III. Civil Procedure and Jurisdiction

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A. Introduction

This survey is limited to a discussion of those cases and amendments to rules which were distinctive in the year reviewed. The survey period saw major changes in the Trial Rules and the Appellate Rules. For the first time, the Supreme Court of Indiana adopted an extensive Original Action Rule, and it amended several of the Small Claims Rules. 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, 1981: Trial Rules 24, 30, 53.4, 59, and 60 and Appellate Rules 8.1 and 12. Additionally, Small Claims Rules 2, 3, 5, 10, and 11 were amended. Finally, the Original Action Rule, which is divided into six discrete rules, is accompanied by four forms.

Each of the Trial Rules was supported by Committee notes which explained the amendments. Several of those amendments and the attendant notes as well as the Rule on Original Action are discussed in this Article and appear where the subject area is reviewed. The Small Claims Rules are not reviewed.

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

1. Jurisdiction.—The principal decision which interpreted Indiana's Trial Rule 4.4 in this reporting period was the California decision of *Indiana Insurance Co. v. Pettigrew*.[1] In *Pettigrew*, an Indiana judgment was enforced pursuant to the full faith and credit clause. The judgment was rendered in a case brought against the defendant because the defendant's minor son, Michael, was involved in a multi-

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[1]114 Cal. App. 3d 732, 171 Cal. Rptr. 770 (1981). In Barker v. Barker, 94 N.M. 162, 608 P.2d 138 (1980), the Supreme Court of New Mexico enforced an Indiana judgment which was obtained ex parte by a former wife in Indiana and which granted a monetary award against her former husband. The husband argued in the New Mexico court that the Indiana judgment was invalid and not entitled to recognition and full faith and credit. The New Mexico court sustained the Indiana judgment and held that because the husband lived in Indiana from March 1970 to October 1974, there was a sufficient contact with Indiana to sustain personal jurisdiction under Trial Rule 4.4(A)(7) even when the Indiana judgment was ex parte. Adequate notice of the proceeding was given to the husband who received a copy of the complaint and summons by registered mail, and a return receipt was signed by the husband.

ple-car collision in Indiana while driving the defendant's car. The insurance company settled the insured's claims, and pursuant to subrogation provisions in the insurance agreement, it instituted an action against Michael and his father in Indiana. At all relevant times both defendants were California residents. The Indiana complaint alleged negligence by the defendant's son and asserted liability against the father who owned the motor vehicle driven by the son. Both defendants were served by certified mail from the Indiana state court; they defaulted in the Indiana action, and judgment was entered.[2]

In enforcing the Indiana judgment, the California court held that Indiana had a nonresident motor statute which provides jurisdiction over the nonresident operator or "his duly authorized agent."[3] Under this provision, the California court observed that an agency relationship was required and that there was no agency relationship between the father and his son. However that may have been, the California court held that under its statutory law an extension of jurisdiction over the owner of an automobile who merely extends permission to another driver to operate in the state of California creates an "agency" in California.[4] The California court stated that the California motor vehicle statute, which imposes a form of vicarious liability, created a sufficient type of "agency" to satisfy the extension of jurisdiction over the defendant pursuant to Indiana's nonresident motorist law.[5]

The California court also concluded that jurisdiction was properly asserted over the California defendant under Indiana's long arm statute, Trial Rule 4.4(A)(2).[6] The California court concluded that

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[2]114 Cal. App. 3d at 733, 171 Cal. Rptr. at 770-71.

[3]*Id.* at 733, 171 Cal. Rptr. at 771. IND. CODE § 9-3-2-1 (Supp. 1981) provides in part:

> The operation by a nonresident, or by any resident of this state who may thereafter become a nonresident of this state, or by his duly authorized agent, of a motor vehicle upon a public street or highway or any other place within this state shall be deemed equivalent to an appointment by such person of the secretary of state, or his successor in office, to be his true and lawful attorney upon whom may be served all lawful processes in any action or proceeding against him . . . .

[4]114 Cal. App. 3d at 733, 171 Cal. Rptr. at 771.

[5]*Id.*

[6]*Id.* at 734, 171 Cal. Rptr. at 772-73. IND. R. TR. P. 4.4(A)(2) provides that there is a basis of jurisdiction in an Indiana state court for: "(2) causing personal injury or property damage by an act or omission done within this state . . . ." The United States Court of Appeals in City of Evansville v. Kentucky Liquid Recycling, Inc., 604 F.2d 1008 (7th Cir. 1979), was much less clear about IND. R. TR. P. 4.4(A)(2) than the California court and held that it could not "determine whether the Indiana courts will conclude that this phrase includes only acts physically done within the state or also includes acts physically done outside the state but causing some injury within it; either construction is possible." 604 F.2d at 1020-21.

when the defendant gave his son permission to drive the defendant's car in Indiana, those acts, which occurred in California, were sufficient as acts "causing personal injury and property damage" within Indiana. Accordingly, the California court enforced the Indiana judgment and found that the Indiana court had jurisdiction based upon its two statutory provisons.[7]

The case of *State ex rel. Long v. Marion County Superior Court*[8] was an original action for a writ of mandamus. It was filed after a petition for the dissolution of marriage was filed in the Hamilton County Superior Court. The other spouse filed a petition in the Marion County Superior Court later in the same day. Service was effected from the Marion County suit first.[9]

The Indiana Supreme Court held that exclusive jurisdiction over the particular claim for relief vested when the complaint or other equivalent pleading or document was filed pursuant to Trial Rule 3.[10] The court concluded that the Hamilton County Superior Court had exclusive jurisdiction because that action was commenced first, regardless of when the summons was served.[11]

2. Power and Duty to Entertain Complaint.—In *Stanton v. Godfrey*,[12] an Indiana trial court awarded attorney's fees to a nonprofit legal organization. The demand for those fees arose from a claim in the state court filed because a previous federal court decision had determined that certain AFDC benefits were improperly withheld by the State of Indiana. Attorney's fees in this litigation were awarded pursuant to 42 U.S.C. § 1988,[13] and on appeal the state argued that the award was improper.[14]

The Indiana Court of Appeals held that an action under section 1983[15] for the vindication of all statutory rights within the ambit of all federal laws could be brought in the Indiana state court and that, of course, the federal statute was not limited to "classical" civil

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[7]114 Cal. App. 3d at 735, 171 Cal. Rptr. at 773.

[8]418 N.E.2d 218 (Ind. 1981).

[9]*Id.* at 219.

[10]*Id.* (citing Barber-Greene Co. v. Blaw Knox Co., 239 F.2d 774, 778 (6th Cir. 1956)).

[11]418 N.E.2d at 220.

[12]415 N.E.2d 103 (Ind. Ct. App. 1981).

[13]42 U.S.C. § 1988 (1976) provides:

> In any action or proceeding to enforce a provision of §§ 1981, 1982, 1983, 1985, and 1986 of this title, Title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or Title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the cost.

[14]415 N.E.2d at 105.

[15]42 U.S.C. § 1983 (1976).

rights claims.[16] Thus, a claim of right arising under the Social Security Act could be vindicated consistent with section 1983. The Indiana court also held that 42 U.S.C. § 1988 applied to all types of section 1983 actions including those based solely on Social Security Act violations or other federal statutory law.[17] The court concluded that the Indiana department of public welfare was a "person" within the meaning of section 1983 and that local governments and local governmental officials are "persons" within the meaning of that provision.[18] The Indiana decision is consistent with cases from the United States Supreme Court, specifically *Maine v. Thiboutot*,[19] *Maher v. Gagne*,[20] and *Martinez v. California*.[21]

Finally, the court of appeals appeared to hold that attorney's fees should be awarded to a non-profit legal organization without a reduction equal to the amount of payments acquired from sources other than the plaintiffs in the present action.[22]

3. Claims in General: Suits under Trial Rule 60 and the 1981 Amendment to Trial Rule 60.—The 1981 amendment to Trial Rule 60(B)[23] struck the word "proceeding" from the rule because that word could have been interpreted as meaning that the trial rule was applicable to an interlocutory order. By striking the word "proceeding" and inserting the words "final order," it is now clear that Trial Rule 60(B) does not apply to interlocutory orders.[24]

In *Keiling v. McIntire*,[25] a default judgment was entered against the defendant, and the defendant moved to set the judgment aside under Trial Rule 60(B)(1). The defendant's evidence showed that the defendant was not served with summons or process.[26]

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[16]415 N.E.2d at 106-07.

[17]*Id.* at 107-08.

[18]*Id.* at 107.

[19]448 U.S. 1 (1980).

[20]448 U.S. 122 (1980).

[21]444 U.S. 277 (1980).

[22]415 N.E.2d at 108.

[23]IND. R. TR. P. 60(B) now provides in part that on motion and upon such terms as are just, the court may relieve a party or the party's legal representative from an entry of a default, final order, or final judgment, including a judgment by default.

[24]The Supreme Court Rules Committee Note on Footnote 22 provided:

> The first sentence of Sec. (B) is amended and the amendment is necessitated in part by the possible construction of Trial Rule 60(B) in its present form which would permit, pursuant to Trial Rule 60(C), a direct appeal from a denial of Trial Rule 60(B) relief sought against an interlocutory order. Pathman Const. Co. v. Drum-Co Engin. Corp., (1980)—Ind.App.—402 N.E.2d 1. The word "proceeding" has been deleted because a party does not seek relief from a proceeding but from an order or a judgment.

[25]408 N.E.2d 565 (Ind. Ct. App. 1980).

[26]*Id.* at 566.

The court of appeals held that a Trial Rule 60(B)(1) motion is proper to set aside a judgment taken against a person who has neither been served with process nor received notice of the institution of the action against him.[27] The court also stated that "service" in this context means compliance with Trial Rules 4.4 -4.17.[28] When a defendant has not been served pursuant to those provisions, such an omission is a *jurisdictional defect*, and it is unnecessary to show that there is a meritorious defense to the action against the defendant. Otherwise, as was shown in *Sanders v. Kerwin*,[29] when a defendant has been served and has defaulted, it is necessary to show that not only was the notice of the action inadequate (or some other basis for relief under this motion), but also that there is a meritorious defense to the suit before the default judgment can be set aside.

4. Computation of Time, Service of Process, and Service on Attorneys.—Trial Rule 6(E)[30] provides that three days shall be added to a prescribed period of time when service is made by mail. In *Erdman v. White*,[31] the court of appeals held that Trial Rule 6(E) had no application when a party was represented in open court by counsel and when that counsel was notified about a court decision or ruling in open court even though out-of-state counsel is notified by mail.[32] The court held that when local counsel was present and when a trial court's order was read, the notification was effective and that the additional three days provided in Trial Rule 6(E) does not accrue to the benefit of a party.[33]

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[27]*Id.*

[28]*Id.* at nn.1 & 2.

