining which do not affect the finality of the trial court’s determination.

⁹³402 N.E.2d at 6-7 n.4.

⁹⁴391 N.E.2d 1185 (Ind. Ct. App. 1979).

⁹⁵*Id.* at 1190.

⁹⁶The last sentence of IND. R. TR. P. 4(B) states: “Separate or additional summons shall as provided by these rules be issued by the clerk at any time upon proper request of the person seeking service or his attorney.”

⁹⁷391 N.E.2d at 1191. The use of “alias” summonses was not impermissible either. *Id.* (citing IND. R. TR. P. 4.15(F)).

⁹⁸398 N.E.2d 680 (Ind. Ct. App. 1979).

vice was made upon the wife pursuant to Trial Rule 4.2(B)⁹⁹ or Trial Rule 4.3.¹⁰⁰ Furthermore, the record failed to show whether the wife was represented by a guardian ad litem, pursuant to Trial Rule 17(C).¹⁰¹ Finally, the plaintiff had made no disclosure about the wife's mental infirmities as required by Trial Rule 4.2(C).¹⁰² The court of appeals set aside the default judgment because of the husband's conspicuous failure to comply with the service of process requirements.¹⁰³

⁹⁹IND. R. TR. P. 4.2(B) states in part:

Service upon an individual who has been adjudged to be of unsound mind, otherwise incompetent or who is believed to be such shall be made upon his next friend or guardian ad litem, if service is with respect to the same action in which the incompetent is so represented. If there is no next friend or guardian ad litem, service shall be made upon his court-appointed representative if one is known and can be served within this state. If there is no court-appointed representative, then upon the named party and also upon a person known to be standing in the position of custodian of his person.

¹⁰⁰IND. R. TR. P. 4.3 states in part:

Service of summons upon a person who is a imprisoned or restrained in an institution shall be made by delivering or mailing a copy of the summons and complaint to the official in charge of the institution. It shall be the duty of said official to immediately deliver the summons and complaint to the person being served and allow him to make provisions for adequate representation by counsel. The official shall indicate upon the return whether the person has received the summons and been allowed an opportunity to retain counsel.

¹⁰¹IND. R. TR. P. 17(C) states in part:

An infant or incompetent person may sue or be sued in any action

- (1) in his own name,
- (2) in his own name by a guardian ad litem or a next friend,
- (3) in the name of his representative, if the representative is a court-appointed general guardian, committee, conservator, guardian of the estate or other like fiduciary.

The court, upon its own motion or upon the motion of any party, must notify and allow the representative named in subsection (3) of this subdivision, if he is known, to represent an infant or incompetent person, and be joined as an additional party in his representative capacity. *If an infant or incompetent person is not represented, or is not adequately represented, the court shall appoint a guardian ad litem for him.*

(Emphasis added).

¹⁰²IND. R. TR. P. 4.2(C) states in part:

Nothing herein is intended to affect the duty of a party to inform the court that a person is an infant or incompetent. An appearance by a court-appointed guardian, next friend or guardian ad litem or his attorney shall correct any defect in service under this section unless such defect be challenged.

¹⁰³398 N.E.2d at 682. See also *Porter v. Harrison Township Volunteer Fire Dep't*, 399 N.E.2d 445 (Ind. Ct. App. 1980) (reversal of summary judgment in which the court of appeals commented that "the trial court would have been correct in [dismissing those third-party defendants pursuant to] Trial Rule 12(B)(4)" because the defendant had failed to serve the third-party defendants with a summons or complaint).

The court of appeals, in *Buck v. P.J.T.*,¹⁰⁴ reiterated the standard used to determine the constitutional adequacy of notice. The trial court had denied appellant's motion to set aside a default judgment entered three years before in which appellant was held to be the father of the appellee. Appellant had been served in Illinois in that action but did not enter an appearance. The court of appeals sustained the service of process in Illinois, observing that there was no dispute as to sufficient contacts with Indiana to sustain the exercise of jurisdiction.¹⁰⁵ The dispute challenged the adequacy of the notice, and the court used the following language:

There is a difference between a form of service that is not reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them the opportunity to be heard and a form that, while reasonably calculated to give actual notice, fails to do so in a specific case. In the former, personal jurisdiction is not acquired because the proceeding fails to accord due process. In the latter, personal jurisdiction is present. However, the result of its exercise may be set aside as a matter of fairness and good conscience. *See, e.g.*, Indiana Rules of Procedure, Trial Rule 60(B).

The form of service on non-residents here employed under TR 4.4(B) is precisely the same as that for service upon residents. TR 4.1(A)(1). Service delivered by United States mail, postage prepaid, as certified mail with a return receipt satisfies the method requirement of due process. No contention is made that the information contained was inadequate or that inadequate time to respond was provided. Since actual delivery to the party is not jurisdictionally necessary, Buck's argument that the court failed to acquire personal jurisdiction fails.

Moreover, it does not appear the court erred in refusing to grant relief under TR 60(B). At no point does Buck assert that he did not receive timely actual notice. Nor, for that matter, does he assert any reasons explaining the long delay in filing his TR 60 motion. No abuse of discretion appears.¹⁰⁶

9. *Venue and Change of Venue.*—In *State ex rel. Indiana Life & Health Insurance Guaranty Association v. Superior Court*,¹⁰⁷ the

¹⁰⁴394 N.E.2d 935 (Ind. Ct. App. 1979).

¹⁰⁵*Id.* at 936.

¹⁰⁶*Id.* at 936-37.

¹⁰⁷399 N.E.2d 356 (Ind. 1980).

supreme court construed Trial Rule 75(E)¹⁰⁸ which provides, generally, that a trial court, in ruling upon a transfer request under Rule 75, does not issue a final or appealable order or judgment at that time. Furthermore, an error by the court shall be grounds for a new trial only if it is shown that the party asserting the error was prejudiced or injured in the refusal to transfer. The supreme court pointed out that Trial Rule 75¹⁰⁹ requires that an objection be presented to the trial court in a pleading or a Trial Rule 12(B)(3)¹¹⁰ motion within the time limitations which are found in Trial Rules 6¹¹¹ and 12.¹¹² Under those two rules, a responsive pleading or a 12(B) motion must be filed within twenty days of the complaint.¹¹³ In this particular case the request for transfer was not filed within that time period, and the court held that the venue objection was waived.¹¹⁴

This interpretation of the rule was reinforced in *Martin v. Indianapolis Morris Plan Corp.*,¹¹⁵ in which the court of appeals held that a party claiming error under Trial Rule 75(E) must show and document present actual injury in order to bring himself under that rule.¹¹⁶ In *Martin*, the moving party filed a motion for preferred venue which set out that the residence of the defendant was over a hundred miles from the city of Indianapolis and that traveling to Indianapolis for the litigation would work undue hardship upon him and his attorney. The court of appeals held that allegation to be insufficient.¹¹⁷ It was not a showing of present harm or injury, but was

¹⁰⁸IND. R. TR. P. 75(E) states:

The ruling of a court granting or refusing to order a case transferred under this rule is not a final or appealable order or judgment, and error of the court therein is grounds for a new trial or reversible error only when evidence in the record shows that the party asserting error was prejudiced or injured thereby.

¹⁰⁹IND. R. TR. P. 75(A) provides for a change of venue if the trial court determines that the county or court where the action was filed does not meet the preferred venue requirements of the rule. That disposition would come, under the language of the rule, after the filing of "a pleading or a motion to dismiss allowed by Rule 12(B)(3) . . ." IND. R. TR. P. 75(A). The rule further states that "[t]he pleading or motion permitted by this rule must be filed within the time prescribed for the party making it by Rules 6 and 12 and any other applicable provision of these rules." IND. R. TR. P. 75(A)(10).

¹¹⁰IND. R. TR. P. 12(B)(3).

¹¹¹See IND. R. TR. P. 6(C).

¹¹²See IND. R. TR. P. 12(A), (B).

¹¹³IND. R. TR. P. 12(B)(8) is more specific and does not refer to the word "complaint" as such. It states in part: "A motion making any of these defenses shall be made before pleading if a further pleading is permitted or within twenty [20] days after service of the prior pleading if none is required." *Id.*

¹¹⁴399 N.E.2d at 359.

¹¹⁵400 N.E.2d 1173 (Ind. Ct. App. 1980).

¹¹⁶*Id.* at 1176.

¹¹⁷*Id.*

simply a speculative allegation of a possible injury in futuro. Hence, there must be an evidentiary showing of actual harm or prejudice to support a motion for transfer under Trial Rule 75, and from this it follows that the trial court must provide the moving party an opportunity to make that evidentiary showing. In view of these two decisions, this writer suggests that the failure to present a moving party with that opportunity would be prejudicial error which should be remedied by a motion for mandate or prohibition.

In *McLaughlin v. American Oil Co.*,¹¹⁸ a medical malpractice action was filed against the defendant and its company physician. In the Lake Superior Court, a motion by the defendants for summary judgment was denied. However, the case was venued to the LaPorte Circuit Court, where the defendants again pursued the motion which the court granted upon reconsideration of an initial denial.

The plaintiff argued on appeal that the first ruling was binding on the LaPorte Circuit Court, but the court of appeals stated "that the ruling of the first judge who exercises jurisdiction does not become the law of the case. . . . [T]he judge who later has jurisdiction is duty-bound to exercise his judicial discretion 'as though the matter were presented for the first time.'"¹¹⁹ The court also stated that "a trial court has inherent power to reconsider, vacate or modify any previous order, so long as the case has not proceeded to judgment. . . ."¹²⁰

C. Pleadings and Pre-Trial Motions

1. *Amendment to Trial Rule 5(B)(1)*.¹²¹—This rule was amended to broaden the definition of "delivery" with respect to service upon

¹¹⁸391 N.E.2d 864 (Ind. Ct. App. 1979).

¹¹⁹*Id.* at 865 (citing *State ex rel. Williams Coal Co. v. Duncan*, 211 Ind. 203, 6 N.E.2d 342 (1937)).

¹²⁰391 N.E.2d at 865.

¹²¹IND. R. TR. P. 5(B)(1) was amended as follows:

The words in *this style type* are additions to the rule. . . .

(B) Service: How made. Whenever a party is represented by an attorney of record, service shall be made upon such attorney unless service upon the party himself is ordered by the court. Service upon the attorney or party shall be made by delivering or mailing a copy of the papers to him at his last known address.

(1) Delivery. Delivery of a copy within this rule means

(a) handling it to the attorney or party;

(b) leaving it at his office with a clerk or other person in charge thereof, or if there is no one in charge, leaving it in a conspicuous place therein; or

(c) if the office is closed, by leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein; or,

a party's attorney. The rule now permits delivery to be made at a place designated by the attorney for receiving delivery such as at a box in a court house. If that form of delivery is to be used, it must first be approved by an order or rule promulgated from a local court. However, the rule plainly means that even if a local rule of court permits this kind of delivery, an attorney may choose not to use it. If that is the attorney's choice, then this form of delivery to him or her is not available.

2. *Filing a Complaint by Mail.*—In an interpretation of Trial Rule 5(E)(2),¹²² the court of appeals has determined that a *complaint* which was filed by registered or certified mail is deemed filed when mailed, and not when received or file marked or stamped. The court reasoned, in *Chalmers v. Estate of Market*,¹²³ that a complaint was a pleading under Trial Rule 7(A),¹²⁴ and further that under prior case law the word "papers" encompassed pleadings. A complaint is thus subject to Trial Rule 5(E)(2)'s filing provisions.

3. *Pleadings and Motions.*—In *Smith v. City of South Bend*,¹²⁵ the court of appeals held, in an interpretation of Trial Rule 7(A),¹²⁶ that a response to a motion to produce which was made under Trial

(d) leaving it at some other suitable place, selected by the attorney upon whom service is being made, pursuant to duly promulgated local rule.

COMMITTEE NOTE *supra* note 88.

¹²²IND. R. TR. P. 5(E) states in part:

The filing of pleadings and papers with the court as required by these rules shall be made by one of the following methods:

- (1) Delivering the pleadings or papers to the clerk of the court;
- (2) Mailing the papers to the clerk by registered or certified mail return receipt requested; or
- (3) If the court so permits, filing the papers with the judge, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk.

Filing by registered or certified mail shall be complete upon mailing.

¹²³397 N.E.2d 636 (Ind. Ct. App. 1979).

¹²⁴IND. R. TR. P. 7(A) states in part:

The pleadings shall consist of

- (1) a complaint and an answer;
- (2) a reply to a denominated counterclaim;
- (3) an answer to a cross-claim;
- (4) a third party complaint, if a person not an original party is summoned under the provisions of Rule 14; and
- (5) a third-party answer.

No other pleadings shall be allowed; but the court may, in its discretion, order a reply to an answer or third-party answer. Matters formerly required to be pleaded by a reply or other subsequent pleading may be proved even though they are not pleaded.

¹²⁵399 N.E.2d 846 (Ind. Ct. App. 1980).

¹²⁶IND. R. TR. P. 7(A). *See* note 124 *supra*.

Rule 34¹²⁷ was not a pleading,¹²⁸ and that statements made within such written response cannot be considered as admissions as would those in a pleading. The plaintiff had argued that the responses to the discovery demand should be regarded as an admission, but the court said that the reply to the discovery demand was not intended to produce evidence but to deny the existence of the materials sought by the plaintiffs.

The remedy of quo warranto was discussed in *Hovanec v. Diaz*,¹²⁹ where the action was brought to declare a judicial office vacant because of a change in township residence by the judge. The supreme court noted that “[h]istorically, quo warranto is the proper remedy to determine the right to an office,”¹³⁰ and held that “[a]lthough a private person may pursue a quo warranto action, he must demonstrate a personal interest distinct from that of the general public [T]hat interest must be in the right or title to the office.”¹³¹ The plaintiff’s interest¹³² fell short of those requirements.

4. *Affirmative Defenses.*—In *Thrasher v. Van Buren Township*,¹³³ the court of appeals stated that “[r]es judicata is an affirmative defense which must be asserted in a responsive pleading [under T.R. 8(C)]¹³⁴ and that it] may be raised in a T.R. 12(B)(6) motion

¹²⁷IND. R. TR. P. 34.

¹²⁸399 N.E.2d at 850. See also *Pomerence v. National Life & Accident Ins. Co.*, 143 Ind. App. 472, 241 N.E.2d 390 (1968) (a motion for a summary judgment is not a pleading).