[29]413 N.E.2d 668 (Ind. Ct. App. 1980) (there was a question here about the adequacy of notice). In Brendonwood Common v. Kahlenbeck, 416 N.E.2d 1335 (Ind. Ct. App. 1981), the parties did not receive notice of the entry of a final injunction, and the time for filing a Trial Rule 59 motion had expired. The losing party filed a motion for relief under Trial Rule 60(B) which the trial court denied and that denial was affirmed on appeal. The appellate court reasoned that a duty was imposed on counsel of record under Trial Rule 72(D) to check the records of the court for the entry of judgment, and if counsel failed to do so, then counsel could not make a sufficient evidentiary showing of entitlement to relief under Trial Rule 60(B). That motion is addressed to the discretion of the trial court, and diligence on counsel's part is required. The opinion seems to be contrary to Soft Water Utilities, Inc. v. LeFevre, 261 Ind. 260, 301 N.E.2d 745 (1973), and there was a strong dissent by Judge Sullivan.

[30]IND. R. TR. P. 6(E) provides that:

> [w]henever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, three [3] days shall be added to the prescribed period.

[31]411 N.E.2d 653 (Ind. Ct. App. 1980).

[32]*Id.* at 656.

[33]*Id.*

Trial Rules 4.9[34] and 4.13[35] were interpreted in the case of *Abell v. Clark County Department of Public Welfare*.[36] In *Abell*, the department attempted to terminate certain parental rights to the defendant's three children. Before this action commenced, the defendant consented to make the children wards of the department; thus the department was familiar with the defendant. Process was served, however, by publication which was supported by an affidavit from the director of the department stating that the current residence of the defendant was unknown and could not be ascertained. A default judgment was entered which the defendant attacked on direct appeal.[37]

The court of appeals held that process in a proceeding to terminate parental rights is basically an *in rem* proceeding governed by Trial Rule 4.9 which permits service by publication to be effected pursuant to Trial Rule 4.13. The court added, however, that service must be made in the best possible manner reasonably calculated to inform the respondent of a pending action and consistent with the fundamental principles of due process of law.[38] The court held that service of process was not reasonably calculated to inform this defendant under the circumstances and ordered a new hearing.[39]

Trial Rule 5(B)[40] provides that when a party is represented by an attorney, service shall be made upon the attorney. This rule was interpreted in *Solar Sources v. Air Pollution Control Board*.[41] In this case the Pollution Control Board notified Solar's *attorney* about the Board's final determination in a dispute with Solar Sources. A review statute provided that if appeal was to be taken then it shall be taken fifteen days after receipt of notice by the person or persons against whom an order has been entered. An appeal by Solar Sources was not taken in the fifteen day period after notification given by the Board to Solar's attorney. The trial court entered a summary judgment for the Board.[42] The Indiana Court of Appeals held that notice to the attorney was insufficient and that Trial Rule

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[34]IND. R. TR. P. 4.9 provides the method for service of summons in actions in rem.

[35]IND. R. TR. P. 4.13 provides that summons may be served by publication and dicates the method for the publication. This trial rule is referred to in Trial Rule 4.9.

[36]407 N.E.2d 1209 (Ind. Ct. App. 1980).

[37]*Id.* at 1210.

[38]*Id.* (citing Robinson v. Hanrahan, 409 U.S. 38 (1972); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950)).

[39]407 N.E.2d at 1211.

[40]IND. R. TR. P. 5(B) states in part that 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."

[41]409 N.E.2d 1136 (Ind. Ct. App. 1980).

[42]*Id.* at 1137.

5(B) was inapplicable in determining the time period of notification to the attorney because, pursuant to Trial Rule 1, the trial rules did not apply to the review of an administrative agency decision.[43]

The reasoning of the court of appeals in *Solar Sources* appears to be flawed. The court reasoned that Indiana Code section 4-22-1-6[44] provides that notice shall be in writing and delivered by registered or certified mail, return receipt requested, and addressed to the person or persons against whom an order or determination may be made, either at their last known place of business or residence. The court then reasoned that the Indiana Supreme Court decision in *Ball Stores, Inc. v. State Board of Tax Commissioners*,[45] was not controlling because, according to the court of appeals, the *Ball Stores* decision represented a holding that when an administrative procedure statute fails to specify some detail, the courts must then look to the Indiana Rules of Trial Procedure to supply the missing rule.[46] The court of appeals seemed to either hold that the trial rules are inapplicable when the administrative procedure statute fails to specify some detail or to reason that there was sufficient detail in the Administrative Adjudication Act on service to a party to obviate the application of Trial Rule 5(B).

In this writer's judgment, there is no conflict between the Administrative Adjudication Act in its section 6 provision for service upon a person and the Trial Rule 5(B) provision for service upon the attorney of a person who is represented in a proceeding. There is no language in either section 14 or section 6 of the Administrative Adjudication Act which excludes the application of Trial Rule 5(B), and the court of appeals in the opinion did not indicate that there was such language. The court concluded that section 6 must be literally interpreted.[47] This result means, of course, that one who is to be

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[43]*Id.* at 1138.

[44]IND. CODE § 4-22-1-6 (1976) provides in part for notice as follows:
In all cases in which the agency is the moving party it shall give at least five (5) days' notice in writing by registered or certified mail with return receipt requested, addressed to the person or persons against whom an order or determination may be made at their last known place of residence, or place of business, which notice shall set forth therein a sufficient statement of the matters of fact or law to advise such person of the matters in issue and to be heard or determined by said agency, together with notice of the time and place of such hearing. Said statement may be informal and need not conform to the requirements of a pleading in court. Whenever the hearing involves the claim, averment or complaint of, or is made by, a private person, a copy or the substance thereof shall be included in or exhibited with such notice.

[45]262 Ind. 386, 316 N.E.2d 674 (1974).

[46]409 N.E.2d at 1138.

[47]*Id.* at 1139.

served with notice pursuant to the Administrative Adjudication Act cannot enjoy or receive the assistance of counsel to represent that person insofar as effective notification is concerned. Furthermore, the opinion in *Solar Sources* was not reconciled with the Indiana Supreme Court decision in *Ball Stores*.

5. Service of Process and "John Doe" Complaints.—In *Maclin v. Paulson*,[48] a complaint was brought against the Chief of Police of Gary, Indiana, and several unnamed police officers. The complaint alleged that they had either participated in or had permitted the beating of the plaintiff while the plaintiff was held in custody in the Gary jail. The complaint listed several police officers as "John Doe, Defendants." Service of process was effected pursuant to Federal Rule of Civil Procedure 4(d)(1) by serving summonses upon the Gary Police Department.

The United States District Court dismissed the complaint on the ground that the service of the summonses was insufficient.[49]

The United States Court of Appeals for the Seventh Circuit reversed and held that in this civil rights action filed under 42 U.S.C. § 1983, the use of fictitious names for the defendants was approved.[50] The court held that when a party is ignorant of a defendant's true identity, it is not necessary that the party name that defendant or those persons until their identity can be learned through discovery or through the aid of the trial court.[51] Moreover, the court of appeals held that there was no statute of limitations problem because the unidentified members of the police department were put on notice of the action when service of the complaint and summons were effected upon the offices of the Gary Police Department before the statute of limitations had run.[52] Accordingly, the Seventh Circuit sustained the use of the "John Doe" complaint and its service by general service upon the department or place where a prospective defendant works or is known to be employed.

6. Venue and Change of Venue.—Trial Rule 75(B)[53] was inter-

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[48]627 F.2d 83 (7th Cir. 1980).

[49]*Id.* at 84-86.

[50]*Id.* at 87.

[51]*Id.*

[52]*Id.* at 88 & n.6.

[53]IND. R. TR. P. 75(B) provides as follows:

> (B) **Claim or proceeding filed in improper court.** Whenever a claim or proceeding is filed which should properly have been filed in another court of this state, and proper objection is made, the court in which such action or proceeding is filed shall not dismiss the same, but shall order said cause transferred to the court in which it should have been filed. The person filing such claim or proceeding shall pay such costs as are chargeable upon a change of venue and the papers and records shall be certified to the court of transfer in like manner as upon change of venue. Such action shall be deemed commenced as of the date of filing the claim in the original court.

preted in the case of *Elliott v. Roach*.[54] The Indiana Court of Appeals held that if a trial court lacks jurisdiction over a dispute which is brought before it, then pursuant to this trial rule a trial court can transfer that case to a correct court for an appropriate remedy.[55] Thus, if the Indiana trial court is confronted with a choice of either dismissal or transfer, which includes the instance in which the trial court lacks subject matter jurisdiction, the trial court can transfer the case pursuant to Rule 75(B) to a trial court with a proper jurisdictional foundation.

A question was raised concerning the constitutionality of Trial Rule 76[56] in the decision of *Piwowar v. Washington Lumber & Coal Co.*[57] In this dispute an action was brought in Lake County, Indiana, because of an injury allegedly caused by a defective nail which splintered and injured the plaintiff's eye. The action was venued to the Porter County Circuit Court and tried there by a jury. The plaintiff claimed that Trial Rule 76 was unconstitutional principally because it deprived the plaintiff of trial by jury pursuant to the "demographic composition of Lake County."[58]

The court of appeals found no such constitutional infirmity in Trial Rule 76.[59] The court held that the automatic change of venue in Trial Rule 76 is "designed to provide a fair and impartial trial to all parties and to prevent protracted litigation" and that those elements are "not outweighed by the inconvenience and expense to the plaintiff which might be caused by a venue change."[60] The court also commented that there was no evidence in the record concerning the "demographic compositon of Lake County" and therefore an insufficient basis upon which to raise this type of challenge to Trial Rule 76.[61]

C. The 1981 Original Action Rule

Perhaps the most significant 1981 amendment adopted by the Indiana Supreme Court is the Original Action Rule (Rule).[62] This Rule provides for writs of mandamus and prohibition, and it is a

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[54]409 N.E.2d 661 (Ind. Ct. App. 1980).

[55]*Id.* at 671-72.

[56]Trial Rule 76 provides for an automatic change of venue upon motion without specifying the ground therefor, and a party shall be entitled to one change from the county and one change from the judge, according to the provisions established in the trial rule.

[57]405 N.E.2d 576 (Ind. Ct. App. 1980).

[58]*Id.* at 578-79.

[59]*Id.* at 580.

[60]*Id.* at 579-80.

[61]*Id.* at 580.

[62]IND. R. P. ORIG. A. 1 to 6 (writs of mandamus and prohibition amended January 1, 1981).

substantial textual change from the former Rule. However, the Rule describes current practice, and the pattern established in the text of the Rule reflects actual practice before the supreme court in pursuing a writ of mandamus or prohibition. The Rule contains six separate rules which describe the mechanism for obtaining the writ of mandamus or prohibition, and it contains four forms adopted by the supreme court to facilitate obtaining either writ.

It is clear from a reading of Rule 1[63] that the Rule governs only original actions for writs of mandamus and prohibition against inferior state courts and a judge or the judges of those courts.[64] Rule 1 expressly states that these Rules do not govern other types of original actions such as: complaints which might be filed against an attorney for some form of misconduct,[65] a writ which might be filed against an administrative agency,[66] or a writ in aid of appellate court jurisdiction.[67] Additionally, the Rule provides that petitions for writs in aid of *appellate court jurisdiction* are not original actions and are governed by Appellate Rule 4(A)(6). The authority for the court of appeals to issue a writ in aid of its appellate jurisdiction is established in Appellate Rule 4(C).[68]

Rule 2(A)[69] contains a condition precedent to making an application for a writ. The application for a writ shall be submitted to the supreme court administrator pursuant to Rule 2(B).[70] Before that submission can be made, however, the relator must have raised the absence of jurisdiction of the respondent court or the failure of the respondent court to act when it is under a duty to act by a written motion filed with the respondent court. An exception to that requirement is an original action involving a change of venue from the judge or county. If this condition precedent is met, then under Rule 2(B) the administrator shall examine the application to determine whether it is complete and in proper form. If it is not, the administrator shall reject the application, return it to the relator, and

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[63]IND. R. P. ORIG. A. 1. Rule 1 is entitled "Scope of Rules". Under subdivision (D), the rule specifically states that writs of mandamus and prohibition against the administrative agencies and the members thereof are not original actions which are governed by these rules, and under subdivision (E) the rule provides that petitions for writs in aid of appellate court jurisdiction are not original actions governed by these rules.

[64]*Id.* 1(B).

[65]*Id.* 1(C).

[66]*Id.* 1(D).

[67]*Id.* 1(E).

[68]*Id.*

[69]*Id.* 2(A).

[70]*Id.* 2(B).

inform the relator of the reason for rejecting the application. If the application is in proper form, the administrator shall accept it, noting appropriately the date of submission, and shall set the date and time when the supreme court will hear an oral argument on the application.

Rule 3[71] determines the content of the petition for writs of mandamus or prohibition. The rule specifies that the petition shall be verified and affirmed and shall state those facts which are detailed in Rule 3(A).[72] Rule 3 also requires a brief to be filed,[73] a record of proceedings to be made,[74] and a certain form of the writ to be used.[75]

Rule 4[76] explains the hearing procedure and dictates that thirty minutes will be allowed for oral argument.[77] Filing of the application occurs only after the hearing on the application and only if permitted by Rule 5.[78] Thus, considerable activity such as the submission of an application for a writ and an actual hearing on the application before the supreme court occurs before there is any formal filing in the office of the Clerk of the Supreme Court.

Rule 6[79] addresses the submission, filing, and service of the application papers, while Rule 5[80] speaks to the disposition of those applications which are filed for either writ. If the application for the writ is denied[81] and if the relator requests that the application be filed with the Clerk of the Supreme Court, then the administrator *shall deliver* the filing fee to the clerk and file with the clerk all papers submitted previously to him by the parties. Thereafter the relator shall have a twenty-day period in which to file an additional brief with the clerk in support of the relator's application. Rule 5(C) states that after the twenty-day period expires the supreme court shall dispose of the original action by written opinion without a hearing or the filing of any further papers.[82]

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[71] *Id.* 3.
[72] *Id.* 3(A).
[73] *Id.* 3(B).
[74] *Id.* 3(C).
[75] *Id.* 3(D).
[76] *Id.* 4.
[77] *Id.* 4(C).
[78] *Id.* 5.
[79] *Id.* 6.
[80] *Id.* 5(B), (C).
[81] If the application for the writ is *granted*, IND. R. P. ORIG. A. 5(A) provides that the writ will be issued and the administrator then shall deliver the filing fee to the clerk and file with the Clerk of the Supreme Court all application papers which were submitted to him by the parties. Those papers shall be given a cause number by the clerk and the parties thereafter shall file all subsequent papers with the clerk. *Id.* 5(A).
[82] *Id.* 5(C).

D. Pleadings and Pre-Trial Motions

1. Trial Rule 7(A)(5).—The court of appeals decided that without an order from a trial court, a reply is not justified to special defenses which are listed in Trial Rule 9. In *Adams v. Luros*,[83] a medical malpractice action was brought against a doctor who argued that the plaintiff had not raised the theory of fraudulent concealment arising from certain conduct performed by the defendant in the plaintiff's complaint or in a reply and that, accordingly, the plaintiff was prohibitied from doing so as a factual matter in the case. The court of appeals noted that under Trial Rule 7(A)(5) matters which formerly were required to be pleaded by a reply or some other subsequent pleading may now be proved even though they are not pleaded.[84]

2. Motions and Amendments to Pleadings.—In *Mills v. American Playground Device Co.*,[85] the court noted that when a motion for failure to state a claim pursuant to Trial Rule 12(B)(6) is raised subsequent to the filing of a defendant's answer, the motion is properly addressed by the trial court as a motion under Trial Rule 12(C) for judgment on the pleadings.[86] The court of appeals observed that the standard of review in either case is the same.[87] The court also stated that a 12(C) motion tests the sufficiency of the complaint to ascertain whether it states a redressable claim, or that the motion is used to test the law of the claim, and not the facts which support it.[88]

Trial Rule 15(C) was interpreted in *Eberbach v. McNabney*.[89] In *Eberbach*, a suit was brought because of a collision involving three automobiles. An interpretation of Trial Rule 15(C) developed because the plaintiff sued one Hanson Castor by the wrong name. Castor was deceased when the suit was brought, but his death did not extinguish his legal existence which was, for purposes of this litigation, transferred to a special administrator of Castor's estate. In the appellate court, the special administrator, who was not named as a party by the plaintiff, argued that the suit brought against the decedent was a nullity and therefore no amendment to the complaint, which would relate to the time when the complaint was originally filed, naming the special administrator could be made. Thus, if the

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[83]406 N.E.2d 1199 (Ind. Ct. App. 1980).

[84]*Id.* at 1201-02.

[85]405 N.E.2d 621 (Ind. Ct. App. 1980).

[86]*Id.* at 626 n.2.

[87]405 N.E.2d at 626 n.2 (citing Anderson v. Anderson, 399 N.E.2d 391, 406 (Ind. Ct. App. 1979)).

[88]*Id.*

[89]413 N.E.2d 958 (Ind. Ct. App. 1980).

argument were correct, the statute of limitations would have run on the plaintiff's action.

The court of appeals held that pursuant to Trial Rule 15(C) the argument was not acceptable. A claim of defense which was asserted in an amended pleading and which arose from the conduct or transaction set forth in the original pleading relates back to the date of the original pleading when the amendment changed the party against whom a claim was asserted providing that the new party has received such notice of the institution of the action that he would not be prejudiced in maintaining his defense and that the new party knew or should have known that but for a mistake concerning the identity of the proper party, the action would have been brought against him.[90]

A leading analysis of Trial Rule 15(C) is found in *General Motors Corp. v. Arnett*,[91] a suit against GM for wrongful death. The action was filed by the deceased's wife who was not appointed the personal representative of the deceased's estate for the purpose of the wrongful death action until after the two-year statutory period had run.

The court of appeals sustained a summary judgment motion against the plaintiff and held that the right to bring a wrongful death action is purely statutory and that bringing the action is a condition of suit itself, not merely a statute of limitation.[92] Thus, the court held that Trial Rule 15(C) was inapplicable because it was not the plaintiff's complaint which was amended; it was the plaintiff's legal status which was changed, and Trial Rule 15(C) does not permit the trial court to change the two-year period from a condition precedent to a statute of limitation.[93] The court said that there was no question about prejudice to GM. Nevertheless, the action was not commenced by a personal representative within the statutory period as a condition precedent to bringing the action. Thus, there was no complaint on file which could be amended.

Trial Rule 15(B) was construed in *Midway Ford Truck Center, Inc. v. Gilmore*.[94] The *Gilmore* court considered whether an issue, once stipulated to have been dismissed with prejudice, may be adjudicated at a later time upon the granting of a motion to amend the pleadings to conform to the evidence. The court reasoned that when an issue has been dismissed with prejudice as a result of the stipulation, the liberal provisions found in Trial Rule 15(B) on conforming a

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[90] *Id.* at 962.
[91] 418 N.E.2d 546 (Ind. Ct. App. 1981).
[92] *Id.* at 548.
[93] *Id.* at 548-49.
[94] 415 N.E.2d 134 (Ind. Ct. App. 1981).

pleading to the evidence are not applicable.[95] They are subordinated to Trial Rules 41(F) and 60(B).

Trial Rule 41(F) provides that a dismissal with prejudice may be set aside by the trial court "for the grounds and in accordance with the provisions of Rule 60(B)."[96] The majority opinion reasoned that those two provisions control amendments to conform the evidence rather than Trial Rule 15(B).[97]

A dissenting opinion stated that Trial Rules 41(F) and 60(B) do not prevent a trial court from reinstating dismissed legal theories under Trial Rule 15(B) and that Trial Rules 41(F) and 60(B) simply mean that a trial court has the power to act under those rules in addition to Trial Rule 15(B).[98]

3. Res Judicata, Prior Judgments, and Comity.[99]—This reporting period saw several cases discuss the doctrine of res judicata. In *Rees v. Heyser*,[100] the court discussed this doctrine and alluded to *State, Indiana State Highway Commission v. Speidel*,[101] which is probably the leading recent decision in Indiana on res judicata.[102]

The court in *Rees* characterized the two branches of this doctrine as "claim preclusion," which is applicable where "there is a final judgment on the merits in a prior case, which acts as a complete bar to a subsequent action on the same claim between the same parties or those in privity with them," and "issue preclusion," which is applicable "when a particular issue is adjudicated and put into issue in a subsequent suit on a different cause of action between the same parties or those in privity with them. In this instance, the former decision on the issue is binding on the parties in this subsequent suit."[103]

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[95]*Id.* at 137.

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

[97]415 N.E.2d at 138.

[98]*Id.* at 138-39 (Young, J., dissenting). Lewis v. Davis, 410 N.E.2d 1363 (Ind. Ct. App. 1980), is consistent with the dissent in *Gilmore*. *See also* Dominguez v. Gallmeyer, 402 N.E.2d 1295 (Ind. Ct. App. 1980), *discussed in* Harvey, *Civil Procedure and Jurisdiction, 1980 Survey of Recent Developments in Indiana Law*, 14 IND. L. REV. 129, 154 (1981) [hereinafter cited as Harvey, *1980 Survey*].