¹²⁹397 N.E.2d 1249 (Ind. 1979).

¹³⁰*Id.* at 1250. In *Madden v. Houck*, 403 N.E.2d 1133 (Ind. Ct. App. 1980), the court of appeals held that quo warranto was the proper remedy to determine a right to an office, and that a declaratory judgment action would not lie for that purpose.

¹³¹397 N.E.2d at 1250.

¹³²The plaintiff claimed status as a taxpayer and as a criminal defendant in the court in question.

¹³³394 N.E.2d 215 (Ind. Ct. App. 1979).

¹³⁴IND. R. TR. P. 8(C) provides in part:

A responsive pleading shall set forth affirmatively and carry the burden of proving: Accord and satisfaction, arbitration and award, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, lack of jurisdiction over the subject-matter, lack of jurisdiction over the person, improper venue, insufficiency of process or service of process, the same action pending in another state court of this state, and any other matter constituting an avoidance, matter of abatement, or affirmative defense. A party required to affirmatively plead any matters, including matters formerly required to be pleaded affirmatively by reply, shall have the burden of proving such matters. The burden of proof imposed by this or any other provision of these rules is subject to the rules of evidence or any statute fixing a different rule. If the pleading mistakenly

if the defense appears on the face of the complaint."¹³⁵

The elements of *res judicata* were discussed in several Indiana decisions, and the principal doctrine was again identified by the court in *Union Insurance Co. v. State ex rel. Indiana Department of Insurance*,¹³⁶ where the court stated:

The doctrine has four essential elements:

- (1) the former judgment must have been rendered by a court of competent jurisdiction;
- (2) the matter now in issue was,¹³⁷ or might have been, determined in the former suit;¹³⁸
- (3) the particular controversy adjudicated¹³⁹ in the former action must have been between the parties to the present suit;
- (4) the judgment in the former suit must have been rendered on the merits.¹⁴⁰

In *Ross v. Ross*,¹⁴¹ a wife petitioned the court to cite her husband for contempt for failure to pay a child support judgment. The husband alleged that the children were emancipated. The appellate court held that under Trial Rule 8(C), *emancipation* was an affirmative defense, which the husband failed to establish to the satisfaction of the trial court.¹⁴² Therefore, the pleading and proof requirements of Trial Rule 8(C) now apply to this defense.

In *American Underwriters, Inc. v. Curtis*,¹⁴³ an action in a proceeding supplemental against the insurance company, the court held that a "no action clause" in an insurance contract¹⁴⁴ constituted an

designates a defense as a counterclaim or a counterclaim as a defense, the court shall treat the pleading as if there had been a proper designation.

¹³⁵394 N.E.2d at 221. IND. R. TR. P. 12(B)(6) provides for a motion to dismiss when there is a "[f]ailure to state a claim upon which relief can be granted, which shall include the failure to name the real party in interest under [Trial] Rule 17."

¹³⁶401 N.E.2d 1372 (Ind. Ct. App. 1980).

¹³⁷The question of an Oklahoma court's jurisdiction could not be relitigated in Indiana by the same parties. *Pringle v. Standard Life & Accident Ins. Co.*, 391 N.E.2d 677 (Ind. Ct. App. 1979). The issue had been litigated in Oklahoma in the court from which the judgment had come.

¹³⁸The probate court's decision on a disputed question was binding on the superior court. *Blake v. Blake*, 391 N.E.2d 848 (Ind. Ct. App. 1979).

¹³⁹"Issue preclusion" and "claim preclusion" were discussed in *State v. Speidel*, 392 N.E.2d 1172 (Ind. Ct. App. 1979). The court pointed out that "claim preclusion" does not bar a second action which comes from the same tortious act when two or more separate actions may arise from that act. *Id.* at 1175. *See also Whipple v. Dickey*, 401 N.E.2d 787 (Ind. Ct. App. 1980).

¹⁴⁰401 N.E.2d at 1378.

¹⁴¹397 N.E.2d 1066 (Ind. Ct. App. 1979).

¹⁴²*Id.* at 1068.

¹⁴³392 N.E.2d 516 (Ind. Ct. App. 1979).

¹⁴⁴*See generally* IND. CODE § 9-2-1-5(c) (Supp. 1980).

affirmative defense which must be specifically pleaded in an answer to the claimant's garnishment action.¹⁴⁵ The insurance company did not specifically plead the defense, and the court held that to be fatal.¹⁴⁶ As a result the court did not meet the question whether an actual trial was necessary in order to proceed against the insurance company after the insured had defaulted in an earlier proceeding brought against him.

Another affirmative defense arose in *Construction Associates v. Peru Community School Building Corp.*,¹⁴⁷ in which the defendant had pleaded *failure of consideration*. Though it was properly raised, there was no factual finding by the trial court concerning the defense. The court of appeals noted that no negative implication could arise or be made against the defendant under Trial Rule 52(D),¹⁴⁸ and remanded to the trial court for, *inter alia*, a finding on the facts related to the affirmative defense of failure of consideration.¹⁴⁹

A very important decision concerning the affirmative defense of the *statute of limitations* developed in *Ferdinand Furniture Co. v. Anderson*.¹⁵⁰ The plaintiff's evidence disclosed that the statute had run. The defendant claimed that it was not necessary for him to present essentially the same evidence during his "side" of the case, even though he had the burden of producing evidence to support the affirmative defense. The court of appeals agreed and held that it was not necessary for a defendant to prove a defense when it was proven by the plaintiff's evidence.¹⁵¹ The defendant had still carried his evidentiary burden.

5. *Amendment to Pleadings.*—In *Health & Hospital Corp. v. Gaither*,¹⁵² the supreme court held that when a defendant *amended* its answer after the plaintiff was given leave to amend the complaint under Trial Rule 15(A),¹⁵³ and the amended answer did not

¹⁴⁵392 N.E.2d at 518.

¹⁴⁶*Id.*

¹⁴⁷393 N.E.2d 792 (Ind. Ct. App. 1979).

¹⁴⁸IND. R. TR. P. 52(D).

¹⁴⁹393 N.E.2d at 797.

¹⁵⁰399 N.E.2d 799 (Ind. Ct. App. 1980).

¹⁵¹*Id.* at 802.

¹⁵²397 N.E.2d 589 (Ind. 1979).

¹⁵³IND. R. TR. P. 15(A) states 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. 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. A party shall plead in response to an amended

raise the affirmative defense of untimely notice to the municipal defendant, then that issue, which was raised in the first answer, was no longer before the trial court.¹⁵⁴

Trial Rule 15(B)¹⁵⁵ was construed in *Dominguez v. Gallmeyer*,¹⁵⁶ where a pre-trial order under Trial Rule 16(J)¹⁵⁷ had been entered. The court noted, according to the language of the rule, that the pre-trial order supplanted the pleadings and controlled the issues for litigation. However, the court determined that the order itself could be amended if the evidence in the case showed that another or a different issue had been raised, and the amendment would conform the pre-trial order to the evidence presented.¹⁵⁸

D. Parties and Discovery

1. *Joinder of Claims.*—In *Peterson v. Culver Educational Foundation*,¹⁵⁹ the court of appeals noted the distinction between the compulsory counterclaim under Trial Rule 13(A),¹⁶⁰ and the permissive

pleading within the time remaining for response to the original pleading or within twenty [20] days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

To grant or to deny leave to amend is a matter of trial court discretion. *Hargis v. United Farm Bureau Mut. Ins. Co.*, 388 N.E.2d 1175 (Ind. Ct. App. 1979). Under IND. R. TR. P. 6(B), a court may allow an answer to be filed 135 days late. *Snyder v. Tell City Clinic*, 391 N.E.2d 623 (Ind. Ct. App. 1979).

¹⁵⁴397 N.E.2d at 592.

¹⁵⁵IND. R. TR. P. 15(B) provides, generally, that an amendment to conform the pleadings to the evidence and to the issues which that evidence raised and tried may be made at any time.

¹⁵⁶402 N.E.2d 1295 (Ind. Ct. App. 1980). *See also* *Davis v. Schneider*, 395 N.E.2d 283 (Ind. Ct. App. 1979). *But see* *Bahre v. Metropolitan School Dist.*, 400 N.E.2d 197 (Ind. Ct. App. 1980).

¹⁵⁷IND. R. TR. P. 16(J) states 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, unless modified thereafter to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided, and may either confine the calendar to jury actions or non-jury actions or extend it to all actions.

¹⁵⁸402 N.E.2d at 1299.

¹⁵⁹402 N.E.2d 448 (Ind. Ct. App. 1980).

¹⁶⁰IND. R. TR. P. 13(A) states in part:

A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject-matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if

joinder of claims under Trial Rule 18(A).¹⁶¹ Suit was brought for the wrongful discharge of the plaintiff, an instructor in the defendant's school, and one count alleging defamation was dismissed without prejudice. After a finding for the plaintiff for breach of contract, the plaintiff commenced the defamation action again, and the question arose whether the former litigation barred the present suit.

The court of appeals held that under Trial Rule 18, the joinder of claims was permissive, and no right was lost if there was no joinder.¹⁶² The language is not mandatory, unlike Trial Rule 13, where, the court observed, the failure to bring a compulsory counterclaim precludes later litigation under the doctrine of res judicata.¹⁶³

2. *Joinder of Parties.*—In *Lutheran Hospital, Inc. v. Department of Public Welfare*,¹⁶⁴ the Department—defendant maintained the failure to join the Indiana Department of Mental Health and the trustees of the civil townships of Allen County required a dismissal because those parties were, it was argued, indispensable to the litigation.

The court of appeals held that under Trial Rule 19(A)¹⁶⁵ an action

(1) at the time the action was commenced the claim was the subject of another pending action, or

(2) the opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this rule.

¹⁶¹IND. R. TR. P. 18(A) provides in part: "A party asserting a claim for relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, whether legal, equitable, or statutory as he has against an opposing party."

¹⁶²402 N.E.2d at 460.

¹⁶³*Id.* (citing *Middelkamp v. Hanewich*, 364 N.E.2d 1024 (Ind. Ct. App. 1977)).

¹⁶⁴397 N.E.2d 638 (Ind. Ct. App. 1979). See note 46 *supra* and accompanying text (discussion of standing).

¹⁶⁵IND. R. TR. P. 19(A) provides in part:

A person who is subject to service of process shall be joined as a party in the action if

(1) in his absence complete relief cannot be accorded among those already parties, or

(2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may:

(a) as a practical matter impair or impede his ability to protect that interest or

(b) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant.

need not be dismissed merely because an indispensable party has not been joined.¹⁶⁶ The trial court has the discretion under Trial Rule 19 to order that the absent party be made a party, or that the action continue without him. Hence dismissal of the action is not the only remedy available when there is a failure to join an indispensable party.¹⁶⁷

A consistent holding is found in *Arnold v. Dirrim*,¹⁶⁸ a case dealing with a proceeding supplemental to satisfy a large judgment. The defendant argued that the failure to join the remainderman of a spendthrift trust should cause the judgment to be set aside. The court of appeals held that the defendant's failure to move either before or during trial to join the indispensable "party" constituted a waiver of any error concerning the absence of that "party."¹⁶⁹

In *Gilstrap v. Gilstrap*,¹⁷⁰ however, a different result was reached. The suit was a partition action, and the court of appeals held that "tenants have the right to a partition of the co-tenancy, along with the right to a sale of the entire tract of land in the event that said land is indivisible."¹⁷¹ The trial court may become involved in adjusting and securing the rights of other interested parties, though, such as a prospective purchaser from the tenants. Here there was such a purchaser, and the trial court's decree purported to secure the purchaser's rights. The court of appeals held that it was reversible error to fail to join the purchaser as a necessary (indispensable) party under Trial Rule 19, while purporting to affect that party's rights.¹⁷²

3. *Class Actions.*—The court in *Arnold v. Dirrim*,¹⁷³ made several important interpretations and holdings concerning class actions. The action was commenced in 1972, and in 1973 the complaint was amended to commence a class action on behalf of certain purchasers of capital stock. The gist of the action was that the sale of the stock was made pursuant to a false and misleading prospectus. The holdings of the appellate court concerning Trial Rule 23 are summarized as follows:

(1) The court held that under Trial Rule 23(B)(3),¹⁷⁴ a common

¹⁶⁶397 N.E.2d at 647.

¹⁶⁷*Id.*

¹⁶⁸398 N.E.2d 442 (Ind. Ct. App. 1979).

¹⁶⁹*Id.* at 448.

¹⁷⁰397 N.E.2d 1277 (Ind. Ct. App. 1979).

¹⁷¹*Id.* at 1281.

¹⁷²*Id.*

¹⁷³398 N.E.2d 426 (Ind. Ct. App. 1979). Another aspect of the same general litigation is discussed in the text accompanying note 168 *supra*.

¹⁷⁴IND. R. TR. P. 23(B)(3) provides that a class action is maintainable if "the court finds that the questions of law or fact common to the members of the class

nucleus of facts was present, and that it satisfied the requirement that questions of law or fact common to the members of the class predominate over questions affecting individual members.¹⁷⁵

(2) The court determined, under Trial Rule 23(A)(3),¹⁷⁶ that the claims of the plaintiff were representative claims and that they need not be identical claims with the members of the class. The rule demands

only a showing that the representative plaintiffs' interests are not antagonistic or in conflict with a class as a whole. . . . Under this approach the typicality prerequisite [is] satisfied if the claims or defenses of the representatives and class members stem from a single event or are based on the same legal theory.¹⁷⁷

(3) The court held that the class action should be treated as such from the time when the amended complaint was filed,¹⁷⁸ which occurred in this case on April 13, 1973, rather than from the time when the trial court certified the case pursuant to a motion for the certification¹⁷⁹ of the class. The significance of this ruling in this case

predominate over any questions affecting only individual members, and that a class action is superior to other available methods"

¹⁷⁵398 N.E.2d at 436.

¹⁷⁶One of the prerequisites to a class action under Trial Rule 23(A) is that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." IND. R. TR. P. 23(A)(3).

¹⁷⁷398 N.E.2d at 436-37 (citation omitted).

¹⁷⁸*Id.* at 440.

¹⁷⁹IND. R. TR. P. 23(C)(1) requires that the trial court shall determine, "[a]s soon as practicable after the commencement of an action brought as a class action . . . whether it is to be so maintained." An order to that effect may be made conditional, and may be altered or amended before the decision on the merits. The determination made by the trial court embraces all of the requirements of the class action, and that can mean that the plaintiff or party asserting the class action claim must make a substantial showing. For example, in *Doe v. Renfrow*, 475 F. Supp. 1012 (N.D. Ind. 1979), the plaintiff brought suit and asked that she be named as the representative of a class which would have constituted all persons who were enrolled at the Highland High School and Highland Junior High School who were the subject of allegedly improper activity. That activity concerned a search of students for drugs which were being used in school. The federal district court denied the certification of the class, holding that the plaintiff had failed to meet the "numerosity" requirement, and that it was clear that many students in the school were not in sympathy with plaintiff's suit and that plaintiff could not represent them. *Id.* at 1028. In another case, *Doe v. Koger*, 480 F. Supp. 225 (N.D. Ind. 1979), the plaintiff failed to allege that the class was so numerous that joinder of all members was impractical, and certification was refused. The class might have included only those special education students actually suspended or expelled by the School City of Mishawaka, Indiana; there were too few members of this class to permit the class action to be maintained.

was that the relevant statute of limitations had not run at the time the amended class action was filed.

(4) The appellate court sustained an award of attorney fees in the amount of \$112,267.00, and it observed that certain evidence in the trial court was to the effect that it is common practice in class action suits to award attorney fees in the amount of 33% of all the recovery or the settlement fund.¹⁸⁰

In *Louisville & Nashville Railroad v. Wollenmann*,¹⁸¹ a class action was certified against the railroad in a suit alleging damages from tanker cars of liquid propane which overturned in the railroad yard. An appeal was taken from that certification under Appellate Rule 4(B)(5).¹⁸²

On appeal the defendant argued that the named plaintiffs operated a business in the vicinity, but sought to represent persons evacuated from their homes, and therefore their claims were not typical of those of all members of the class, as required under Trial Rule 23(A)(3). However, the court, citing extensive federal authority, held that the claims of the class representatives need not be identical to the claims of the members of the class.¹⁸³

The defendant also argued that under Trial Rule 23(B)(3) the questions of fact and law common to the members of the class did not predominate over any questions affecting only individual members of the class. In response, the court of appeals stated that "[a]ssuming, arguendo, that damages will have to be proved for each class member, certainly the larger issue will be the question of negligent conduct"¹⁸⁴ of the railroad, a question common to all members of the class.

The court also commented that the absence of attempted intervention by other members of the class did not eliminate the danger of multiple litigation as argued by the defendant.¹⁸⁵

4. *Intervention.*—In *Lawyers Title Insurance Corp. v. C & S Lathing and Plastering Co.*,¹⁸⁶ Lawyers Title attempted intervention after the satisfaction of a judgment and the dismissal of a suit. It had not been a party, but had become liable for payment of the judgment. The motion was made under Trial Rule 24(C),¹⁸⁷ which pro-

¹⁸⁰398 N.E.2d at 441.

¹⁸¹390 N.E.2d 669 (Ind. Ct. App. 1979).

¹⁸²IND. R. APP. P. 4(B)(5) permits the appeal of an interlocutory order which is not appealable as a matter of right, if the conditions in that rule have been met.

¹⁸³390 N.E.2d at 670.

¹⁸⁴*Id.* at 672.

¹⁸⁵*Id.* at 672 & n.3.

¹⁸⁶403 N.E.2d 1156 (Ind. Ct. App. 1980).

¹⁸⁷IND. R. TR. P. 24(C) states in part:

A person desiring to intervene shall serve a motion to intervene upon the

vides for intervention after judgment, for the purpose of filing a motion under Trial Rule 60. The court of appeals held that obtaining permission to intervene is a prerequisite for filing a Trial Rule 60 motion.¹⁸⁸ However, the appellate court determined that the trial court had erred in failing to hold a hearing on the motion to intervene. That question had been preserved for review on appeal. The opinion was not clear as to just what final judgment was being appealed if the motion under Trial Rule 60 is not allowed until one has been granted permission to intervene.

Nevertheless, the court of appeals established the following test for intervention, saying:

In *Hinds v. McNair*, . . . the Third District of this court adopted the following threefold test used by most federal courts in determining whether intervention should be granted under Fed. R. Civ. P. 24(a)(2) (1966), which is similar to T.R. 24(A)(2):

“(1) the assertion of interest in the subject of the action, (2) a possibility that the disposition of the action may as a practical matter impede protection of the interest, and (3) inadequacy of representation of the interest by existing parties. . . .”

Furthermore, T.R. 24(A) expressly states that a motion for intervention of right must be timely. C & S and Sanborn have vigorously argued that Lawyers Title's motion was not timely. Our examination of the record of this case, however, leads us to the conclusion that the information available to the trial court was inadequate to make a determination of timeliness. It is not clear, for example, when Lawyers Title first learned of its potential liability under the insurance policy it had issued or when it first had reason to believe that the so-called partial satisfaction may have been intended to be a satisfaction and accord.¹⁸⁹

These standards were further explained in *E.N. Maisel & Associates v. Camden Corp.*,¹⁹⁰ where the court of appeals stated that

parties as provided in Rule 5. The motion shall state the grounds therefor and set forth or include by reference the claim, defense or matter for which intervention is sought. Intervention after trial or after judgment for purposes of a motion under Rules 50, 59, or 60, or an appeal may be allowed upon motion. The court's determination upon a motion to intervene may be challenged only by appeal from the final judgment or order in the cause.

¹⁸⁸403 N.E.2d at 1158.

¹⁸⁹*Id.* at 1159 (citations omitted).

¹⁹⁰398 N.E.2d 1366 (Ind. Ct. App. 1980).

"[t]he facts alleged in a motion to intervene must be taken as true [and the] merits of the claim are not to be determined . . . , at least in the absence of sham, fraud or other similar objections."¹⁹¹ In *Maisel*, the court held¹⁹² that the interest of a contract purchaser in a shopping center was sufficient for purposes of intervention under Trial Rule 24(A)(2).¹⁹³

5. *Discovery*.—In *Gumz v. Starke County Farm Bureau Co-operative Association*,¹⁹⁴ the supreme court reaffirmed its decision in *Augustine v. First Federal Savings & Loan Association*,¹⁹⁵ and held that a deposition must be "published"¹⁹⁶ before it can be used by the trial court or by the court of appeals.¹⁹⁷ Unless a motion is made and granted to publish the deposition, the contents of the deposition cannot be considered by the court. In *Gumz*, the trial court had considered the depositions without a motion to publish having been filed, but the supreme court held that any error was waived because the trial court later entered an order publishing the depositions and no party objected to that procedure.¹⁹⁸ Thus the depositions could be considered in the trial court and also on appeal.

Trial Rule 32 was interpreted again in its federal rule form¹⁹⁹ in *Oberlin v. Marlin American Corp.*,²⁰⁰ where the district court excluded

¹⁹¹*Id.* at 1367-68.

¹⁹²*Id.* at 1368.

¹⁹³IND. R. TR. P. 24(A) provides in part:

Upon timely motion anyone shall be permitted to intervene in an action

(1) when a statute confers an unconditional right to intervene; or

(2) when the applicant claims an interest relating to a property, fund or transaction, which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect his interest in the property, fund or transaction, unless the applicant's interest is adequately represented by existing parties.

During this survey period, the substitution of a party for another under IND. R. TR. P. 25 received a brief comment in *Braun v. Loshe*, 390 N.E.2d 189 (Ind. Ct. App. 1979). The court of appeals observed that the transfer of an interest subsequent to the commencement of the action may allow the substitution of the person to whom the interest was transferred, but that substitution is not required under Trial Rule 25(C). 390 N.E.2d at 192. The action may be continued by or against the original party in the trial court's discretion. *Id.*

¹⁹⁴395 N.E.2d 257 (Ind. 1979), *vacating* 383 N.E.2d 1061 (Ind. Ct. App. 1978).

¹⁹⁵384 N.E.2d 1018 (Ind. 1979), *questioned in* *Harvey, 1979 Survey, supra* note 9, at 73. The holding in *Gumz* merely accepts *Augustine*. IND. R. TR. P. 32 does not require "publication" and the procedure was not continued after the 1970 adoption of the rules. The requirement for publication appears to have been revived by these decisions.

¹⁹⁶"Publication means the breaking of the sealed envelope containing the [deposition] and making it available for use by the parties or the court." 384 N.E.2d at 1020. "This is done by order of the court upon motion of any person or party interested." *Id.*

¹⁹⁷395 N.E.2d at 260.

¹⁹⁸*Id.*

¹⁹⁹FED. R. CIV. P. 32.

²⁰⁰596 F.2d 1322 (7th Cir. 1979).

parts of a deposition containing the cross-examination of Oberlin by his own counsel; the cross-examination was conducted by leading questions.²⁰¹ Oberlin's attorney argued that no objection was made to the form of the question during the deposition, and the failure to object constituted a waiver. The circuit court agreed and held that the failure to object to the form of the question at the time of the deposition waived that ground for objection at trial.²⁰²

a. *Attorney-client privilege and work product.*—The attorney-client privilege, in relation to discovery, was interpreted in *Estate of Voelker*.²⁰³ The trial court had ordered discovery of copies of unsigned wills allegedly in the possession of the deceased's attorney. On interlocutory appeal, the claimant argued that under Indiana law, the attorney-client privilege is waived or terminated after death with regard to an executed will so that the testamentary intent may be established. The appellate court reversed, however, pointing out that no will was executed, and that all preliminary documents clearly fell within the attorney-client privilege.²⁰⁴

In a criminal case, *George v. State*,²⁰⁵ the state filed a discovery motion in which it requested that the defendant produce statements of any witness to be called by the defendant and copies of memoranda by those witnesses. The defendant objected on the ground that the materials constituted work product of the defendant's attorney. The court of appeals sustained the defendant's objection. The court held that the "witness statements taken by the defendant, his attorney, or his agents in anticipation of litigation are not subject to pre-trial discovery by the prosecution over a timely work-product objection."²⁰⁶ The appellate court held that the trial court had clearly abused its discretion when it ordered the defendant to produce the statements.²⁰⁷

b. *Protective orders.*—In *Geib v. Estate of Geib*,²⁰⁸ a resident of Pennsylvania was appointed by the Lake Superior Court as co-administrator of the estate of Stanley R. Geib. The estate's total assets appeared to be less than \$5,500. Lora Geib served notice of

²⁰¹Under federal evidence law, no one has an absolute right to ask leading questions on cross-examination. *Id.* at 1328 (citing FED. R. EVID. 611(c)).

²⁰²596 F.2d at 1328.

²⁰³396 N.E.2d 398 (Ind. Ct. App. 1979).

²⁰⁴*Id.* at 399.

²⁰⁵397 N.E.2d 1027 (Ind. Ct. App. 1979). An important statement of policy concerning discovery in criminal cases is found in *Gutierrez v. State*, 395 N.E.2d 218 (Ind. 1979). The particular form of discovery in criminal cases is left largely to the discretion of the trial court. *Id.* at 223.

²⁰⁶397 N.E.2d at 1035.

²⁰⁷*Id.*

²⁰⁸395 N.E.2d 336 (Ind. Ct. App. 1979).

her intention to take the deposition of the Pennsylvania resident in Munster, Indiana. Motions to strike the notice and for a protective order²⁰⁹ were granted by the trial court, and affirmed on appeal. The appellate court emphasized, as the trial court did, that the estate's assets would be unduly depleted by the travel expenses, and that an alternative method must be used.²¹⁰

c. *Trial Rules 36 and 37.*—In *Justak v. Bochnowski*,²¹¹ the plaintiff, acting pro se, had her complaint dismissed with prejudice under Trial Rule 37(B).²¹² The court of appeals affirmed,²¹³ holding that when “(1) a party has in bad faith and abusively resisted or obstructed discovery, and (2) the conduct of that party has [threatened] to so delay or obstruct the rights of the opposing party that any other relief would be inadequate,”²¹⁴ the severe sanction of dismissal is proper. The court noted that the plaintiff had failed to appear for scheduled hearings and depositions after she had notice. She also had failed to comply with the trial court's requests that she substantiate her claims of illness, which she offered as her excuse for not complying with the discovery requests and orders.²¹⁵

In *Pathman Construction Co. v. Drum-Co Engineering Corp.*,²¹⁶ the defendant failed to answer certain requests for admissions under Trial Rule 36,²¹⁷ and the trial court entered a summary judgment for plaintiff because of those admissions. The court of appeals held that once the time limitation specified in the request for admissions under Trial Rule 36²¹⁸ has passed, the statements are admitted by operation of law.²¹⁹ Additionally, no motion is required to effect those admissions and if one is made, it is superfluous.²²⁰ Finally, the court pointed out that relief might be obtained from the admission

²⁰⁹See IND. R. TR. P. 26(C).

²¹⁰395 N.E.2d at 338.

²¹¹391 N.E.2d 872 (Ind. Ct. App. 1979). See also *Hawkins v. Means Auto, Inc.*, 403 N.E.2d 1106 (Ind. Ct. App. 1980) (the plaintiff's complaint was dismissed after he had failed to comply with a court order to answer an interrogatory under Trial Rule 33).

²¹²IND. R. TR. P. 37(B)(4) allows a court to dismiss a complaint with prejudice against a party who fails to comply with the court's orders concerning discovery.

²¹³391 N.E.2d at 878.

²¹⁴*Id.* at 876.

²¹⁵*Id.*

²¹⁶402 N.E.2d 1 (Ind. Ct. App. 1980).

²¹⁷IND. R. TR. P. 36(A) provides that the matter in the request for an admission “is admitted unless, within a period designated in the request, not less than thirty [30] days after service thereof . . . , the party to whom the request is directed” responds as required by the rule.

²¹⁸*Id.*

²¹⁹402 N.E.2d at 5.

²²⁰*Id.* at 6.

under Trial Rule 36(B),²²¹ but if that procedure is not followed, there is no cause for complaint on appeal.²²²

d. Admissibility of copies of documents and Trial Rule 34.—In *Smith v. City of South Bend*,²²³ suit was brought by the plaintiffs to secure certain retirement benefits. The plaintiffs gave notice to the city under Trial Rule 34²²⁴ to produce certain job descriptions and related documents. The city produced a copy of the fire department job classification manual. It was later offered into evidence and the city objected, claiming that the document offered was not the best evidence and not properly authenticated. The trial court sustained the objections.