[99]For a recent case dealing with comity, see Scherer v. Scherer, 405 N.E.2d 40 (Ind. Ct. App. 1980), *discussed in* Rhine & Weinheimer, *Domestic Relations, 1981 Survey of Recent Developments in Indiana Law*, 15 IND. L. REV. 203, 218 (1982).

[100]404 N.E.2d 1183 (Ind. Ct. App. 1980).

[101]392 N.E.2d 1172 (Ind. Ct. App. 1979).

[102]Additional cases discussing res judicata are Indiana Univ. v. Indiana Bonding & Sur. Co., 416 N.E.2d 1275 (Ind. Ct. App. 1981), Glass v. Continental Assur. Co., 415 N.E.2d 126 (Ind. Ct. App. 1981), Martin v. Indiana Bell Tel. Co., 415 N.E.2d 759 (Ind. Ct. App. 1981), Kirby v. Second Bible Missionary Church, 413 N.E.2d 330 (Ind. Ct. App. 1980), State v. King, 413 N.E.2d 1016 (Ind. Ct. App. 1980), United Farm Bureau Mut. Ins. Co. v. Wampler, 406 N.E.2d 1195 (Ind. Ct. App. 1980), and Peterson v. Culver Educ. Foundation, 402 N.E.2d 448 (Ind. Ct. App. 1980).

[103]404 N.E.2d at 1185.

E. Parties and Discovery

1. Appointment of Guardian Ad Litem.—In *Brewer v. Brewer*,[104] the court of appeals held that Trial Rule 17(C) imbued the trial court with the discretion to determine whether to appoint a guardian ad litem and that, accordingly, the appointment of a guardian ad litem is not mandatory.[105] A substantial question arose whether one of the litigants, who filed the action, should have had a guardian ad litem appointed for her at or prior to the commencement of the trial. The trial court determined, after the evidence was closed in the case, that the plaintiff was incompetent and appointed a guardian to manage her affairs. The court of appeals held that the discretion vested in a trial court under Trial Rule 17(C) depends on whether the trial court perceives that the interests of the infant or the incompetent are adequately represented and protected during trial. If so, no guardian ad litem is required even though the trial court concludes after the evidence is presented that the litigant is incompetent to manage the litigant's affairs.[106]

2. Trial Rule 21(B): Venue and Jurisdiction over the Subject Matter.—Trial Rule 21(B) contains two important provisions each of which was interpreted in two separate cases. Those interpretations, while consistent with Trial Rule 21(B), greatly expand the authority of an Indiana trial court.

In *Elliott v. Roach*,[107] the court of appeals held that Trial Rule 21(B) extends a trial court's jurisdiction to all claims and over all parties which are required or permissively asserted if the trial court had jurisdiction and venue over the original claim which was asserted and if the original claim is within the subject matter jurisdiction of the court.[108] The scope of this interpretation is disclosed in the facts in *Elliott*. An action was brought in a municipal court of Marion County, Indiana. At the time the action was commenced, the court had a jurisdictional limitation of $10,000. A suit demanding the return of about $65.00 was initiated by the plaintiff. Three defendants counterclaimed alleging defamation and demanding about $200,000 each. The court of appeals held that the municipal court could entertain the counterclaim which was filed under Trial Rule 13(C) because of the first sentence in Trial Rule 21(B).[109]

In *Piskorowski v. Shell Oil Co.*,[110] the second paragraph in Trial Rule 21(B) was authoritatively interpreted. In the *Piskorowski* deci-

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[104]403 N.E.2d 352 (Ind. Ct. App. 1980).
[105]*Id.* at 354.
[106]*Id.* at 354-55.
[107]409 N.E.2d 661 (Ind. Ct. App. 1980).
[108]*Id.* at 667.
[109]*Id.* at 667-68.
[110]403 N.E.2d 838 (Ind. Ct. App. 1980).

sion, two suits were filed by the plaintiff in Lake County Superior Court. In 1976, a third action was filed against Shell which moved for summary judgment and for dismissal because the previous actions were pending in the Porter County Superior Court. The Lake County Superior Court ordered consolidation of the 1976 action with the previous actions pending in the Porter County Superior Court. The transcript and pleadings in the 1976 action were never physically transferred to the Porter County Superior Court.

The court of appeals held, however, that when the Lake County Superior Court *ordered* the 1976 action to be consolidated with the previous actions pending in the Porter County Superior Court, at that time and at that moment the Lake County Superior Court lost jurisdiction over the case.[111] Accordingly, it did not matter that the pleadings and transcript were not sent to the Porter County Superior Court because the latter court acquired jurisdiction over the dispute when the Lake County Superior Court entered its order for transfer pursuant to Trial Rule 21(B).

3. Class Action: Trial Rule 23.—Bowen v. Sonnenburg[112] concerned a class action to secure compensation for services performed while persons were patients in institutions for the mentally handicapped and the mentally retarded in the State of Indiana. The court of appeals' opinion contains an outstanding discussion of the development of a class action under Indiana Trial Rule 23. The opinion points out that under Trial Rule 23(A) there are *four* prerequisites to maintaining *all class actions*. Thereafter, Trial Rule 23(B) identifies three separate but not mutually exclusive types of class actions. Under subsection (B) a class action is appropriate if, and only if, in addition to meeting all the requirements for subsection (A), one or more of the additional conditions which are found to exist in subsection (B) is met. These distinct types of class actions are very important because, as the opinion states, Trial Rules 23(C)(2) and 23(C)(3) create substantial distinctions as to notice requirements and opting-out requirements concerning members of a class. These distinctions depend upon whether the class exists under Trial Rule 23(B)(1), 23(B)(2), or 23(B)(3). The court of appeals observed that it is critically important in maintaining a class action that the subsection under which the class exists is properly identified in the pleadings and documents which control that aspect of the case.[113]

The court held that pursuant to Trial Rule 23(C)(2) for any class action which is maintained under subsection 23(B)(3), that the trial court shall direct to the class members the best notice practicable

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[111] *Id.* at 842.

[112] 411 N.E.2d 390 (Ind. Ct. App. 1980).

[113] *Id.* at 396-98.

under the circumstances, including individual notice to all members who can be identified through reasonable effort.[114] The court referred to and adopted the decisions found in *Eisen IV*, *Eisen v. Carlisle & Jacquelin*.[115] The court also held that "[a]lthough there are some federal decisions to the contrary, the general view is that these notice requirements and opting-out rights afforded by TR 23(C)(2) *do not apply* to actions maintained under TR 23(B)(1) or (2)."[116] The court stated that "[t]he plain language of TR 23(C)(2) makes the mandatory notice provision and opting-out rights applicable only to class actions maintained under TR 23(B)(3)."[117]

4. Trial Rule 24: Intervention.—This rule was amended effective January 1, 1981,[118] to state that a trial court's determination upon a motion to intervene shall be deemed interlocutory for all purposes unless the ruling by the trial court is made final pursuant to Trial Rule 54(B). The effect of this amendment was to delete a prohibition against an appeal from an order upon a motion to intervene except on appeal from the final judgment. If a determination of finality is appropriate and is made under Trial Rule 54(B), an appeal shall become available even though the order is not the final judgment in the case.

The Supreme Court Rules Committee Note[119] states that the amendment does not affect the decision in *Indiana Bankers Association v. First Federal S. & L. Association*.[120] *Indiana Bankers* held that an interlocutory appeal was appealable pursuant to Appellate Rule 4(B)(5) after a ruling on a motion to intervene. It is an interlocutory order unless, of course, it is made final by the application of Trial Rule 54(B).

5. Trial Rule 53.4: Continuances by Agreement of Parties.—Before January 1, 1981, Trial Rule 53.4 provided that parties could agree to a continuance of a case. The rule was amended

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[114]*Id.* at 399.

[115]415 U.S. 156 (1974).

[116]411 N.E.2d at 400 (emphasis added).

[117]*Id.*

[118]IND. R. TR. P. 24 has been amended as follows:

(C) Procedure. A person desiring to intervene shall serve a motion to intervene upon the 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 shall be interlocutory for all purposes unless made final under Trial Rule 54(B).

[119]*See* IND. CODE ANN., IND. R. TR. P. 24, Supreme Court Committee Note (West 1981).

[120]387 N.E.2d 107 (Ind. Ct. App. 1979).

effective January 1, 1981, by the Indiana Supreme Court (there was no recommendation from the Supreme Court Rules Committee) to remove those words which permitted continuances to be made by agreement of parties.[121]

6. Discovery.—Several important decisions concerning the subject of discovery were handed down by the Supreme Court of the United States and Indiana's appellate courts during the year under review.

a. Trial preparation materials: Trial Rule 26(B)(2).—The case of *Upjohn Co. v. United States*[122] is perhaps the most significant discovery decision since *Hickman v. Taylor.*[123] *Upjohn* arose because the company believed that some of its overseas divisions might have made illegal payments to foreign governments or officials which would be in violation of certain rules and regulations of the Internal Revenue Service (IRS) and the Securities and Exchange Commission (SEC).

In order to atempt to ascertain whether these suspected violations had in fact occurred, the general counsel of the company, after consultation with outside counsel and the chairman of the board, conducted an internal investigation. A letter containing a questionnaire was directed to all foreign general and area managers over the chairman's signature. The letter was identified as an investigation to determine the magnitude of these possible payments. The letter instructed the managers to treat the investigation as "highly confidential" and not to discuss it with any person other than Upjohn employees who might be helpful in providing the requested information. Responses, it instructed, were to be sent directly to the general counsel. Additionally, the general counsel and outside counsel also interviewed the recipients of the questionnaires and approximately thirty-three other Upjohn officers and employees as a part of the investigation.

Subsequently, a summons was filed by the IRS which sought disclosure of all files relevant to the investigation conducted by the general counsel of the company. The summons specifically referred to the written questionnaire which was sent to the managers of the company's foreign affiliates, and the summons demanded memoranda or notes of interviews conducted in the United States and abroad with officers and employees of the Upjohn Company and its subsidiaries. The company refused to produce the documents described in the summons on the grounds that they were: (1) protected from disclosure by the attorney-client privilege, and (2) con-

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[121]IND. R. TR. P. 53.4 (amended January 1, 1981).

[122]101 S.Ct. 677 (1981).

[123]329 U.S. 495 (1947).

stituted the work product of attorneys in anticipation of litigation and were not discoverable pursuant to Federal Rule of Civil Procedure 26(b)(3) (and Indiana Trial Rule 26(B)(2)).