The court of appeals held that sustaining those two objections was erroneous because it is manifestly unfair to sustain an objection to the admission of a copy of a document on the ground that it is not the best evidence or properly authenticated, when the party making the objection also produced the document pursuant to a Trial Rule 34 request.²²⁵ The court of appeals cited Trial Rule 34(D)²²⁶ which contemplates the waiver of any objection on the basis of either the best evidence rule or proper authentication of the document, when the party has produced the document pursuant to a request.²²⁷

²²¹IND. R. TR. P. 36(B) states in part:

Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 16 governing amendment of a pre-trial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission by him for any other purpose nor may it be used against him in any other proceeding.

The defendant attempted to attack the trial court's order finding the matter admissible by moving under Trial Rule 60(B), but the court of appeals held that the trial court's order was interlocutory and could not be attacked under Trial Rule 60. 402 N.E.2d at 6.

²²²402 N.E.2d at 6.

²²³399 N.E.2d 846 (Ind. Ct. App. 1980).

²²⁴The procedure for giving notice to produce a document is established under IND. R. TR. P. 34(B), and the allowable scope of the production is defined under IND. R. TR. P. 34(A).

²²⁵399 N.E.2d at 851.

²²⁶IND. R. TR. P. 34(D) states in part:

When a party or witness in control of a writing or document subject to examination under this rule or Rule 9.2(E) refuses or is unable to produce it, evidence thereof shall be allowed by other parties without compliance with the rule of evidence requiring production of the original document or writing as best evidence.

²²⁷399 N.E.2d at 851.

E. Trial and Judgment

1. *Trial By Jury.*—The *Indiana Judicial Report for 1979*²²⁸ shows that 69,483 plenary jurisdiction civil cases, not including small claims cases, were disposed of in 1979. Of those, the *Report* shows that 831 were disposed of by civil jury trials, and 14,176 by civil bench trials.

The court of appeals in *Farmers Bank & Trust Co. v. Ross*,²²⁹ in its interpretation of Trial Rule 38(A),²³⁰ would further curtail the right to a jury trial. The plaintiff brought suit to foreclose a mortgage on certain real estate, and the defendant counterclaimed for damages alleging a breach of contract. The case was submitted to a jury over objection of the plaintiff. The court of appeals held that once equity had jurisdiction, even a counterclaim at law must be tried in equity and there would be no right to a jury trial on the damage claim.²³¹

2. *Involuntary Dismissals.*—An important decision under Trial Rule 41(B)²³² should be noted. It represents a significant reconsideration of the previous interpretations in the court of appeals on this rule.²³³

In *Ferdinand Furniture Co. v. Anderson*,²³⁴ suit was brought

²²⁸DIVISION OF STATE COURT ADMINISTRATION, INDIANA JUDICIAL REPORT (1979). The pages of this REPORT which are referred to in the text are set out in full as an Appendix to this Article.

²²⁹401 N.E.2d 74 (Ind. Ct. App. 1980).

²³⁰IND. R. TR. P. 38(A) states in part:

Issues of law and issues of fact in causes that prior to the eighteenth day of June, 1852, were of exclusive equitable jurisdiction shall be tried by the court; issues of fact in all other causes shall be triable as the same are now triable. In case of the joinder of causes of action or defenses which, prior to said date, were of exclusive equitable jurisdiction with causes of action or defenses which prior to said date were designated as actions at law and triable by jury—the former shall be triable by the court, and the latter by a jury, unless waived; the trial of both may be at the same time or at different times, as the court may direct.

The time for requesting a jury trial can be extended under IND. R. TR. P. 6(B)(2). *Johnson v. Wabash County*, 391 N.E.2d 1139 (Ind. Ct. App. 1979).

²³¹401 N.E.2d at 76.

²³²IND. R. TR. P. 41(B).

²³³The discussion of this subject, between this writer and the court of appeals, has appeared before. See *Harvey, 1979 Survey, supra* note 9, at 76-78 & n.167. IND. R. TR. P. 41(B) provides for the involuntary dismissal of a case tried to the court, upon a motion which attacks the evidence of the nonmoving party. This writer has maintained that the court of appeals has erred in developing a standard of interpretation which has effectively removed fact-finding power from the trial courts in Indiana. That is an interpretation which the court has admitted, but the court maintains that even if the interpretation is incorrect, it cannot be changed except by rule amendment.

²³⁴399 N.E.2d 799 (Ind. Ct. App. 1980).

against the defendant due to a fire which destroyed a building and its contents. The plaintiff had purchased a heating unit from the defendant; the unit allegedly malfunctioned and caused the fire. At the close of the plaintiff's evidence, the defendant moved to dismiss under Trial Rule 41(B). The trial court overruled, noting that it was the trial court's understanding that in ruling on a Trial Rule 41(B) motion it was unable to weigh the evidence. However, the trial court also determined that the evidence and inferences therefrom were not sufficient to sustain the allegations of any count in the complaint. The trial court told the defendant that it could proceed with its defense, but that if the defendant rested at that point there would be a judgment for the defendant on all counts in the complaint.

The court of appeals, after reviewing the development of the holdings under Trial Rule 41(B), sustained the trial court,²³⁵ and pointed out a very important distinction. Under Trial Rule 41(B), unlike Trial Rule 50, the judge is the ultimate fact finder on the merits of the cause. Under Trial Rule 41(B), the trial court must give every reasonable inference and favorable determination to the evidence of the nonmoving party in order to determine whether the nonmoving party has established a prima facie case. Nevertheless, the trial judge is charged with the responsibility of determining the ultimate facts on the merits of the case. Thus, although a prima facie case might be established by the proponent of the evidence, if the trial court is not satisfied that the party has carried its ultimate evidentiary burden, the trial court, under Trial Rule 41(B), may find against the party which has established its prima facie case.

In short, the trial court under Trial Rule 41(B) is the ultimate finder of fact, and it may find against a plaintiff who has carried his burden of producing evidence to show a prima facie case. The court can make that finding without requiring the moving party to put on evidence.

3. *Separation of Claims for Trial.*—In *Dayton Walther Corp. v. Caldwell*,²³⁶ a case arising from an automobile accident, the trial court allowed a defendant to implead a third-party defendant. After the third-party defendant had filed a responsive pleading, it requested a severance of the claim against it from the original suit. The trial court ordered a separate trial after determining that the

²³⁵*Id.* at 803-06.

²³⁶389 N.E.2d 723 (Ind. Ct. App. 1979). The court of appeals decision on the issue of separate trials was expressly affirmed in the supreme court although the trial court's decision as to damages was sustained and the court of appeals' decision on damages was vacated. 402 N.E.2d 1252, 1259 (Ind. 1980). See also note 357 *infra*.

indemnification question would present too many complications at trial on the original claim.

In an interpretation of Trial Rule 42(B)²³⁷ and Trial Rule 14(C),²³⁸ the appellate court held that the fact that a trial court had permitted a third-party defendant action to be filed did not prevent reassessment of the complexity of the claims.²³⁹ This is especially true where a pre-trial conference had enabled the court to narrow the issues for trial, and the order separating the claims was quite appropriate.²⁴⁰

4. *Voir Dire Examination, Preliminary Instructions and Contempt of Court.*—In *Sims v. Huntington*,²⁴¹ the question arose whether the trial court erred in refusing counsel an opportunity to orally interrogate the jurors. The supreme court stated that “the trial judge has wide discretion in arranging and conducting a proper voir dire [examination, and that Trial Rule 47(A)] does not require verbal questioning by the parties.”²⁴² The court observed that attorneys for the parties are permitted to supplement an examination of prospective jurors by the trial court in any manner (such as by written questions submitted to the trial judge) which reasonably produces answers to the questions. Thus there is no absolute right to orally interrogate a jury during voir dire examination.

In *Drake v. State*,²⁴³ a criminal conviction for a felony was reversed because the trial judge did not give either preliminary or final instructions to the jury. Rather the trial judge gave the instructions to the jury foreman and instructed him to read both sets

²³⁷IND. R. TR. P. 42(B) states in part:

The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury.

²³⁸IND. R. TR. P. 14(C) states in part:

With his responsive pleading or by motion prior thereto, any party may move for severance of third-party claim or ensuing claim as provided in this rule or for a separate trial thereon. If the third-party defendant is a proper party to the proceedings under any other rule relating to parties, the action shall continue as in other cases where he is made a party.

²³⁹389 N.E.2d at 734.

²⁴⁰*Id.*

²⁴¹393 N.E.2d 135 (Ind. 1979).

²⁴²*Id.* at 139. IND. R. TR. P. 47(A) states in part: “The court shall permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by further inquiry.”

²⁴³393 N.E.2d 148 (Ind. 1979).

of instructions to the jury before the jury began its deliberations. The supreme court held that that was reversible error.²⁴⁴ The court further held that the failure of the trial court to instruct the jury in open court violated Indiana Trial Rule 51²⁴⁵ and Indiana statutory law;²⁴⁶ the duty to give those instructions could not be delegated to the jury foreman.²⁴⁷

In *Skolnick v. State*,²⁴⁸ a witness showed direct contempt to a trial court and was convicted of that contempt by the court. In an extensive opinion on the law on the subject, the court of appeals held that under Indiana law,²⁴⁹ a trial judge "must set out in writing a 'distinct' statement describing the allegedly contumacious conduct and any statement of the alleged contemnor made in denial, explanation or extenuation."²⁵⁰ A trial judge's conclusory recital of the conduct is not sufficient, because the statement is to serve the dual purposes of providing the contemnor with a concise record of the reason for the contempt and providing a reviewing court a clear statement of the nature of the conduct.

The court observed that in the present case no such statement was made but determined that the lack of the statement did not warrant reversal because the contempt was easily discerned from the nature of the conduct shown by the transcript of the proceedings before the trial court.²⁵¹

5. *Motions for Judgment on the Evidence.*—In *Amos v. Kepingler*,²⁵² the plaintiff brought a negligence action against the defendant but the jury returned a verdict against the plaintiff. The trial court, upon motion duly made, entered a judgment against the defendants notwithstanding the jury's verdict.²⁵³ The court of appeals stated that the trial court did have authority "to enter a judgment imposing liability in favor of a party having the burden of proof and contrary to that imposed by the jury's verdict."²⁵⁴

²⁴⁴*Id.* at 149 (citing *Williams v. State*, 269 Ind. 430, 381 N.E.2d 458 (1978), *cert. denied*, 100 S. Ct. 1328 (1980) and *Purdy v. State*, 267 Ind. 282, 369 N.E.2d 633 (1977)).

²⁴⁵IND. R. TR. P. 51(A) sets out those instructions which the trial court must give to the jury at the commencement of the action, and IND. R. TR. P. 51(B) refers to instructions which the trial court must give to the jury after arguments.

²⁴⁶IND. CODE § 35-1-35-1 (1976).

²⁴⁷393 N.E.2d at 149. The judge could not even ensure that the instructions were given under such a delegation.

²⁴⁸388 N.E.2d 1156 (Ind. Ct. App. 1979).

²⁴⁹IND. CODE § 34-4-7-7 (1976).

²⁵⁰388 N.E.2d at 1163.

²⁵¹*Id.* at 1164.

²⁵²397 N.E.2d 1010 (Ind. Ct. App. 1979).

²⁵³See IND. R. TR. P. 50(A).

²⁵⁴397 N.E.2d at 1011 (citing *State v. Bedwell*, 371 N.E.2d 709 (Ind. 1978)).

Trial Rule 50(A)(3)²⁵⁵ was interpreted in *Keck v. Kerbs*,²⁵⁶ an automobile accident case. At the close of the presentation of all the evidence, the trial court granted Kerb's motion for judgment on the evidence. The evidence concerned a charge of wanton negligence. The court of appeals held that issues of fact for the jury were present,²⁵⁷ and stated that the "motion may be granted only if there is no substantial evidence or reasonable inference to be adduced therefrom to support an essential element of the claim. . . . [I]f reasonable persons might differ, then judgment on the evidence is improper."²⁵⁸

6. *Default Judgments.*—Several opinions have given important interpretations to Trial Rule 55.²⁵⁹ In *Martin v. Indianapolis Morris Plan Corp.*²⁶⁰ the plaintiff Morris Plan brought suit to satisfy judgment which was previously obtained against Martin. Martin filed a motion to dismiss and in the alternative for preferred venue, and the trial court denied the motion. The defendant thereafter failed to participate in the litigation. The plaintiff gave more than the required three days' notice of its intention to apply for a default judgment and then applied for and obtained a default judgment. The defendant had received proper and timely notice of all events relevant to the litigation. Within the sixty day time limit of Trial Rule 59,²⁶¹ the defendant filed a motion to correct error. The court of appeals noted that the motion to correct error is a proper vehicle to challenge a default judgment if it is timely filed.²⁶² The court held that the default judgment was properly entered pursuant to Trial Rule 55.²⁶³

In *Hurt v. Polak*,²⁶⁴ a taxpayer brought suit for a refund of property tax overpayments. A cross complaint was filed by the county

²⁵⁵IND. R. TR. P. 50(A)(3) states that a party may move for judgment on the evidence after all the evidence in the case has been presented and before judgment has been entered.

²⁵⁶395 N.E.2d 845 (Ind. Ct. App. 1979).

²⁵⁷*Id.* at 850.

²⁵⁸*Id.* at 846. The leading Indiana decision is *Huff v. Travelers Indem. Co.*, 266 Ind. 414, 363 N.E.2d 985 (1977), *discussed in* *Harvey, 1977 Survey, supra* note 9, at 66-67.

²⁵⁹IND. R. TR. P. 55 provides, generally, for the determination and the entry of default judgments, and it establishes that such judgments may be set aside under IND. R. TR. P. 60(B) according to the grounds found in that trial rule.

²⁶⁰400 N.E.2d 1173 (Ind. Ct. App. 1980).

²⁶¹IND. R. TR. P. 59(C) requires that a motion to correct error "be filed not later than sixty [60] days after the entry of a final judgment or an appealable final order." "Finality" under this Rule is discussed in the text accompanying note 308 *infra*.