The lower federal courts ordered a disclosure of information on the ground that the attorney-client privilege did not apply to communications which were made by officers and agents of a corporation to an attorney if those officers and agents were not responsible for directing the company's actions in response to legal advice.[124] The principal reason offered by the lower federal courts was that the communications were not the "client's". The gist of this theory was that the attorney-client privilege is applicable only between the attorney and the "control group" of a corporation, and that "control group" means a president, director, the chairman of the board of directors, and similarly situated officers and persons.[125]

The Supreme Court of the United States reversed,[126] and its principal holdings were these:

(i) The attorney-client privilege applies to corporations. The attorney-client privilege is fully applicable to a corporation (probably this case is citable for the proposition that it is applicable to an organization or an unincorporated association).[127]

(ii) The "control group" test was disallowed. The court reasoned that the "control group" test was too limited because the attorney-client privilege protects not only the giving of professional advice to those who can act on it, but also the giving of information to an attorney to enable him to analyze and deliver sound and informed advice. The Court said that the first step in the resolution of any legal problem is ascertaining the factual background of the problem and sifting through the facts in order to determine those which are legally relevant. The Court observed that many lower-level corporate employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulty. Those employees who have relevant information must be able to communicate directly and openly to the attorney if such corporate counsel is to adequately advise his client with respect to potential problems. Thus, the Court reasoned that the "control group" test, which was adopted by the lower federal courts, frustrated the very purpose of the attorney-client privilege by discouraging the disclosure of relevant information by employees of the client to attorneys

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[124]United States v. Upjohn Co., 600 F.2d 1223, 1227 (6th Cir. 1979), *rev'd*, 101 S. Ct. 677 (1981).

[125]*Id.* at 1227.

[126]Upjohn Co. v. United States, 101 S. Ct. 677 (1981).

[127]*Id.* at 682-83 (citing United States v. Louisville & Nashville R.R., 236 U.S. 318, 336 (1915)).

who would attempt to render legal advice to the client corporation.[128]

(iii) Does the attorney-client privilege extend to post-employment interviews? The Supreme Court declined to rule on whether the attorney-client privilege still applied to seven of eighty-six employees who were interviewed by corporate counsel after those employees terminated their employment with Upjohn. The Court observed that the question had not been treated in the lower federal courts and declined to pass upon it in the opinion.[129]

(iv) The privilege protects only disclosure of communications. The Court held that the attorney-client privilege protects only disclosure of communications.[130] It does not protect the disclosure of underlying facts although those facts were communicated to an attorney by a client. The distinction which the Court drew is found in the observation that a client cannot be compelled to answer the question, "What did you say or write to the attorney?" But the client may not refuse to disclose any relevant fact within his knowledge merely because he communicated a statement of that fact in his communication to his attorney.[131]

(v) Work-product protection not defeated by mere showing of necessity and hardship. The Court concluded that communications by Upjohn employees to corporate counsel were protected by the attorney-client privilege. This holding disposed of responses to the questionnaires and any notes reflecting responses to interview questions in the dispute. In this regard, the Court held that the burden imposed on the IRS to obtain the necessary information from other sources did not in any respect overcome the policy served by the attorney-client privilege.[132]

(vi) The work-product doctrine protects communications by former employees. The Court held that the work-product doctrine applied to the seven former employees and to counsel's notes and memoranda about those interviews if it should be determined that the attorney-client privilege was not applicable to them.[133]

(vii) Memoranda of oral statements are protected by the work-product doctrine. The Court distinguished, as a part of an attorney's work product, facts which might be found in an attorney's file from an oral statement made by a witness which is presently in the form

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[128]101 S. Ct. at 683-84.

[129]*Id.* at 685 n.3.

[130]*Id.* at 685.

[131]*Id.* at 685-86 (citing City of Philadelphia v. Westinghouse Elec. Corp., 205 F. Supp. 830, 831 (E.D. Pa. 1962)).

[132]101 S. Ct. at 686-89.

[133]*Id.* at 686 n.6.

of an attorney's mental impressions or memoranda. The Court observed that as to the latter type of information, Federal Rule of Civil Procedure 26(b)(3) provides that the trial court "shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation."[134] The Court observed that it was clear that oral statements given by witnesses to an attorney fell inside that proscription because of the great danger that their disclosure would also reveal the attorney's mental process.[135] The Court declined to rule whether the language in Rule 26(b)(3) means that no showing of necessity can ever be made which would justify their production, although there is language in the *Hickman* decision which indicates precisely that conclusion.[136]

The work product here consisted of notes and memoranda which were based on oral statements taken by an attorney from a witness. Because those witnesses were also employees of the company, the Court held that their communications were protected by the attorney-client privilege. To the extent that those notes do not reveal privileged communications, they might reveal the attorney's mental process in evaluating the communications.[137] The Court held that as to those communications it was clear that both Rule 26(b)(3) and the *Hickman* decision posit that work product cannot be disclosed simply on a showing of "substantial need and inability to obtain the equivalent without undue hardship."[138] The limited reservation which the Court made was found in the statement that it was not prepared to say that such material is always protected by the work-product rule but that a much more powerful showing of necessity and unavailability by other means must be made in order to compel disclosure.[139] Perhaps the Court was thinking about a situation in which it is impossible to obtain that kind of information from any other sources. For example, a witness is now deceased or some other truly extraordinary factual situation.

The *Upjohn* decision is fully applicable to Indiana and its Trial Rule 26(B)(2) in view of the decisions which have assimilated federal authority and federal interpretations into the Indiana Discovery Rules.[140]

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[134]*Id.* at 687; FED. R. CIV. P. 26(b)(3).

[135]101 S. Ct. at 688.

[136]Hickman v. Taylor, 329 U.S. 495 (1947). The Court in *Hickman* did "not believe that any showing of necessity can be made under the circumstances of this case so as to justify production." *Id.* at 512.

[137]101 S. Ct. at 686.

[138]*Id.* at 688.

[139]*Id.* at 688-89.

[140]*See, e.g.*, Newton v. Yates, 353 N.E.2d 485 (Ind. Ct. App. 1976).

The court of appeals decision in *In re Snyder*,[141] contains an important interpretation of "in anticipation of litigation" in the trial preparation materials provision of Trial Rule 26(B)(2). An appeal was taken by a mother from a decision which terminated her parental rights to her children. In the trial court, the mother sought discovery of a welfare caseworker's qua investigator's notes which were compiled when the mother was interviewed by that person. The Department resisted the discovery claiming that the notes were "work product" and thus exempt from discovery except on a sufficient showing of good cause.

The appellate court disagreed with the Department's position and overruled the trial court on the point[142] by holding that the "work product" or the trial preparation materials restriction on discovery was not applicable unless the caseworker's notes were prepared in anticipation of litigation and that the test was:

> [W]hether, in the light of the nature of the document and the factual situation of the particular case, the document could be fairly said to have been prepared or obtained because of the prospect of litigation. Conversely, even though litigation is already in prospect, there is no work product immunity for documents prepared in the regular course of business rather than for purposes of litigation.[143]

b. Trial Rule 26(B)(3): expert witnesses.—Trial Rules 26(B)(3)(a) and 26(B)(3)(c) were discussed and interpreted in *Evans v. Huss*.[144] This decision involved an advisory expert who would testify but whose information for which he was compensated concerned computations and drawings of a non-testimonial nature in the hands of the party from whom discovery was sought. A party sought and obtained certain information from the opposing party's expert which was, in essence, advice and work which the expert had given to and performed for the opposing party. Discovery was conducted on an amicable basis, and the opposing party sent to the discovering party a bill for time and travel in responding to the deposition, *and* a bill for certain computations and drawings which were provided to the discovering party. The discovering party, however, refused to pay and argued that it was not liable to pay for the computations and the drawings and that Trial Rule 26(B)(3)(c) was not available to the trial court to order payment unless there was first an order providing for that discovery pursuant to Trial Rule 26(B)(3)(a).

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[141]418 N.E.2d 1171 (Ind. Ct. App. 1981).

[142]*Id.* at 1177-78.

[143]*Id.* at 1177 (quoting Galambus v. Consolidated Freightways Corp., 64 F.R.D. 468, 472 (N.D. Ind. 1974)).

[144]415 N.E.2d 783 (Ind. Ct. App. 1981).

The court of appeals disagreed. It held that when discovery occurs amicably or pursuant to informal procedures which were agreed to by the parties without the benefit of a trial court order under Trial Rule 26(B)(3)(a) and when a fair and equitable payment is not made, a party may seek a court order under Trial Rule 26(B)(3)(c), and a trial court may grant the order depending upon the merits of the claim for payment or compensation.[145]

c. Trial Rule 30(E): submission of a deposition to a witness.—Trial Rule 30(E) was extensively amended effective January 1, 1981. The new rule speaks to those situations which occurred under the former trial rule when a witness received a deposition and failed to return it to the reporter or officer taking the deposition or when the deposition was returned unsigned to that person. Under the new rule, if a witness desires to change an answer in the deposition submitted to him, then each change shall be noted and made by the witness on a separate form provided by the reporter, and a copy of the change shall be furnished by the reporter to each party.[146] If reading and signing the deposition have not been waived by the witness and each party to the deposition, then the deposition shall be signed by the witness and returned to the reporter within thirty days after being submitted to the witness.[147] If the deposition is not returned to the reporter or has not been signed by the witness, then the reporter shall execute a certificate to that fact, attach it to the original deposition, and cause both to be filed with the trial court. In that event the deposition may be used by any other party as if it had been signed by the witness.[148]

The new rule contains a definition of the words "submitted to the witness." It means notification to the witness and each attorney attending the depositon by registered or certified mail that the deposition can be read in the office of the reporter or officer before whom it was taken, or it means that the original copy of the deposition shall be mailed by registered or certified mail to the witness at an address designated by that witness or his attorney.[149]

It is suggested that Trial Rule 30(E)(1)(b), which provides for mailing the original deposition to the witness at an address designated by the witness or his attorney if requested, must be read in conjunction with Trial Rule 30(F)(2). The latter provision states that "[u]pon payment of reasonable charges therefore, the officer shall

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[145]*Id.* at 786-88.
[146]IND. R. TR. P. 30(E)(2).
[147]*Id.* 30(E)(3).
[148]*Id.* 30(E)(4).
[149]*Id.* 30(E)(1).

furnish a copy of the deposition to any party or the deponent." It is plain that the Indiana Supreme Court Rules Committee did not intend to create the situation in which the original copy of the deposition would be mailed by an officer or reporter without payment for it which an isolated reading of Trial Rule 30(E)(1)(b) might suggest.

d. Use of depositions: Trial Rule 32.—In *Manning v. Allgood*,[150] the court of appeals held that Trial Rule 32(A)(4) requires only that the relevant portions of a deposition be introduced after other portions of the deposition have been used during an examination at trial.[151] Plaintiff's counsel presented portions of two depositions during the plaintiff's case-in-chief which were read into evidence when the plaintiff's counsel attempted to place the deponent's statements in a chronological order so the jury might better understand the sequence of events. Defense counsel was permitted to read the entire deposition during the presentation of defendant's case-in-chief. The court of appeals held that the trial court correctly refused the defendant's request to read the entire deposition during the presentation of the plaintiff's case and that a reading would have been "unnecessarily disruptive of the plaintiff's case."[152]

e. Trial Rule 33: Interrogatories.—Trial Rule 33 received a significant interpretation in this reporting period. In *Bowling v. Holdeman*,[153] the court of appeals held that answers to interrogatories given under oath pursuant to Trial Rule 33(B) do not automatically become evidence in a case.[154] Before answers to interrogatories can be considered by the trier of fact, they must be introduced into evidence. If they are not, then the answers are not before the trier of fact even though they are on file in a clerk's office or retained by the court pursuant to local procedures.

f. Request for admissions: Trial Rule 36.—Trial Rule 36 received two important interpretations, and the first is found in the case of *Brown v. Union Oil Co.*[155] There the plaintiff alleged an agency relationship which would have imputed liability to Union Oil. However that may be, the court held that the absence of the agency

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[150]412 N.E.2d 811 (Ind. Ct. App. 1980).

[151]*Id.* at 814.

[152]*Id.*

[153]413 N.E.2d 1010 (Ind. Ct. App. 1980).

[154]*Id.* at 1013.

[155]406 N.E.2d 1218 (Ind. Ct. App. 1980). The scope of discovery under Indiana Trial Rule 36(A) is very broad and is more expansive than FED. R. CIV. P. 36(a). Under the Federal Rule, a request for an admission is limited to "statements or opinions of fact or of the application of law to fact . . . ." This restriction does not appear in the Indiana rule. The facts in *Brown* show the considerable sweep in Indiana's rule. One may request an admission "of the truth of any matters within the scope of Rule 26(B) . . . ." A case which contains a good discussion of relevancy under FED. R. CIV. P. 26(b)(1) is McClain v. Mack Trucks, Inc., 85 F.R.D. 53 (E.D. Pa. 1979).

relationship was established by the plaintiff's failure to respond to a request for an admission under Trial Rule 36.[156] When the plaintiff failed to respond to that request, the trial court granted a summary judgment to the defendant; thus the failure to respond was fatal to the plaintiff's case. Under Trial Rule 36, unlike Trial Rule 33, if an admission is effected because of the failure to respond to a request, then that admission is deemed established for all purposes in the litigation, and it may not be contradicted by the finder of fact unless the admission is amended away under Trial Rule 36(B).

The latter provision was interpreted in the case of *Hanchar Industrial Waste Management, Inc. v. Wayne Reclamation & Recycling, Inc.*[157] In *Hanchar*, the trial court permitted a defendant to file answers to the plaintiff's request for admissions after the time specified in the request had expired. After the defendant's failure to respond to the request for the admission, the defendant filed a motion for an extension of time in which to answer the request on the grounds of excusable neglect pursuant to Trial Rule 6(B)(2),[158] which motion the trial court granted. The court of appeals held that the granting of an extension of time was error and concluded that Trial Rule 36(B) specifically establishes the standard to be utilized by a trial court in determining whether a party should be allowed to withdraw or amend its admissions.[159] Because that standard makes no reference to Trial Rule 6(B)(2) or to excusable neglect, the court held that "excusable neglect" had no bearing on whether the defendant in this case should have been permitted to withdraw or amend the admissions made by operation of law by failing to respond to the request.[160]

g. Enforcement of discovery: Trial Rule 37.—Several important holdings developed in this area during the year in review.

(i) Enforcement without preceding trial court order. In *State v. Kuespert*,[161] the State of Indiana failed to make adequate responses to requests for discovery consisting of certain interrogatories, requests for admissions, and other discovery information. The

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[156]406 N.E.2d at 1219-20.

[157]418 N.E.2d 268 (Ind. Ct. App. 1981).

[158]IND. R. TR. P. 6(B)(2) provides for the enlargement of time after the expiration of a specified period in which an act is to be performed, upon the basis of excusable neglect. The rule also contains absolute restrictions upon a trial court's ability to extend time in which to perform an act under Trial Rules 50(A), 52(B), 59(C), and 60(B). The opinion in Skolnick v. State, 417 N.E.2d 1103 (Ind. 1981), shows that the time for filing a motion to correct error under Trial Rule 59(C) cannot be extended under Trial Rule 6 even if there were a showing of excusable neglect.

[159]418 N.E.2d at 270.

[160]*Id.* (citing Pathman Const. Co. v. Drum-Co Engin., 402 N.E.2d 1 (Ind. Ct. App. 1980) *discussed in* Harvey, *1980 Survey*, *supra* note 98, at 162-63).

[161]411 N.E.2d 435 (Ind. Ct. App. 1980).

responses which were filed appeared to be incomplete and inaccurate particularly in view of a previous hearing in the case. The plaintiff filed a motion to compel production and response to the requested discovery. The motion asked for attorney's fees and expenses on the ground that the state had repeatedly given partial, inaccurate or untrue, and misleading information in response to discovery procedures. The trial court awarded attorney's fees in the amount of $1,400 and ordered compliance with the discovery request.

The court of appeals sustained the trial court's orders and pointed out that under Trial Rule 37 costs and expenses might be assessed "when a party must go to the trouble of obtaining a court's intervention to compel discovery."[162] The court concluded that Indiana Trial Rule 37(B)(2)(c) allows such cost assessments against a party who has failed to comply with the discovery request *when there is no preceding order to make the discovery or to comply with the discovery request* and when it is shown that the party from whom the discovery is sought has been obstructive or derelict in its failure to respond to the discovery requests.[163]

(ii) Remedies for failure to follow court orders compelling discovery. In *Chrysler Corp. v. Reeves*,[164] the court of appeals appeared to qualify its policy concerning dismissal pursuant to Trial Rules 37(B)(2) and (4). In *Chrysler Corp.*, a trial court entered a judgment on the issue of liability against the corporation which, if affirmed, would have left the sole issue as one of damages to be awarded to the plaintiff. The court of appeals held that even though the two critical findings under Trial Rules 37(B)(2) and (4) had been made, nevertheless the trial court had "abused its discretion in ordering a partial default because *other relief would have been adequate*."[165] The court concluded that, as a matter of policy, other available remedies should be used rather than dismissing an action or finding against one of the parties. The court of appeals suggested that the assessment of attorney's fees might stimulate an answer to an interrogatory and preserve the possibility of trial on the merits at the same time.[166]

The extensive power to visit sanctions upon an attorney was reviewed and specifically affirmed by the United States Supreme Court in *Roadway Express, Inc. v. Piper*.[167] In *Roadway*, three attorneys brought suit against Roadway on behalf of two of its employees claiming certain employment discrimination. The at-

[162] *Id.* at 437.
[163] *Id.*
[164] 404 N.E.2d 1147 (Ind. Ct. App. 1980).
[165] *Id.* at 1152 (emphasis added).
[166] *Id.* at 1154.
[167] 100 S. Ct. 2455 (1980).

torneys manifestly lacked diligence because they failed to respond to interrogatories, to appear for argument, to attend a rescheduled argument, to meet appointed deadlines, to appear on appointed days, and to comply with federal district court requests for the filing of briefs and other matters. Roadway moved to dismiss the suit under Federal Rule of Civil Procedure 37(b)(2)(C) and requested an award of attorney's fees and costs in excess of $17,000.

The Court interpreted Federal Rule of Civil Procedure 37(b) and the sanctions contained therein to authorize a trial court to impose expenses, including attorney's fees, upon parties and counsel.[168] The Court held, "Rule 37 sanctions must be applied diligently both 'to penalize those whose conduct may be deemed to warrant such a sanction, [and] to deter those who might be tempted to such conduct in the absence of such a deterrent.' "[169]

The Court affirmed a federal district court's authority to dismiss the case because of the failure of the *attorneys* to act diligently and expressly held that the attorneys may be charged with the resulting costs and attorney's fees which Roadway had demanded.[170] Alternatively, the Supreme Court held that a federal trial court has the inherent power, apart from Federal Rule of Civil Procedure 37, to levy sanctions upon attorneys for abusive litigation practices.[171] Additionally, the Court affirmed that a trial court has the inherent power to dismiss *sua sponte* for the lack of prosecution, separate and distinct from Federal Rule of Civil Procedure 41(b).[172] The Court finally held the general rule in federal courts that a litigant will not recover his counsel fees does not apply when the opposing party or counsel has acted in bad faith.[173]

F. Trial and Judgments

1. Entry of Final Judgment: Trial Rule 54(B).—In *Krueger v. Bailey*,[174] the plaintiff brought an action arising from a frisbee accident which occurred on a school playground. Suit was filed against four defendants, three individuals and the Michigan City Area Schools Corporation. Each defendant filed a motion for summary judgment. Two of those motions were granted and two were not.

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[168]*Id.* at 2462-63.

[169]*Id.* at 2463 (citing National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639, 643 (1976)).

[170]100 S. Ct. at 2463.

[171]*Id.* at 2463.

[172]*Id.* at 2463-64.

[173]*Id.* at 2464. The *Roadway* decision also interpreted 28 U.S.C. § 1927, which relates specifically to federal trial courts, and is beyond the scope of Indiana state court practice and development. The reader should examine *Roadway*, however, for the interpretation given to § 1927 under Title 28 of the United States Code.

[174]406 N.E.2d 665 (Ind. Ct. App. 1980).

On appeal a question was raised whether a trial court's failure to resolve all of the issues as to all the parties resulted in a "final judgment" from which the appeal might be taken. The court of appeals held that when summary judgment disposes of less than all of the claims or parties, then the judgment is interlocutory and is not final.[175] It is not appealable unless a trial court expressly determines in writing that there was no just reason for delay and expressly directs in writing the entry of a judgment thereon.[176]

However that may be, the court of appeals, in an unusual act, considered the case on the merits and proceeded to dispose of the appeal. The appellate court acted in its discretion as it is authorized to do by Appellate Rule 4(E).

2. Default Judgments: Trial Rule 55.—There is a critical distinction betweeen being entitled to three days notification pursuant to Trial Rule 55(B) and being permitted to file a pleading or document which will avoid that party's default during those three days.