²⁶²400 N.E.2d at 1174 n.1. *Accord*, *Munden v. Munden*, 398 N.E.2d 680 (Ind. Ct. App. 1979); *Protective Ins. Co. v. Steuber*, 370 N.E.2d 406 (Ind. Ct. App. 1977).

²⁶³400 N.E.2d at 1177.

²⁶⁴397 N.E.2d 1051 (Ind. Ct. App. 1979).

auditor which the taxpayer failed to answer for thirteen months. One day after the auditor had filed a motion for default judgment on the cross complaint, the answer was filed; the trial court permitted the answer. The court of appeals stated that “[w]hen a party fails to file a timely answer and answers only after the filing of a motion for default judgment, the trial court remains vested with power to exercise its discretion” by accepting the answer, and thereby denying the default judgment.²⁶⁵ The only issue on appeal is whether the trial court abused that discretion or committed reversible error which prejudiced the party moving for the default judgment.²⁶⁶

The case of *Snyder v. Tell City Clinic*²⁶⁷ is similar. A medical malpractice action was filed and the plaintiffs moved for a default judgment against the defendants who had appeared but had not answered the complaint. The defendants moved to extend the time for answering the complaint to the day of the hearing on the default judgment motion; the trial court granted the defendant’s motion. The answer was thus filed 135 days late, but the court of appeals sustained the trial court’s decision, holding that Trial Rule 6²⁶⁸ provides the court with discretion to extend the time for the filing of pleadings.²⁶⁹ Here, the trial court had acted properly in denying the motion for a default judgment because of the substantial amounts of money at issue and the extent of the parties’ ongoing discovery.²⁷⁰

*Stewart v. Hicks*²⁷¹ is a leading opinion on default judgments occurring after an attorney has withdrawn from the case. Stewart brought suit against Hicks who was apparently represented by three different sets of attorneys, all of whom withdrew from the case. Thereafter no other attorney appeared for Hicks, and eventually the trial court entered a default judgment against him awarding \$50,000.00 damages and other relief. The appeal arose after the filing of a Trial Rule 60(B) motion, alleging that no notice of a default hearing was given to Hicks. Relief from the judgment was given by the trial court on the basis of excusable neglect. The court of appeals reversed, holding that Hicks was not entitled to notice under 55(B)²⁷² because he had no appearance on file, either pro se or by

²⁶⁵*Id.* at 1053.

²⁶⁶*Id.*

²⁶⁷391 N.E.2d 623 (Ind. Ct. App. 1979).

²⁶⁸IND. R. TR. P. 6(B).

²⁶⁹391 N.E.2d at 627.

²⁷⁰*Id.*

²⁷¹395 N.E.2d 308 (Ind. Ct. App. 1979).

²⁷²IND. R. TR. P. 55(B) states, in part, that if a default judgment is sought against a party who has appeared in the action, then the party “shall be served with written notice of the application for judgment at least three [3] days prior to the hearing on such application.”

counsel, and accordingly the notice provision requiring three days notice prior to a hearing on an application for default was not applicable to Hicks.²⁷³

The court further observed that "default judgments actually consist of two stages . . . : (1) the entry of default and (2) the entry of the appropriate relief including damages."²⁷⁴ The court stated that "[a]n entry of default is interlocutory until it determines all the rights of the parties at which time it becomes a final judgment."²⁷⁵ Nevertheless, consistent with the January 1, 1980 amendments to the trial rules,²⁷⁶ the default entry can be appealed by filing a Trial Rule 60(B) motion.

The court held that no hearing on the damages question was required when the damages were for a sum certain and liquidated, but that if a judgment is obtained by default and the damages are unliquidated or not otherwise determined, then the defaulted defendant may still appear and be heard concerning the amount of damages which results from the interlocutory entry of default.²⁷⁷ Additionally, there is the right to a jury trial on the issue of damages in this setting.²⁷⁸

The court discussed the problem which may occur, namely, that evidence which a defaulted defendant might offer could be seen as an attempt to impeach the underlying default. The court concluded that the trial court was correct in allowing the defendant, pursuant to Trial Rule 60(B)(8),²⁷⁹ to have a hearing on the damages portion of the judgment. The court of appeals observed that the entry of a \$50,000.00 default judgment was not sustained by the allegations in the complaint. Hence, the damages stage of the default proceeding was remanded to the trial court with instructions to provide the parties with a hearing to determine the amount of damages to which the plaintiff was entitled. The other stage of the proceeding, the entry of default against the defendant, was not set aside, and could not be set aside upon the record.²⁸⁰ This writer would observe that, in circumstances such as these, the two distinct stages found in Trial Rule 55 are very important and should be carefully noted.

In *Justak v. Bochnowski*,²⁸¹ the clerk of the court, without refer-

²⁷³395 N.E.2d at 312.

²⁷⁴*Id.*

²⁷⁵*Id.*

²⁷⁶*Id.* at 312 n.2. See notes 88-89 *supra* and accompanying text.

²⁷⁷395 N.E.2d at 312.

²⁷⁸*Id.*

²⁷⁹IND. R. TR. P. 60(B)(8) provides that the court may allow relief from a default judgment for any justifiable reason.

²⁸⁰395 N.E.2d at 312.

²⁸¹391 N.E.2d 872 (Ind. Ct. App. 1979).

ring the matter to the judge, "signed a document entitled 'Judgment by Default,' which purported to award [the plaintiff] a judgment of one million dollars."²⁸²

The court of appeals held that under Trial Rule 55(A) a judgment by default can be entered only by the trial court, not the clerk of the court.²⁸³ The latter can enter, without the intervention of the court, an "entry of default" but not a judgment.²⁸⁴

F. Appeals

1. *Motion to Correct Error: 1980 Revision.*—The supreme court approved an amendment to Trial Rule 59.²⁸⁵ Because a motion to cor-

²⁸²*Id.* at 877.

²⁸³*Id.*

²⁸⁴*Id.*

²⁸⁵IND. R. TR. P. 59 (amended effective Jan. 1, 1980) now provides:

(A) Motion to correct error—Bases for. The bases for a motion to correct error are established, without limitation, as follows:

(1) Denial of a fair trial by any irregularity in the proceedings of the court, jury or prevailing party, or any order of court, abuse of discretion, misconduct of the jury or prevailing party;

(2) Accident or surprise which ordinary prudence could not have guarded against;

(3) Excessive or inadequate damages, amount of recovery or other relief;

(4) The verdict or decision is not supported by sufficient evidence upon all necessary elements of a claim or defense, or is contrary to the evidence specifically pointing out the insufficiency or defect;

(5) Uncorrected error of law occurring and properly raised in the proceedings or prior to, at or subsequent to the trial;

(6) Newly discovered material evidence which could not, with reasonable diligence have been discovered and produced at the trial;

(7) Correction of a judgment subject to correction, alteration, amendment or modification; or

(8) The verdict or decision being contrary to law specifically pointing out the insufficiency or defect;

(9) For any reason allowed by these rules, statute or other law.

(B) Filing of motion. The motion to correct error may be made by the trial court, or by any party.

(C) Time for filing: Service on judge. A motion to correct error shall be filed not later than sixty [60] days after the entry of a final judgment or an appealable final order. A copy of the motion to correct error shall be served, when filed, upon the judge before whom the case is pending pursuant to Trial Rule 5.

(D) Errors raised by motion to correct error, and content of motion.

(1) Errors Raised by Motion to Correct Error. A motion to correct error shall be addressed to those errors claimed to have occurred prior to the filing of the motion.

(2) Content of Motion. In all cases in which a motion to correct error is made, such motion shall separately state the error or errors which are claimed.

rect error is a prerequisite to the appeal of any final order or judgment, the amendment is extraordinarily important.

The error claimed is not required to be stated under, or in the language of the bases for the motion allowed by this rule, by statute, or by other law. Each claimed error shall be stated in specific rather than general terms, and shall be accompanied by a statement of the facts and grounds upon which the errors are based.

(E) Motion to correct error granted. A party who is prejudiced by any modification or setting aside of a final judgment or an appealable final order following the filing of a motion to correct error may appeal that ruling without filing a motion to correct error.

(F) Denial of motion to correct error, and assertion of grounds for relief.

(1) Following the filing of a motion to correct error, a party who opposes the motion may file a statement in opposition to the motion to correct error not later than fifteen [15] days after service of the motion. The statement in opposition may assert grounds which show that the final judgment or appealable final order should remain unchanged, or the statement in opposition may present other grounds which show that the party filing the statement in opposition is entitled to other relief.

(2) If a motion to correct error is denied, the party who prevailed on that motion may, in his appellate brief and without having filed a statement in opposition to the motion to correct error in the trial court, first assert grounds entitling him to relief in the event the appellate court concludes that the trial court erred in denying the motion to correct error. If the appellate court reverses the judgment of the trial court, nothing in these Rules or the Appellate Rules precludes the appellate court from determining that the appellee is entitled to any alternative relief which the appellee has requested.

(G) Motion to correct error based on evidence outside the record.

(1) When a motion to correct error is based upon evidence outside the record, the motion shall be supported by affidavits showing the truth of the grounds set out in the motion and the affidavits shall be served with the motion.

(2) If a party opposes a motion to correct error made under this subdivision, that party has fifteen [15] days after service of the moving party's affidavits and motion, in which to file opposing affidavits.

(3) If a party opposes a motion to correct error made under this subdivision, that party has fifteen [15] days after service of the moving party's affidavits and motion, in which to file its own motion to correct errors under this subdivision, and in which to assert relevant matters which relate to the kind of relief sought by the party first moving to correct error under this subdivision.

(4) No reply affidavits, motions, or other papers from the party first moving to correct errors are contemplated under this subdivision.

(H) Costs in the event a new trial is ordered. The trial court, in granting a new trial, may place costs upon the party who applied for the new trial, or a portion of the costs, or it may place costs abiding the event of the suit, or it may place all costs or a portion of the costs on either or all parties as justice and equity in the case may require after the trial court has taken into consideration the causes which made the new trial necessary.

(I) Relief granted on motion to correct error. The court, if it determines that prejudicial or harmful error has been committed, shall take such

The new rule retains much of the law found in *P-M Gas & Wash Co. v. Smith*.²⁸⁶ However, there are some modifications of that opinion. Generally, it is still the law that one motion to correct error must be made by one party to effect an appeal from a final judgment or an "appealable final order."²⁸⁷ It is no longer the law, however, that a party cannot raise on appeal an error or a question from the trial court, unless it first presents the error to the trial court in the form of a motion to correct error.²⁸⁸ In fact, only when

action as will cure the error, including without limitation the following with respect to all or some of the parties and all or some of the errors:

- (1) Grant a new trial;
- (2) Enter final judgment;
- (3) Alter, amend, modify or correct judgment;
- (4) Amend or correct the findings or judgment as provided in Rule

52(B);

- (5) In the case of excessive or inadequate damages, enter final judgment on the evidence for the amount of the proper damages, grant a new trial, or grant a new trial subject to additur or remittitur;

- (6) Grant any other appropriate relief, or make relief subject to condition; or

- (7) 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 non-advisory jury is clearly erroneous as contrary to or not supported by the evidence, or if the court determines that the findings and judgment upon issues tried without a jury or with an advisory jury are against the weight of the evidence.

In its order correcting error the court shall direct final judgment to be entered or shall correct the error without a new trial unless such relief is shown to be impracticable or unfair to any of the parties or is otherwise improper; and if a new trial is required it shall be limited only to those parties and issues affected by the error unless such relief is shown to be impracticable or unfair. If corrective relief is granted, the court shall specify the general reasons therefor. When a new trial is granted because the verdict, findings or judgment do not accord with the evidence, the court shall make special findings of fact upon each material issue or element of the claim or defense upon which a new trial is granted. Such finding shall indicate whether the decision is against the weight of the evidence or whether it is clearly erroneous as contrary to or not supported by the evidence; if the decision is found to be against the weight of the evidence, the findings shall relate the supporting and opposing evidence to each issue upon which a new trial is granted; if the decision is found to be clearly erroneous as contrary to or not supported by the evidence, the findings shall show why judgment was not entered upon the evidence.

²⁸⁶268 Ind. 297, 375 N.E.2d 592 (1978), discussed in Harvey, 1979 Survey, *supra* note 9, at 81-85 and in Harvey, *Civil Procedure and Jurisdiction, 1978 Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 42, 67-68 (1979) [hereinafter cited as Harvey, 1978 Survey].

²⁸⁷IND. R. TR. P. 59(C). All references are to sections in the amended rule, which is set forth in note 285 *supra*.

²⁸⁸If a party seeks to raise error which occurred at trial, or afterward in a verdict

the motion to correct error arises under Trial Rule 59(G), which addresses matters outside the trial record, is it imperative that a party responding to a motion to correct error also file that motion.²⁸⁹

a. Grounds for relief.—The bases for this motion are found under section 59(A),²⁹⁰ and the Rules Committee's Notes²⁹¹ show that no change was intended in the substantive law which has developed the various grounds for relief. The first paragraph of section 59(A) was rewritten to explain that the section now sets out the bases for this motion. The provision in the first paragraph of the former section 59(A) concerning who can file the motion, was moved to the current section 59(B).

b. Who may file.—Under section 59(B), the motion may be filed by any party or by the trial court. It should be observed that a significant question may arise when one seeks to intervene, particularly if that person seeks to intervene late in the litigation. A person who has not shared the burden and expense of the litigation, but wants to intervene to "set some new law," can force the other parties into the appellate process when they might not have wanted the additional burden and cost of an appeal. There is nothing in Trial Rule 59 which speaks to this question. However, these considerations should arise with a request for intervention or separation of causes for trial.

c. Statement in opposition.—Section 59(F)(1) introduces a new concept into the motion to correct error practice and procedure; this is the "statement in opposition."²⁹² The statement must be made not later than fifteen days after service of the motion to correct error.²⁹³ The statement may assert grounds which show (a) that the final judgment or appealable final order should remain unchanged, or (b) that the party filing the motion to correct error should not receive the relief sought, or (c) that the party filing the statement is entitled to relief other than that sought by the opposing party in the motion to correct error.²⁹⁴

or judgment, then [the previous rule] require[d] that party to make a motion to correct error." 268 Ind. at 306, 375 N.E.2d at 596.

²⁸⁹IND. R. TR. P. 59(G)(3).

²⁹⁰IND. R. TR. P. 59(A).

²⁹¹COMMITTEE NOTE, *supra* note 88, *reprinted in* 1 1980 Ann. Ind. Code Serv. 361 (West), states:

There is very little change effected from former T.R. 59(A). The first paragraph was rewritten to explain that this provision sets out the bases for the motion. What was found under the first paragraph in the former rule has been moved to the new provision, T.R. 59(B), where the parties and the trial court are empowered to make this motion.

²⁹²IND. R. TR. P. 59(F)(1), (2).

²⁹³IND. R. TR. P. 59(F)(1). IND. R. TR. P. 5 & 6 govern issues concerning the time, manner and effectiveness of service.

²⁹⁴IND. R. TR. P. 59(F)(1).

It is imperative to understand that the statement is *not* required as a jurisdictional prerequisite to an appeal, or to raising the above-mentioned points on appeal once a motion to correct error has been filed by an opposing party or the trial court.²⁹⁵

The statement serves multiple purposes. It gives the party opposing the motion time in which to reply, and it allows the party making the statement an opportunity to address the trial court concerning the issues raised by the movant. The statement may show that the final judgment or appealable final order should not be changed, perhaps avoiding an appeal which otherwise might be taken from the trial court's response to the motion to correct error.

In many instances, a party who has received a judgment might consider requesting additional relief on appeal. The burdens associated with an appeal, however, are often too great when balanced against the judgment received in the trial court and the uncertainty of additional relief. The statement in opposition is designed to remedy that situation by affording the party an opportunity to show why he is entitled to some form of relief other than that which was received.²⁹⁶

²⁹⁵COMMITTEE NOTE, *supra* note 88, concerning Trial Rule 59(F)(1) explains the statement in opposition.

Subsection (1) of T.R. 59(F) describes the situation in which an appellee or a party who opposes a motion to correct error wants to present to the trial court certain grounds for sustaining the final judgment or appealable final order, which is under attack by a motion to correct error. In addition, that party might want to direct the trial court's attention to certain errors which were adverse to the party (who stands in opposition to the motion to correct error), which would be the bases for the relief which might be had, rather than the relief which the party who has made the motion to correct error has sought.

This is raised by the practical matter which can develop, under each section of T.R. 59(F), and *P-M Gas*, that a judgment may be sufficiently favorable to a party that the party will choose not to commence his own appeal on the basis of errors which occurred which were adverse to him. If the other side or party decides to commence an appeal, however, the prevailing party or the party who received the judgment might want to show the trial court and the appellate court why he should continue to prevail, or he might want to show that there were other grounds which would give the prevailing party other relief.

It is to be emphasized that the filing of a statement in opposition to the motion to correct error is not a jurisdictional requirement for asserting those same or similar grounds in the appellate court by the party who prevailed when the motion to correct error was denied under subsection (2). Thus each subsection, working together, is designed to give maximum flexibility to the trial court and the parties, and to generate excellent appellate court practice.

Id. reprinted in 1 1980 Ann. Ind. Code Serv. 365 (West).

²⁹⁶*Id.*

Nonetheless, the party who would have filed the statement in opposition can raise precisely the same points on appeal even if no statement in opposition was filed in the trial court.²⁹⁷ The statement is not mandatory and is not a prerequisite to raising those questions on appeal, even if they are first raised to the supreme court on a petition to transfer. This proposition is consistent with the meaning of section 59(F)(2). It is to be emphasized, though, that the statement in opposition may be filed in *every* case and situation in which a motion to correct error is filed. It is not limited to the situation set out in section 59(F)(2).

d. Motion to correct error denied—section 59(F)(2).—This section was borrowed from Federal Rule of Civil Procedure 50(d),²⁹⁸ but its applicability is much more extensive. The federal rule is limited, generally speaking, to a motion for a judgment notwithstanding the verdict, whereas the Indiana provision is applicable to all relief which can be granted under Trial Rule 59, including all of the bases for relief set out in section 59(A) and all of the relief available under section 59(I), as supplemented by Appellate Rule 15(N).²⁹⁹

Thus an appellee is not limited under section 59(F)(2) to seeking only a new trial from an appellate court. Under the federal rule, a new trial is generally held to be the only alternative available to the appellee who might have his judgment upset on appeal. However, if the state court appellee believes that the appellant might be successful in reversing the trial court's judgment and obtaining a new judgment consistent with his motion to correct error, the appellee can request forms of relief other than merely a new trial. The appellee can make that request even if it was not made in the trial court.

²⁹⁷*Id.*

²⁹⁸FED. R. CIV. P. 50(d) states in part:

If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

²⁹⁹IND. R. APP. P. 15(N). The authority of the Indiana appellate court to grant relief other than what was asked for in the trial court was expressly affirmed in *Cunningham v. Hiles*, 402 N.E.2d 17 (Ind. Ct. App. 1980). The court cited Trial Rule 59(E), Appellate Rule 15 and prior Indiana decisions. The *Cunningham* decision goes beyond the language of Trial Rule 59(F)(2), in that the court of appeals stated, "It is well settled that the relief granted by this Court need not be identical to the relief requested by the parties. *McConnell v. Thompson* (1937), 213 Ind. 16, 11 N.E.2d 183." 402 N.E. 2d at 20 n.3.

The appellee's request for relief would be made in his brief,³⁰⁰ and the request can be made even if the appellee did not make a motion to correct error in the trial court asserting the insufficiency of relief and the underlying trial error which supports the assertion. For example, an appellee could ask for increased damages in the appellate court even if the appellee did not make that request in the trial court or in a statement in opposition.

It is clear that this provision changes a part of *P-M Gas & Wash Co. v. Smith*,³⁰¹ and it changes the limitation-of-issues-on-appeal holdings in cases such as *DeHart v. Anderson*.³⁰² The Rules Committee comments affirmatively recognize this change concerning Trial Rule 59(E).³⁰³ The principle is the same under either section 59(E) or section 59(F)(2).

³⁰⁰The 1980 amendments to Appellate Rules 8.1 and 8.3, with their Committee Notes follow. See note 88 *supra* for explanation of typing code.

IND. R. APP. P. 8.1(A) states:

Appeals from Final Judgments or Appealable Final Orders. The appellant shall have thirty (30) days after filing the record in which to file his brief, and if the brief is not filed within that time, the clerk shall enter an order dismissing the appeal, unless a petition for extension of time is on file. The appellee shall file his brief within thirty (30) days after the filing of the appellant's brief. ~~If cross errors are assigned, the appellee shall file his brief thereon within thirty (30) days after the filing of the appellant's brief or the same shall be stricken out.~~ The appellant shall file his reply brief within fifteen (15) days after the filing of appellee's brief.

COMMITTEE NOTE, *supra* note 88. The committee's comment states that the "amendments are necessitated by the proposed amendments to Trial Rule 59." *Id.*

IND. R. APP. P. 8.3(A) states in part:

(A) Brief of the Appellant. . . .

. . . .

(7) An argument. 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. If substantially the same question is raised by two or more errors alleged in the motion to correct errors, they may be grouped and supported by one argument. *If an error is raised on brief which was not set out in the court below in a motion to correct errors, the error will be considered on appeal if raising the error is consistent with the provisions found in Trial Rule 59.* 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 relate to the particular facts of the case under review.

COMMITTEE NOTE, *supra* note 88. The committee's comment again states that the "amendments are necessitated by the proposed amendments to Trial Rule 59." *Id.*

³⁰¹268 Ind. 297, 375 N.E.2d 592 (1978).

³⁰²383 N.E.2d 431, 434 (Ind. Ct. App. 1978), *discussed in*, Harvey, 1979 Survey, *supra* note 9, at 83 and the text accompanying note 207 therein.

³⁰³COMMITTEE NOTE, *supra* note 88, develops this important principle of Indiana appellate practice fully.

An appellant, however, is limited on appeal to the assertion of those bases and errors which were asserted in his motion to correct error, which the trial court denied. Thus the appellant must carefully

(2) It is the intention of the Committee to change one of the holdings in *P-M Gas*, in this section. In *P-M Gas* the Court stated "[that] it is not necessary for that appellant to file a motion to correct error if appellant does not raise error himself. If appellant seeks [only to appeal the favorable relief given to appellee] because it was incorrect . . . then it is not necessary for the appellant to do more than request relief on brief in the appellate court." 375 N.E.2d at 597.

It is the Committee's judgment that *P-M Gas* has altered the traditional rule that a party must first specifically present error to the trial court for an opportunity for correction and only then can that party raise the error on appeal. That rule has been altered to the extent that an appealing party can raise error in the appellate court by appealing the trial court's ruling on a motion to correct error without making a motion to correct error too.

The Committee recommends that this principle be extended to the situation identified in the examples set out below.

The Committee recommends that this provision be interpreted to allow an appellant in this situation to appeal not only the granting of the motion to correct error, which would be raised on brief as set out in *P-M Gas*, but the appellant should be allowed to raise those errors which occurred at trial on brief in the appellate court too.

For example: X received a judgment as the plaintiff in an action against Y, but two rulings were made against X on the admissibility of evidence which caused X's evidence to be excluded. X properly preserved the questions at trial, by an offer to prove. Y made a motion to correct against X's judgment, and had a judgment entered for Y, the defendant, and now appellee, on that motion.

It is the Committee's recommendation that X be allowed to appeal the entry of the motion to correct error, and raise, in addition, the two claimed errors which adversely affected X at trial, without making a motion to correct error to that effect. In this way, that part of *P-M Gas* would be changed, and the limitation on issues on appeal found in *DeHart v. Anderson*, 383 N.E.2d 431, 433-434 (Ind. App. 1979) be changed too.

In such a situation as the one confronting X in this appeal, it might be the case that the appellate court, and X too, believes that X's original judgment cannot be reinstated. Nevertheless, X might be entitled to a new trial because of the alleged trial court error, and can show the appellate court that error and ask for that relief, in the alternative, in X's appeal to the appellate court.

The Committee believes that X should be able to make that appellate claim without filing a motion to correct error as a predicate for making it.

Of course, under this provision it will be necessary for the appellant to have objected to the ruling at trial which was adverse to the appellant. In that way the trial court has had an opportunity to examine the issue and rule; the Committee believes that is sufficient and that it need not recur in the trial court, and can be raised on brief by the appellant herein described.

To further demonstrate the intention of the Committee, the Committee considered but rejected the following language:

If a party seeks relief on appeal from error which is claimed to have occurred prior to or in the trial court's entry of a judgment,

weigh the law found in this rule before taking an appeal. The appellee can ask for different relief on appeal than that received by the appellee in the trial court; but the appellant cannot do this. The distinction is entirely justified by the fact that a trial court (judge or jury) has made a decision upon the claims asserted there, and if an appellant is allowed to reassert his lost claims in a second (appellate) court, which is the essence of an appeal, then an appellee should also be allowed to seek relief which was not received in the trial court.

e. Motion to correct error granted—section 59(E).—This section is new, and the Rules Committee Note³⁰⁴ explains that it speaks to several situations. It sustains one of the principal holdings of *P-M Gas*, the holding that only one motion to correct error is ever required.³⁰⁵

The fundamental trial court pattern which is addressed in section 59(E) is that the appellant received a judgment, which the ap-

or an appealable final order, that party must have filed a motion to correct error directed to the error which is claimed.

The Committee preferred a more liberal system of raising errors on appeal, if it is the appellant who raises that error, and hence rejected the provision set out.

COMMITTEE NOTE, *supra* note 88, reprinted in 1 1980 Ann. Ind. Code Serv. 363-64 (West).

³⁰⁴The initial text of the Committee's comment on §59(E), which precedes the text in note 303, *supra*, states:

This section is new, and it speaks to several situations. A party under *P-M Gas* can appeal an adverse determination made on another party's motion to correct errors, without making a motion himself. See *P-M Gas v. Smith*, 375 N.E.2d at 597. That remains correct under this section.

In addition, any party is allowed to appeal a ruling on a motion to correct errors without making another motion, or a 'second' motion to correct errors, see *Bridge v. Board of Zoning Appeals of Ft. Wayne*, 381 N.E.2d 1060 (Ind. 1978). This provision is consistent with that holding, and rule.

(1) Under this provision, if the appellant received a judgment and the appellee made a motion to correct errors against that judgment, which the trial court granted, and entered judgment against the appellant (or a lesser form of relief), then the appellant can appeal the granting of the motion to correct errors without making a motion himself and the appellant can ask for the reinstatement of the judgment which was set aside in the trial court as a result of the motion to correct errors. That was the factual setting in *DeHart v. Anderson*, 383 N.E.2d 431, 433-434 (Ind. App. 1978), in which the Court of Appeals pointed out that the issues on appeal were determined by: (1) the judgment dismissing the cause (which occurred in the case), (2) the motion to correct errors, and (3) the trial court's ruling on the motion. The provision is also consistent with the procedural facts and law in *Schmal v. Ernst*, 387 N.E.2d 96 (Ind. App. 1979).

COMMITTEE NOTE, *supra* note 88, reprinted in 1 1980 Ann. Ind. Code Serv. 363 (West).

³⁰⁵268 Ind. at 303, 375 N.E.2d at 596. However, at least one party must make a timely motion to correct error. See *Indiana Parole Board v. Gaidi*, 395 N.E.2d 829 (Ind. Ct. App. 1979).

pellee upset in the trial court on the appellee's motion to correct error. The Rules Committee recommended³⁰⁶ that the appellant should also be able to raise those errors which were raised in his opponent's motion to correct error and in the judgment which was upset. In addition, the appellant should be able to raise other errors concerning rulings adverse to him in the trial court, without first making a motion to correct error himself to raise those points. Thus, the ruling in cases such as *P-M Gas & Wash Co.* and *DeHart* are changed to allow the appellant to raise an error or question which was not asserted in an appellant's motion to correct error in the trial court because the appellant did not make such a motion.

Any party is allowed to appeal a ruling on a motion to correct error without making another motion, or a "second" motion, and that law is continued under this provision.

f. Errors which can be raised by motion—section 59(D)(1).—The motion to correct error must clearly address those errors which allegedly occurred prior to the entry of the final judgment or appealable final order. When this provision is read with section 59(C), it is also clear that if there is some error which developed in the sixty-day period for filing the motion to correct error, that error too can be addressed in the motion.

g. Content of the motion—section 59(D)(2).—This provision contains the essence of former Rule 59(B). The Advisory Committee stated, though, that "this rule does address *errors* and not *issues* which latter word was used throughout the former rule, and is discontinued in the new rule."³⁰⁷

h. Finality of judgment—section 59(C).—The Rules Committee Note³⁰⁸ contains an excellent discussion on the law and doctrine of

³⁰⁶See note 303 *supra*.