This distinction was illustrated in the case of *Erdman v. White*.[177] The opinion is very important and reveals a split among the districts in the court of appeals. In *Erdman*, the plaintiff obtained a default judgment against the defendant because the defendant failed to comply with a court order issued after a hearing held on March 2, 1979. The trial court order directed the defendant to answer within ten days, which the defendant failed to do. On March 13, 1979, the plaintiff moved for and received a default judgment against the defendant; on that day, the defendant did file an answer by his out-of-state attorney. The gist of the defendant's argument on appeal was that because the defendant had appeared, he was entitled to an additional three-day notice under Trial Rule 55(B) and could hence file the answer when the additional time commenced to run, which, according to the defendant, began on March 13, 1979.

The appellate court squarely held to the contrary. The court held that it was within the trial court's discretion to grant the default judgment or to allow the defendant to file an answer to the complaint.[178] In short, the three-day notice in Trial Rule 55 does not provide a delinquent party additional time in which to plead and thereby entirely avoid the question of default. This opinion cited *Hiatt v. Yergin*[179] and expressly disapproved of it to the extent that

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[175]*Id.* at 667.

[176]*Id.* (citing IND. R. TR. P. 56(C); Stanray Corp. v. Horizon Constr., Inc., 342 N.E.2d 645 (Ind. Ct. App. 1976); and Kasten v. Sims Motor Transp., 166 Ind. App. 117, 333 N.E.2d 906 (Ind. Ct. App. 1975)).

[177]411 N.E.2d 653 (Ind. Ct. App. 1980).

[178]*Id.* at 657 (citing Green v. Karol, 168 Ind. App. 467, 473, 344 N.E.2d 106, 110 (1976)).

[179]152 Ind. App. 497, 284 N.E.2d 834 (Ind. Ct. App. 1972).

it interpreted Trial Rule 55(B).[180] The opinion also cited the cases of *Clark County State Bank v. Bennett*[181] and *Snyder v. Tell City Clinic*[182] as cases which approved the interpretation given to Trial Rule 55 by the *Erdman* court.

3. Entry of Final Judgment: Trial Rule 58.—In *In re Estate of Jackson*,[183] the court of appeals held that the entry of a judgment pursuant to Trial Rule 58 is made when the judgment is entered as required by Trial Rule 77(E) but that the judgment or order itself need not be set out and may make reference to a separate order book in which the ruling is entered verbatim.[184]

The occasion for this holding was an appeal by the Department of Revenue in which the appellate court held that the Department's motion to correct error was not timely filed because it was one day too late.[185] A mere one-sentence entry was made by the probate court on the estate docket book while a written order was entered in its entirety in the probate order book to which reference was made in the docket book. The appellate court held that the docket book entry with reference to where the full judgment could be found was insufficient.[186]

Another case which interpreted Trial Rule 58 was *State v. Normandy Farms*.[187] There the State initiated a condemnation action for about five acres of land. The jury returned a verdict for the defendant, Normandy Farms, but a mistake appeared in the jury verdict where it assessed the sum of "no damage dollars." Apparently, the jury intended that the Farm would receive approximately $96,000 for the land actually taken, but no damages to the residue. The jury was polled, and it was apparent from several statements made by the jury that the mistake had occurred. The trial court, pursuant to a motion to correct error filed by the Farm, ordered a new trial.

The State argued on appeal that Trial Rule 58 required the trial court to enter judgment on the verdict. The court of appeals held that Trial Rule 58 required a prompt entry of a judgment, *but the required judgment is not restricted to a judgment on the verdict.*[188] Therefore, if the jury verdict is clearly erroneous, as here, "T.R. 58 does not mandate the trial court to perpetuate the error by entering judgment on the verdict."[189] The rule requires the trial court to

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[180]411 N.E.2d at 656-57.
[181]166 Ind. App. 471, 336 N.E.2d 663 (Ind. Ct. App. 1975).
[182]391 N.E.2d 623 (Ind. Ct. App. 1979).
[183]409 N.E.2d 1251 (Ind. Ct. App. 1980).
[184]*Id.* at 1253.
[185]*Id.* at 1254.
[186]*Id.* at 1253-54.
[187]413 N.E.2d 268 (Ind. Ct. App. 1980).
[188]*Id.* at 270.
[189]*Id.* at 270-71.

promptly enter a judgment which may include any form of corrective relief which is available under Trial Rule 59(J) (the opinion refers to Trial Rule 59(I), which was the alphabetizing of the rule when the decision was reached). Thus, Trial Rule 58, the court held, "does not excuse the trial court from entering a final judgment in order to preserve the parties' appellate rights, it only authorizes the refusal to enter a judgment on the verdict."[190]

4. Preliminary Injunctions and Temporary Restraining Orders: Trial Rule 65.—The case of *Bottoms v. B&M Coal Corp.*[191] arose from a violent labor strike in southern Indiana. An injunction was obtained against persons who committed violent destructive acts on the company's property. One of the questions raised on appeal was whether there was sufficient notice of the restraining orders which had been issued by the trial court as a predicate for a contempt of court citation. Appellants argued that because they were not properly served with notice of the restraining orders, they could not be held in contempt of them.

The court of appeals disagreed and held that notice of an injunction or a restraining order must be served on a person who is to be enjoined by the order but that an exception exists to that general principle when it is shown that a person had actual knowledge of a restraining order or injunction. When that showing is made that person "may be held liable for violating the provisions of the order."[192] In this respect, actual knowledge must be established from the facts presented to the trial court, but actual knowledge may be shown by "circumstantial evidence" or may be inferred from the facts of the case.[193] In this case, there was ample support for the trial court's findings that all of the appellants had actual knowledge of the retraining order. The court of appeals also held that the proper procedure in Indiana is that before a defendant may be held in contempt for violating an injunction, the court should bring the offender before the court a second time and then determine the appropriate penalty.[194]

In *Good v. Crowel*,[195] a temporary injunction was issued as a result of a school reorganization dispute in which Good, a newly elected school board member, was restrained from participation in certain school board proceedings. Good agreed to a stipulation in

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[190] *Id.* at 271.

[191] 405 N.E.2d 82 (Ind. Ct. App. 1980). *See* Archer, *Labor Law, 1981 Survey of Recent Developments in Indiana Law*, 15 IND. L. REV. 269, 287-88 (1981), for a thorough presentation of the factual background in *Bottoms*.

[192] 405 N.E.2d at 89 (citing Shaughnessey v. Jordan, 184 Ind. 499, 111 N.E. 622 (1916)).

[193] 405 N.E.2d at 89.

[194] *Id.* at 94-95.

[195] 416 N.E.2d 899 (Ind. Ct. App. 1981).

which the temporary restraining order was dissolved. In an appeal, Good argued that under Trial Rule 65(C) he should be allowed to collect attorney's fees despite the agreement dissolving the injunction.

The court of appeals held that a "voluntary dismissal *by a plaintiff* of an action in which a bond has been given and a temporary restraining order or an injunction has been obtained is considered to be a breach of the bond."[196] Under Indiana precedent such a dismissal is tantamount to a judicial determination that the plaintiff was not entitled to the equitable relief sought, and therefore the injunction was wrongfully granted.[197] However that may be, a dismissal of an action *by both parties* through an amicable and voluntary agreement is quite different. The court held that the agreement "does not operate as a confession of judgment by the plaintiff nor does it admit that the plaintiff had no right to the injunction."[198] Thus when there is an amicable and voluntary agreement of both parties, the defendant or the enjoined person waives his rights under the bond and any right of action based on a breach of the bond. The court of appeals concluded that the trial court properly dismissed Good's motion for an assessment of damages against the surety.

G. Appeals

1. Motion to Correct Error: Trial Rule 59.—This rule was substantially revised effective January 1, 1980.[199] The 1981 amendments restate and realign some of the sections of the rule without change in the meaning of the 1980 amendments. Perhaps the most significant realignment was to place the language of the 1980 version of the rule concerning the "Statement of Opposition to a Motion to Correct Error" in a separate paragraph. The purpose of this change, which appears in the 1981 version as Trial Rule 59(E), is to show that the statement of opposition to a motion to correct error is intended to be applicable to every situation in which a motion to correct error is made. Previously that provision was found in a paragraph which related to the denial of a motion to correct error, and it might have been read as being applicable only in that situation. It is not, however, and the statement of opposition applies to all motions to correct error if the party opposing that motion should choose to file a statement of opposition.

The statement in opposition was authoritatively interpreted in the decision of *Ralston v. State*.[200] In *Ralston*, the defendant filed a

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[196]*Id.* at 901 (emphasis in original).

[197]*Id.* (citing St. Joseph & Elkhart Power Co. v. Graham, 165 Ind. 16, 74 N.E. 498 (1905)).

[198]416 N.E.2d at 901.

[199]*See* Harvey, *1980 Survey*, *supra* note 98, at 171-89 for an extensive discussion of the 1980 revisions to Trial Rule 59.

[200]412 N.E.2d 239 (Ind. Ct. App. 1980).

motion to correct error to which the State did not respond in the trial court. On appeal the defendant principally argued that a motion to correct error is viewed as a "complaint on appeal" and that accordingly there must be an "answer" to that "complaint."

The court of appeals held that even though there is now an *opportunity* to respond to a motion to correct in the trial court pursuant to Trial Rule 59(E), it *is not mandatory* that the opponent to the motion respond.[201] Additionally, there is no "admission" when there is a failure to respond or file the statement in opposition.[202] The court of appeals also held that the motion to correct error "is clearly not a complaint in the literal sense as the term is used" in Indiana Trial Rule 7.[203]

The opinion in *Stanley v. Kelley*[204] is one of the clearest statements in Indiana's appellate literature on the trial court's function when a motion to correct error has been made after a judgment has been entered upon a jury verdict. In this case a judgment was entered for the plaintiff for approximately $130,000, which was set aside by the trial court as a jury verdict which was "clearly erroneous and not supported by the evidence."

The court of appeals stated that under Trial Rule 59(J)(7) (the opinion refers to Trial Rule 59(I)(j), the lettering used before the 1981 amendments), a trial court reviewing the evidence can respond in one of three ways:

> If the trial court determines the verdict is against the weight of the evidence, it shall grant a new trial, making special findings upon each material issue and relating the supporting and opposing evidence to each issue upon which a new trial is granted. If the trial court determines the verdict is clearly erroneous as contrary to or not supported by the evidence, it shall enter final judgment, specifying the . . . reasons therefor. If, however, the trial court, after finding the verdict clearly erroneous, determines that entry of final judgment would "be impracticable or unfair to any of the parties or is otherwise improper . . . ," it may grant a new trial, making special findings of fact upon each material issue and showing why judgment was not entered upon the evidence.[205]

The court then held that when a trial court is reviewing a motion for judgment on the evidence subsequent to a jury verdict and

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[201] *Id.* at 245.

[202] *Id.*

[203] *Id.*

[204] 417 N.E.2d 1145 (Ind. Ct. App. 1981), *appellate opinion on the merits*, 422 N.E.2d 663 (Ind. Ct. App. 1981).

[205] 417 N.E.2d at 1146.

the claim is that the verdict was clearly erroneous because not supported by the evidence, "it views only the evidence favorable to the non-moving party and the reasonable inferences to be drawn therefrom."[206] The trial court may not weigh the evidence, and it is clearly erroneous only if there is no substantial evidence or reasonable inference to be adduced therefrom to support an essential element of the claim. This means that the evidence must point unerringly to a conclusion not reached by the jury. The court of appeals also stated that the standard of appellate review of a trial court determination that the verdict is clearly erroneous is "identical to the standard of review guiding trial judges."[207]

The court also held that "[i]n reviewing a claim that the weight of the evidence preponderates against the jury's verdict, the trial judge sits as a 'thirteenth juror.' . . . If . . . the trial judge believes that a contrary result should have been reached in the minds of reasonable men, it should grant a new trial."[208] The case was remanded to the trial court for compliance with Trial Rule 59(I)(7) to show why the judgment was entered for defendant Kelley.

2. Finality of Judgments: Appealable Final Orders.—The opinion in *City of Evansville v. Miller*[209] concerned a class action filed against the City of Evansville in 1969. The action arose because of an amendment to its municipal code which concerned a refusal to collect trash and refuse from certain dwelling houses and apartments. A similar ordinance was held by the Indiana Supreme Court to improperly distinguish between commercial and non-commercial enterprises.[210] After that holding, the Warwick County Circuit Court entered a judgment on September 7, 1973, which in essence determined that the defendants were liable to the plaintiffs in the class action from and after March, 1969, when the action was filed. The City did not perfect an appeal from that entry because the City did not file a praecipe for an appeal.[211]

After the determination of liability was made, evidence was taken for the next four-and-a-half years and presented to a master to determine damages to the class. Damages were established at approximately $240,000 plus eight percent interest from 1973. On appeal the City attempted to raise questions concerning the liability side of the case, but the court of appeals refused to entertain that part of the appeal.

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[206]*Id.* at 1146-47.

[207]*Id.* at 1147.

[208]*Id.* (citation omitted).

[209]412 N.E.2d 281 (Ind. Ct. App. 1980).

[210]State *ex rel.* Miller v. McDonald, 260 Ind. 565, 297 N.E.2d 826 (1973), *cert. denied*, 414 U.S. 1158 (1973).

[211]IND. R. APP. P. 2(A) states that an appeal is initiated by filing with the clerk of the trial court a praecipe designating what is to be included in the record of the pro-

The appellate court held that the trial court's order, which determined liability and reserved until a later date a ruling on damages, became a final and appealable order at the time the City's motion to correct error was denied in 1973.[212] The City failed to perfect an appeal from that final and appealable order, and as a result the court of appeals declined to entertain the appeal on those issues. The appellate court also held that the requirements of Trial Rule 54(B) did not preclude this result because the rule deals with multiple claims and multiple parties. The court reasoned that in this class action there was essentially one issue, the liability of the City, and that once that liability was determined, it was appealable notwithstanding the future determination of damages.[213]

3. Damages for Vexatious Appeals: Appellate Rule 15(G).—The cases of *Sandock v. Taylor Construction Corp.*,[214] *Indiana Department of Public Welfare v. Rynard*,[215] and *Deetz v. McGowan*[216] all acknowledge the availability of the power of an appellate court to assess damages for frivolous appeals which is plainly established in Appellate Rule 15(G). In *Rynard*, the appellate court held that an appeal by the Department of Public Welfare was vexatious and frivolous and awarded damages in the amount of ten percent of the trial court's judgment of over $250,000 against the Department.[217]

In *Sandock*, the court of appeals also entered a judgment of ten percent of the judgment that was entered in the trial court.[218] *Sandock* was a case in which the court of appeals concluded that a defendant's refusal to pay upon a contract pursuant to which the plaintiff had fully performed, thus forcing the plaintiff to file an action to collect on the contract and allowing the defendant five years in which to avoid payment of the defendant's debt, was in bad faith.[219] Further, the court reasoned that there was no substance in the defendant's appeal which the court found was taken to harrass and to delay.[220] Upon those facts and with those findings, the court of appeals awarded a ten percent judgment based upon the amount of the trial court's judgment. It affirmed the trial court's judgment but modified it by the amount of the damages made pursuant to the finding and determination in the appellate court.

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ceedings. The praecipe shall be filed within thirty days after the trial court's ruling on the motion to correct errors or the right to appeal will be forfeited. Kelsey v. Nagy, 410 N.E.2d 1333 (Ind. Ct. App. 1980).

[212]412 N.E.2d at 284.

[213]*Id.*

[214]416 N.E.2d 882 (Ind. Ct. App. 1981).

[215]403 N.E.2d 1110 (Ind. Ct. App. 1980).

[216]403 N.E.2d 1160 (Ind. Ct. App. 1980).

[217]403 N.E.2d at 1113.

[218]416 N.E.2d at 866.

[219]*Id.*

[220]*Id.*

4. Appellate Court Jurisdiction: Appellate Rule 3(A).—A strong general principle in Indiana appellate practice is that the appellate court acquires jurisdiction of a case upon the filing of the record of proceedings and that the jurisdiction is to the exclusion of all further activity in the trial court.[221]

The case of *Donahue v. Watson*[222] is an exception to that general principle. There the trial court found that a defendant had committed a breach of trust and ordered the defendant removed as a trustee. The trial court stated that the defendant was liable to the beneficiaries for their attorney's fees, but no award of fees was included in the order. An appeal was taken. After the record of proceedings was on file in the appellate court, the trial court entered a second judgment, an order directing the defendant to pay $10,000 in attorney's fees incurred by the beneficiaries. On appeal the defendant argued that when the record of proceedings was filed, the trial court lost jurisdiction over the entire subject matter of the controversy pursuant to Appellate Rule 3(A).

The court of appeals held that generally this was correct, but that Appellate Rule 3(A) did not prevent the trial court from entering a judgment concerning attorney's fees because the "trial court impliedly reserved this ancillary matter until an evidentiary hearing could be conducted and a determination made as to what a reasonable fee would be."[223] The appellate court stated that it believed that this practice is contemplated in the language of Trial Rule 54(B) and concluded that the trial court retained a limited jurisdiction over the case to dispose of those claims left unresolved by the first judgment.[224]

5. Additional Appellate Rule Amendments in 1981.—During the past year, the Indiana Supreme Court amended Appellate Rule 8.1 to state that the failure of an appellant to timely file the appellant's brief, which shall be filed thirty days after the record of proceedings is filed, shall subject the appeal to summary dismissal.

Additionally, part (A) of the Appellate Rule 12 was amended as follows (the amendment is self-explanatory): "Papers required or permitted to be filed in a court of appeal shall be filed with the clerk in the manner prescribed in subdivision (C) below or by personally presenting the papers to the clerk or a person designated by the clerk."[225]

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[221]The principle of exclusive appellate court jurisdiction is a derivation of IND. R. APP. P. 3(A) which states that every appeal should be deemed submitted and the appellate court shall acquire jurisdiction on the date that the record of proceedings is filed with the clerk of the appellate court.

[222]413 N.E.2d 974 (Ind. Ct. App. 1980).

[223]*Id.* at 975-76.

[224]*Id.*

[225]IND. R. APP. P. 12.

APPENDIX

INDIANA JUDICIAL REPORT FOR 1980

TOTAL CASES FILED IN 1980

SUMMARY

	Circuit, Superior, Probate Courts	Marion Municipal Courts	County Courts & County Court Function	Total
Criminal	17,183	50,245	72,916	140,344
Re-Docketed Criminal	2,830	64	2,211	5,105
Juvenile	27,732	-0-	-0-	27,732
Civil (Plenary)	58,988	13,100	7,304	79,392
(Small Claims)	-0-	-0-	111,448	111,448
Re-Docketed Civil	16,880	11,081	48,294	76,255
Dissolution	49,132	-0-	-0-	49,132
Re-Docketed Dissolution	29,837	-0-	-0-	29,837
Probate/Adoption	21,799	-0-	-0-	21,799
Non-Felony Traffic	-0-	91,012	320,971	411,983
Guardianship	5,532	-0-	-0-	5,532
Other	10,793	2	5,950	16,745
TOTAL	240,706	165,504	569,094	975,304

APPENDIX

INDIANA JUDICIAL REPORT FOR 1980

TOTAL CASES FILED IN 1980

SUMMARY

	Circuit, Superior, Probate Courts	Marion Municipal Courts	County Courts & County Court Function	Total
Criminal	16,889	37,443	64,471	118,803
Re-Docketed Criminal	2,717	64	2,177	4,958
Juvenile	26,462	-0-	-0-	26,462
Civil (Plenary)	55,365	13,093	4,182	72,640
(Small Claims)	-0-	-0-	107,342	107,342
Re-Docketed Civil	13,353	8,037	36,260	57,650
Dissolution	48,053	-0-	-0-	48,053
Re-Docketed Dissolution	27,111	-0-	-0-	27,111
Probate/Adoption	21,743	-0-	-0-	21,743
Non-Felony Traffic	-0-	88,419	301,486	389,905
Guardianship	4,185	-0-	-0-	4,185
Other	9,194	5	5,174	14,373
* TOTAL	225,072	147,061	521,092	893,225

* This includes Venued Out cases.

APPENDIX

INDIANA JUDICIAL REPORT FOR 1980

1980 METHOD OF DISPOSITION SUMMARY

	Circuit, Superior, Probate Court	Marion Municipal Courts	County Courts & County Court Function	Total
Jury Trial				
Criminal	1,039	86	167	1,292
Civil (Plenary)	646	36	22	704
(Small Claims)	-0-	-0-	-0-	-0-
Other	49	24	70	143
Bench Trials				
Criminal	1,388	7,080	7,837	16,305
Civil (Plenary)	11,235	1,093	787	13,115
(Small Claims)	-0-	-0-	20,818	20,818
Re-Docketed Civil	4,883	5,335	18,630	28,848
Dissolution	32,393	-0-	-0-	32,393
Non-Felony Traffic	-0-	2,068	10,126	12,194
Other	57,198	50	4,603	61,851
Settled	12,609	661	22,280	35,550
Plea	15,743	64,305	128,777	208,825
Dismissed	52,069	49,424	70,448	171,941
Default	20,505	8,570	46,649	75,724

Traffic Violations Bureau	-0-	6,985	172,164	179,149
Transferred Out	1,330	-0-	2,971	4,301
Venued Out	5,644	76	406	6,126
Closed	7,498	-0-	-0-	7,498
Other	843	1,268	5,524	7,635
Failed to Appear	-0-	-0-	8,813	8,813
TOTAL	225,072	147,061	521,092	893,225