³⁰⁷The full text of the Committee's comments on IND. R. TR. P. 59(D)(2) states: This provision contains the essence of the rule and case law which was found in the former section in the old T.R. 59(B), and it is expanded somewhat here. No change in the case law interpretation was contemplated by the Committee in this reorganization, except it is to be emphasized that this rule does address *errors* and not *issues* which latter word was used throughout the former rule, and is discontinued in the new rule.

COMMITTEE NOTE, *supra* note 88, reprinted in 1 1980 Ann. Ind. Code Serv. 362-63 (West).

³⁰⁸The text of the Committee's comment relating to "finality" follows: This provision replaces former rules found under T.R. 59(C) and 59(G). The Committee does not intend to make the motion applicable to interlocutory orders, or orders appointing or refusing to appoint a receiver, or to orders in proceedings supplemental to execution. Thus the exceptions found in former T.R. 59(G) are saved and preserved, but they are not expressly set out in the rule itself. Additionally, no change in the former case law has been contemplated either, and those cases which addressed interlocutory orders, or

“finality” which has developed in Indiana, and two major points about that discussion are to be made. First, the motion to correct error is not applicable to interlocutory orders, or to orders appointing or refusing to appoint a receiver, or to orders in proceedings supplemental to execution. Prior law was not changed, although these exceptions are not expressly stated in the present rule; they were in the former rule. No change in the former law was made or intended in this regard. Second, the Rules Committee Notes treat certification of a class, in class action litigation under Trial Rule 23, as a final and appealable order, although previously most of those questions have been raised on appeal under Appellate Rule 4(B)(5),³⁰⁹ rather than as of right. The Rules Committee’s judgment was that the court in *Gulf Oil Corp. v. McManus*,³¹⁰ concluded that class certification would be a final order or judgment, and that the better procedure would be to treat certification questions as “final” for purposes of an appeal.

A major problem area, which often appears to be related to a question of “finality of judgment,” occurs when a trial court, or an administrative function in the trial court system, is non-responsive to a motion to correct error or to another request made by motion to the trial court. In using the word “non-responsive,” several situations come to mind. First, a trial court might fail to address the

orders appointing or refusing to appoint a receiver, or orders in proceedings supplemental to execution in the context of T.R. 59 are saved.

The Committee has seen the essential problem here as one of “finality”, although the Committee has not defined either “final judgment” or “appealable final order” as those words are used in this section. Final orders and judgments are defined, generally speaking, by case law or by rules. Thus a final judgment or order is one which finally determines the rights of the parties involved, and which the trial court intends as its final and complete disposition in the case.

In addition, T.R. 54(B) and 56(C), each define “finality” when those rules are complied with, as shown in the leading decision of *Stanray Corp. v. Horizon Constr., Inc.*, 342 N.E.2d 645 (Ind. App. 1976); compare *Geyer v. City of Logansport*, 317 N.E.2d 893 (Ind. App. 1974). An order under T.R. 23(C)(1), which allows an action to exist as a class action, is a final determination, and appealable under this provision, *Gulf Oil Corp. v. McManus*, 363 N.E.2d 223 (Ind. App. 1977), but a discovery order or an order effecting discovery, without a special certification under App. R. 4(B)(5), and which is not appealable as an interlocutory order under App. R. 4(B)(1)-(4), see *Finley, [sic] v. Finley*, 367 N.E.2d 1126 (Ind. App. 1977), is not a final order or judgment and not appealable as such. *Greyhound Lines v. Vanover*, 311 N.E.2d 632 (Ind. App. 1974).

COMMITTEE NOTE, *supra* note 88, reprinted in 1 1980 Ann. Ind. Code Serv. 361-62 (West).

³⁰⁹IND. R. APP. P. 4(B)(5).

³¹⁰363 N.E.2d 223 (Ind. Ct. App. 1977), see note 308 *supra*.

questions raised in the motion to correct error and simply re-enter the prior judgment or appealable final order. Second, a trial court might fail to address the questions raised in the motion to correct error but alter some other aspect of the final judgment or appealable final order in such a way that another error develops or alter the judgment in an insignificant way which does not speak to the errors raised in the motion. Third, a trial court might appear to have entered a final judgment or appealable final order, thus generating a motion to correct error, and after the motion is filed the court might make an entry under Trial Rule 54(B).³¹¹ Last, in the category of the administrative function in the trial court, a clerk's office might fail to give notice, under Trial Rule 72,³¹² of the entry of a ruling on a motion to correct error. This list is not exhaustive, but is sufficient to describe the problem area.

These situations are addressed in at least two cases, and the rule of those cases is preserved in the new Trial Rule 59. First, the Indiana Supreme Court, in *Soft Water Utilities, Inc. v. Le Fevre*,³¹³ held that a trial court has discretion to grant relief under Trial Rule 60 when a clerk of the trial court fails to perform an administrative function under Trial Rule 72 in sending late notice of a ruling, or in failing to send notice at all.³¹⁴ The case has been cited several times and the remedy which it supports should always be available to correct administrative errors made by the clerks of the courts.³¹⁵

Other instances in which there is "non-responsiveness" to the motion to correct error may be remedied by the filing of a second motion to correct error which is permitted but not required under *P-M Gas*.

The leading case during this survey period is the court of appeals' decision in *Continental Casualty Co. v. Novy*.³¹⁶ There, the trial court was "non-responsive" to each party's motion to correct error in the sense that each was overruled and the relief sought was denied. However, the trial court entered "Amended Special Findings of Fact and Conclusions of Law and Judgment."³¹⁷ Afterward, the insurance company filed a second motion to correct error, as did the

³¹¹The COMMITTEE NOTE quoted at note 308, *supra*, explains that IND. R. TR. P. 54(B) defines "finality."

³¹²Under IND. R. TR. P. 72(D), the clerk has the duty, generally speaking, to give notice of rulings to the parties or their attorneys of record.

³¹³261 Ind. 260, 301 N.E.2d 745 (1973).

³¹⁴*Id.* at 269, 301 N.E.2d at 750.

³¹⁵The same relief may be obtained from the appellate courts. *Lugar v. State ex rel. Lee*, 383 N.E.2d 287 (Ind. 1978); *Costanzi v. Ryan*, 368 N.E.2d 12 (Ind. Ct. App. 1977). See text accompanying note 350, *infra*.

³¹⁶397 N.E.2d 294 (Ind. Ct. App. 1979).

³¹⁷*Id.* at 295.

plaintiff *Novy*. Each of those motions was also overruled. Eventually, *Novy* filed a motion to dismiss the appeal for the reason that the insurance company's appeal was not timely with respect to the trial court's ruling on the first motion to correct error.³¹⁸ The appellate court was thus presented squarely with two questions: (1) whether a second motion to correct error could be filed and (2) whether an appeal taken from the trial court's ruling upon the motion was timely filed.³¹⁹

The court of appeals held that a second motion to correct error was allowable and that the appeal was timely.³²⁰ In so ruling, the court of appeals provided the needed flexibility which had not previously been stated in decisional form, but which had always been found in the trial rule.

The decision in *Novy* effectively addressed all of those areas which have been identified as "non-responsive" categories, and very probably all situations which may arise. The flexibility inherent in the decision is consistent with the proposition that the trial court should be allowed to correct its own mistake before an appeal ensues. The same spirit is found in the new Trial Rule 59 also, and its provisions hopefully will reduce the number of appeals because disputes can be resolved in the trial court even after an initial judgment is entered. The spirit is shown, for instance, in the permissive statement in opposition wherein the trial court can be presented with reasons to consider a different kind of relief than that which was entered. Seen in a broader context, the new Trial Rule 59, *P-M Gas* and *Novy* are responsive to the great demand for a better system of "dispute resolution" than was available in Indiana before the 1980 amendments.

i. Service of the motion on the trial judge—section 59(C).—There was no change from prior law in this very important provision. The rule states that the trial judge shall be served with a motion to correct error, and that filing must also be perfected according to Trial Rule 5.³²¹ This provision for service upon the judge is reptitious when Trial Rule 53.1³²² is examined, but is intentionally

³¹⁸*Id.* See IND. R. APP. P. 2(A).

³¹⁹This writer would observe that in fact it should make no difference, in a jurisdictional sense, whether this kind of question is raised by a second motion to correct error, or by a motion under IND. R. TR. P. 60(B).

³²⁰397 N.E.2d at 296.

³²¹See IND. R. TR. P. 5(E).

³²²IND. R. TR. P. 53.1(A) requires that a copy of a motion to correct error "shall be served upon the judge before whom the cause is pending and proof of such service shall be filed with the court." The Committee's comments on this provision under IND. R. TR. P. 59(C) state:

The provision concerning service of the Motion to Correct Error on the trial judge, has been placed here, and taken from former Trial Rule 53.1(A), in

so. The repetition is intended to alert or remind the attorney that Trial Rule 53.1 provides additional relief to the parties in the event of a delay in ruling on motions, and the trial judge must be served if the thirty-day limit in Trial Rule 53.1 is to be operative with respect to a motion to correct error. However, the basic effectiveness of a properly filed motion to correct error is not affected by a failure to effect service upon the trial judge.³²³

Under Trial Rule 59(C), the requirement that the motion to correct error shall be filed not later than sixty days after the entry of "a final judgment or appealable final order" is continued. Because of that language, counsel must remain particularly mindful of Trial Rule 54(B) and its provision for certification of a final judgment, and therefore, must file the motion to correct error in a timely manner after such a certification. It is still the rule that the motion, to be effective, must be filed against a final judgment or an appealable final order—as those terms are now used and defined in the new rule.

j. Affidavits and section 59(G).—The provision concerning a motion to correct error based on matters which appear outside the record is now contained in Trial Rule 59(G). The provision was rewritten and divided into four parts which relate to the service of affidavits and opposing affidavits by the moving party and the opposing party respectively.

The rule contemplates that no "reply" affidavits from the party first moving to correct error under this subsection shall be filed. The motion must be supported by affidavits under section 59(G)(1), and opposing affidavits may be filed under section 59(G)(2). Section 59(G)(4), however, provides that no additional affidavits need be filed by the movant under this aspect of the motion to correct error.³²⁴

Finally, it should be noted that section 59(G)(3) allows the filing of a separate motion to correct error by the party who opposes the first motion under this subsection. Thus, only when a party wishes to assert other errors based on evidence outside the record, are two motions to correct error recognized and required.

order to better remind the attorney of the service requirements found in the rule. There are no changes in the law which attends this provision, or in the interpretation thereof. Cases such as *Unishops, Inc. v. May's Family Centers, Inc.*, 375 N.E.2d 1135 (Ind. App. 1978), are retained unless overturned by subsequent decisions.

COMMITTEE NOTE, *supra* note 88, reprinted in 1 1980 Ann. Ind. Code Serv. 362 (West).

³²³*Unishops, Inc. v. May's Family Centers, Inc.*, 375 N.E.2d 1135 (Ind. Ct. App. 1978).

³²⁴*Cf. In re Marriage of Myers*, 387 N.E.2d 1360 (Ind. Ct. App. 1979) (unless matters in an affidavit are contradicted, those matters shall be accepted as true for the purpose of determining whether relief should be granted).

k. *Costs—section 59(H).*—The Rules Committee Note³²⁵ shows that no change in the former law was intended, although the rule was rewritten for purposes of clarity. The trial court has great discretion under this section, and it should be read in conjunction with section 59(I)(6) because the trial court may impose costs on the party seeking the new trial as a condition for that relief.

2. *Transcript of Proceedings and Marginal Notes; Assignment of Error and Trial Rule 59.*—The case of *Kentucky-Indiana Municipal Power Association v. Public Service Co.*³²⁶ contains several important holdings concerning administrative matters in the appellate courts.

An appeal was taken from a Public Service Commission ruling on certain matters, and during the appeal the Commission raised the proposition that the appeal should be dismissed because (1) an assignment of errors was filed separately from the transcript of the proceedings contravening Appellate Rule 7.2(A)(1),³²⁷ (2) the transcript was filed without marginal notations required under Appellate Rule 7.2(A)(3),³²⁸ and (3) the transcript contained certain pages without numbered lines also in contravention of Appellate Rule 7.2(A)(3).³²⁹

The court of appeals distinguished the prior Indiana authority in *Scott Paper Co. v. Public Service Commission*,³³⁰ by limiting the case to its facts.³³¹ In *Scott Paper*, the court had dismissed an appeal because the appellant failed to file any assignment of errors as required under section 8-1-3-1.³³² The court also distinguished *Moore v. Spann*³³³ which had dismissed an appeal because the appellants had failed to include in the transcript of proceedings a certified copy of the motion to correct error, by limiting that case to a motion-to-correct-error type of appeal from a trial court.³³⁴

The court noted that unlike the motion to correct error, an assignment of error is filed with the appellate court and that its in-

³²⁵COMMITTEE NOTE, *supra* note 88, reprinted in 1 1980 Ann. Ind. Code Serv. 367 (West), concerning costs states: "This provision is a slightly rewritten version of former T.R. 59(F). The Committee does not contemplate any change in the former law, but it was the hope of the Committee that the language used in the new provision is more clear than the former provision of 59(F)."

³²⁶393 N.E.2d 776 (Ind. Ct. App. 1979).

³²⁷IND. R. APP. P. 7.2(A)(1).

³²⁸IND. R. APP. P. 7.2(A)(3).

³²⁹*Id.*

³³⁰164 Ind. App. 565, 330 N.E.2d 137 (1975).

³³¹393 N.E.2d at 783.

³³²IND. CODE § 8-1-3-1 (1976).

³³³157 Ind. App. 33, 298 N.E.2d 490, *rehearing denied*, 302 N.E.2d 825 (1973).

³³⁴393 N.E.2d at 783.

clusion is a matter of convenience to the court, and perhaps to the parties also; thus, it is a rule of waiver, not a rule of jurisdiction.³³⁵ The court held that the rules³³⁶ requiring marginal notations on pages of the transcript, pagination, and references in the brief to page and line information are rules for the benefit of the court, not the parties.³³⁷ The court has the discretion to invoke the rule and might order a rebriefing or correction of the defect, but the court may also deem the question waived.³³⁸

The practitioner should note that the discretion found in the court's authority to waive these certain mechanical defects was not extended to a failure to include a motion to correct error when appeal is taken from a trial court's final judgment.³³⁹

3. *Petition for Rehearing.*—In *Ross v. Schubert*,³⁴⁰ the appellee filed a petition for rehearing after the court of appeals reversed³⁴¹ a jury verdict and judgment in his favor. The appellant filed a motion to dismiss the petition because it contained extensive argument improperly interspersed within the petition. The appellee had failed to separate his argument into a supporting brief. The court of appeals granted the motion to dismiss, citing the language in Appellate Rule 11(A),³⁴² and various cases decided under that rule's predecessor.³⁴³

4. *Failure to File Timely Brief.*—In *Metropolitan Development Commission v. Douglas*,³⁴⁴ the plaintiff brought suit against Douglas seeking a permanent injunction because Douglas' carport was allegedly constructed in violation of a certain Marion County zoning ordinance. The trial court denied the injunctive relief, and the plaintiff appealed.

In the appeal, the defendant did not file an appellee's brief, and the court of appeals noted that, in such a case, the appellant "need

³³⁵*Id.* at 784.

³³⁶IND. R. APP. P. 7.2(A)(3), 8.2(B)(5).

³³⁷393 N.E.2d at 784.

³³⁸*Id.* In *Stewart v. State*, 402 N.E.2d 973, 974 (Ind. 1980), the supreme court stated, "It is well settled that an appellate court possesses the inherent power to award *sua sponte* a writ of certiorari in order to complete or correct the record on appeal."

³³⁹393 N.E.2d at 783.

³⁴⁰396 N.E.2d 147 (Ind. Ct. App. 1979).

³⁴¹388 N.E.2d 623 (Ind. Ct. App. 1979).

³⁴²IND. R. APP. P. 11(A) provides in part: "Application for a rehearing . . . may be made by petition, *separate from the brief*, . . . stating concisely the reasons why the decision is thought to be erroneous. Such application may, if desired, be supported by briefs . . ." (emphasis added).

³⁴³*E.g.*, *Automobile Underwriters, Inc. v. Smith*, 241 Ind. 302, 171 N.E.2d 823 (1961).

³⁴⁴390 N.E.2d 663 (Ind. Ct. App. 1979).

only establish that the trial court committed prima facie error to [obtain a] reversal."³⁴⁵

5. *Timely Filing a Motion to Correct Error.*—In *White v. Livengood*,³⁴⁶ the plaintiff had obtained a judgment for \$6,000 for certain items of personal property. The defendant obtained the services of an attorney fifty-eight days after that judgment. The attorney immediately filed a defective motion to correct error³⁴⁷ and requested permission to file a belated motion to correct error. The second motion to correct error was filed about ninety days after the judgment against the defendant.

The court held that the second motion was not timely,³⁴⁸ because the limitations found in Trial Rule 6(B)(2)³⁴⁹ specifically state that the time for filing a motion to correct error cannot be extended. The effect of allowing the second motion would have been to extend the time for filing it. The court did state, however, that it "ha[d] the inherent power to entertain an appeal although jurisdictional time limits have expired,"³⁵⁰ but that such discretion would be exercised "only in rare and exceptional cases, such as in matters of great public interest, or where extraordinary circumstances exist."³⁵¹

6. *Trial Rule 59 and New Trial Limited to Damages.*—In *Amos v. Keplinger*,³⁵² the court of appeals held, in an interpretation of Trial Rule 59(I)(5),³⁵³ that, regardless of the rule's language, a trial court does not have the authority "to assess credibility or weigh conflicting evidence on the issue of damages."³⁵⁴ Rather, under Trial Rule 59(I)(5), the trial court is authorized "to enter a final judgment fixing damages when the evidence on the amount of damages is

³⁴⁵*Id.* at 664 n.2.

³⁴⁶390 N.E.2d 696 (Ind. Ct. App. 1979).

³⁴⁷The motion was defective because it failed to allege any error with the required specificity. *See* IND. R. TR. P. 59(D)(2).

³⁴⁸390 N.E.2d at 698.

³⁴⁹IND. R. TR. P. 6(B)(2).

³⁵⁰390 N.E.2d at 699 (citing *Lugar v. State ex rel. Lee*, 383 N.E.2d 287 (Ind. 1978); *Costanzi v. Ryan*, 368 N.E.2d 12 (Ind. Ct. App. 1977)).

³⁵¹390 N.E.2d at 699 (quoting *Costanzi v. Ryan*, 368 N.E.2d 12, 16 (Ind. Ct. App. 1977)). An example of the latter would occur when the clerk gave incorrect notice of the date of the ruling on the motion to correct error. *See* *Soft Water Utils., Inc. v. LeFevre*, 261 Ind. 260, 301 N.E.2d 745 (1973) (late filing of a praecipe); *Goodwill v. Goodwill*, 382 N.E.2d 720 (Ind. Ct. App. 1978) (late filing of a transcript).

³⁵²397 N.E.2d 1010 (Ind. Ct. App. 1979).

³⁵³IND. R. TR. P. 59(I)(5). The court in *Amos* construed former Trial Rule 59(E)(5). After the 1980 amendments, that provision is now embraced in Trial Rule 59(I)(5), which states that a trial court, as a part of the relief to be granted on a motion to correct error, can: "In the case of excessive or inadequate damages, enter final judgment on the evidence for the amount of the proper damages, grant a new trial, or grant a new trial subject to additur or remittitur."

³⁵⁴397 N.E.2d at 1011.

clear and un rebutted."³⁵⁵ Because the evidence in *Amos* on damages was conflicting, the trial court's award of damages, in the amount of \$4,915.36, was reversed for a new trial solely on the issue of damages.³⁵⁶

In *McNall v. Farmers Insurance Group*,³⁵⁷ the plaintiff brought suit under his father's uninsured motorist policy, for injuries sustained in a motorcycle accident. The plaintiff's appeal concerned the jury's failure to award damages in spite of a verdict in his favor. The court of appeals stated that "[w]here the trier of fact has found [for] the plaintiff on the issue of liability and the evidence relating to injury is uncontroverted and establishes a substantial injury proximately caused by the defendant's negligence, an assessment of damages inconsistent with the uncontroverted evidence is improper and will be reversed."³⁵⁸

The court noted that a new trial could be limited to the question of damages alone, but held that in this case it would not be appropriate.³⁵⁹ It appeared that the jury's verdict was a result of compromise on the questions of liability and damages. As a result, the new trial would extend to both damages and liability, pursuant to Appellate Rule 15(N).³⁶⁰

In *Hudson v. Dave McIntire Chevrolet, Inc.*,³⁶¹ the plaintiff bought a car, paying the full purchase price of \$2944, but returned it due to uncorrected mechanical defects. Suit was filed for the purchase price plus incidental and consequential damages. The trial court found for the plaintiff but awarded him only \$177.78 as total damages. The appellee admitted on appellate brief that the trial court was in error, but asked for relitigation of the liability question. In the trial court, the appellant made a motion to correct error limited to damages only.

³⁵⁵*Id.*

³⁵⁶*Id.*

³⁵⁷392 N.E.2d 520 (Ind. Ct. App. 1979). See also *Dayton Walther Corp. v. Caldwell*, 389 N.E.2d 723, *opinion clarified and rehearing denied*, 393 N.E.2d 723 (Ind. Ct. App. 1979), *vacated in part*, 402 N.E.2d 1252 (Ind. 1980). The court of appeals had ordered a new trial under IND. R. APP. P. 15(N)(5) limited to the issue of damages only. 393 N.E.2d at 211. The supreme court vacated the court of appeals' decision in part, 402 N.E.2d at 1253, and held that the evidence was sufficient to sustain the jury's verdict of about \$800,000 and that trial counsel's comments on the evidence were fully supported in the record. *Id.* at 1259. The supreme court's decision to vacate the court of appeals' decisions did not upset the lower appellate court's interpretation of IND. R. APP. P. 15(N). 402 N.E.2d at 1253.

³⁵⁸392 N.E.2d at 525.

³⁵⁹*Id.* at 526.

³⁶⁰*Id.* at 525. "[I]f a new trial is required it shall be limited only to those parties and issues affected by the error unless such relief is shown to be impracticable or unfair." IND. R. APP. P. 15(N). Identical language is contained in IND. R. TR. P. 59(I).

³⁶¹390 N.E.2d 179 (Ind. Ct. App. 1979).

The court of appeals observed that Indiana decisions did not articulate a "specific standard by which the propriety of granting a new trial limited to damages . . . is to be judged."³⁶² The decisions of other jurisdictions were reviewed, and the court concluded that a showing of inadequate damages, which was admitted by all parties here, did not automatically entitle an appellant to a new trial on damages alone.³⁶³ Rather, the appellant must also carry the burden of showing that the liability issue is clear and free from doubt, which this appellant did not do.³⁶⁴ The case was reversed for a new trial on all issues.³⁶⁵

On the question of damages, the court noted that "consequential damages are recoverable when they represent a loss 'resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know'" and that such questions are for the trier of fact to determine.³⁶⁶ The court further observed that the buyer could present evidence that the seller had reason to know that the buyer would borrow money to complete the purchase, and consequential damages consisting of interest on that bank loan could be shown and proved.³⁶⁷

³⁶²*Id.* at 182.

³⁶³*Id.*

³⁶⁴*Id.* at 183-84.

³⁶⁵*Id.* at 184.

³⁶⁶*Id.* at 184 n.4.

³⁶⁷*Id.*

APPENDIX

INDIANA JUDICIAL REPORT FOR 1979

The following information is taken from pages 31, 32, 35 and 36.

The trial court caseload data reflected herein was reported by the trial courts on a standard form (Quarterly Case Status Report) on a quarterly basis. These reports contain information on the cases filed (including those that come on a change of venue), disposed and pending at the end of the reporting period. This information is categorized by type of case, such as criminal, civil, dissolution, etc. The reports also show the method of disposition for the type of cases. Other matters, such as number of days with Judges Pro Tempore, number of trials disposed by Special Judges, number of cases heard or disposed by Masters, the use of Court Commissioner or Referee, and the number of days the Judge served in another County are also reported but are not reflected in this report. The information submitted on a quarterly basis has been combined and is presented here as yearly totals.

The reports are divided into two sets, Caseload of the Circuit and Superior Courts (including the Marion County Municipal, Juvenile, Probate and Criminal Courts, and the St. Joseph Probate Court) and Caseload of the County Courts. The latter set includes the cases filed in the small claims and misdemeanor dockets of the Circuit and Superior Courts, where such dockets exist. This caseload is referred to as "County Court Function" of the Circuit and Superior Courts.

As used in this report, the following definitions apply:

Criminal: This includes both misdemeanors and felony cases. Where multi-defendants are jointly charged and tried, only one criminal case is noted.

Re-Docketed Criminal: This includes those criminal matters which are re-opened after an initial judgment is entered. An example of this type of case would be a proceeding under Post Conviction Remedy Rule 1.

Juvenile: This includes all juvenile matters where formal proceedings are initiated and such proceedings concern a minor.

Civil: This includes all civil cases other than dissolution, probate, adoption, or guardianship cases. In the County Courts and the "County Court Function" of the Circuit and Superior Courts, small claims are reported separately.

Re-Docketed Civil: Those civil matters which for some

reason are again brought before the court following the entry of the initial judgment.

Dissolution: Cases where the parties seek to dissolve a marriage.

Re-Docketed Dissolution: Dissolution cases where the cause is brought before the court after the initial judgment. This would include petitions to modify and contempt citations.

Probate-Adoption: Those proceedings involving the distribution of estates or adoption of children. This would not include claims against an estate which are litigated; such matters are shown as "civil" cases.

Non-Felony Traffic: Cases where a traffic citation was issued.

Guardianship: This involves such matters as where a guardianship is opened under existing law of the state.

Others: This category is intended to include matters where an adjudication is made, but the full formalities of a trial are not involved. This would include probable cause determinations and commitment proceedings.

TOTAL CASES DISPOSED IN 1979
SUMMARY

	Circuit, Superior, Probate Courts	Marion Municipal Courts	County Courts & County Court Function	Total
Criminal	16,331	34,569	53,618	104,518
Re-Docketed Criminal	2,164	8	1,374	3,546
Juvenile	22,329	-0-	-0-	22,329
Civil (Plenary)	53,634	12,435	3,414	69,483
(Small Claims)	-0-	-0-	95,388	95,388
Re-Docketed Civil	13,836	7,355	28,689	49,880
Dissolution	50,854	-0-	-0-	50,854
Re-Docketed Dissolu- tion	26,969	-0-	-0-	26,969
Probate/Adoption	20,644	-0-	-0-	20,644
Non-Felony Traffic	-0-	90,214	264,517	354,731
Guardianship	4,508	-0-	-0-	4,508
Other	11,263	-0-	5,251	16,514
*TOTAL	222,532	144,581	452,251	819,364

*This includes Venued
Out cases.

SUMMARY

	Circuit, Superior, Probate Courts	Marion Municipal Courts	County Courts & County Court Function	Total
Jury Trial				
Criminal	932	69	180	1,181
Civil (Plenary)	754	54	23	831
(Small Claims)	—0—	—0—	—0—	—0—
Other	130	15	114	259
Bench Trials				
Criminal	1,404	6,932	6,761	15,097
Civil (Plenary)	11,841	832	1,503	14,176
(Small Claims)	—0—	—0—	18,777	18,777
Re-Docketed Civil	5,352	4,556	14,039	23,947
Dissolution	31,586	—0—	—0—	31,586
Non-Felony Traffic	—0—	7,391	9,319	16,710
Other	56,360	93	3,650	60,103
Settled	13,073	1,995	19,386	34,454
Plea	11,562	48,083	111,085	170,730
Dismissed	56,174	40,613	60,510	157,297
Default	18,449	6,668	39,108	64,225
Traffic Violations				
Bureau	—0—	23,946	152,354	176,300
Transferred Out	1,403	12	2,258	3,673
Venued Out	5,360	56	485	5,901
Closed	7,668	—0—	—0—	7,668
Other	484	3,266	3,181	6,931
Failed to Appear	—0—	—0—	9,518	9,518
TOTAL	222,532	144,581	452,251	819,364