III. Civil Procedure and Jurisdiction

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A. Introduction

This Survey Article is limited to a discussion of those cases and amendments to trial rules which were distinctive in the year reviewed.[1] During the survey period, the Indiana Supreme Court decided a case of extraordinary significance concerning the relationship between Trial Rules 59 and 60. Pursuant to its inherent rule-making authority, the Indiana Supreme Court amended the following rules effective January 1, 1983: Trial Rules 53.1, 53.2, 53.3, 53.4, and 53.5 and Small Claims Rule 8(C).

B. Jurisdiction, Process, and Venue

1. Personal Jurisdiction.—In *Tietloff v. Lift-A-Loft Corp.*,[2] an Arkansas resident sought to enforce an Arkansas default judgment against Lift-A-Loft, an Indiana corporation. Lift-A-Loft collaterally attacked the

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[1]Although a review of the Federal Rules of Civil Procedure is beyond the scope of this Article, significant amendments to these rules were made during the survey period. Federal Rule of Civil Procedure 4 was amended effective February 26, 1983. *See* Sinclair, *New Act Makes Drastic Shifts In Federal Service of Process*, Nat'l L.J., Mar. 7, 1983, at 20, col. 3. Additionally, the United States Supreme Court promulgated amendments to the following Federal Rules of Civil Procedure effective August 1, 1983: 6, 7, 11, 16, 26, 52, 53, 67, 72, 73, 74, 75, and 76. For a brief review of the legislative history of these amendments, see Harvey, *Rules, Rulings for the Trial Lawyer*, 27 RES GESTAE 176, 176-77 (1983).

In addition, practitioners are advised to take special note of two cases decided after the survey period, Mennonite Bd. of Missions v. Adams, 103 S. Ct. 2706 (1983), and Hughes v. County of Morgan, 452 N.E.2d 447 (Ind. Ct. App. 1983). In *Mennonite Bd.*, the United States Supreme Court addressed the constitutional adequacy of notice of a proceeding to sell mortgaged property for nonpayment of taxes. Reversing the Indiana Court of Appeals, the Court held that the mortgagee is entitled to personal service or notice by mail. 103 S. Ct. at 2712. In *Hughes*, the Indiana Court of Appeals dismissed an appeal because the appellant failed to meet the Appellate Rule 2(C) time limits for the filing of a praecipe and a submission for pre-appeal conference. The court declared that as of July 1, 1983, the rule would be strictly enforced. 452 N.E.2d at 447. Appellate Rule 2(C), which applies only to appeals taken to the court of appeals, provides that upon the filing of a praecipe with the clerk of the trial court, the appellant shall have ten days in which to file a copy of the praecipe, the motion to correct errors and the ruling thereon, a statement of the nature of the case, and the judgment. The sanctions for failure to comply with this rule include assignment of attorney fees and costs or other appropriate action. *See* IND. R. APP. P. 2(C).

[2]441 N.E.2d 986 (Ind. Ct. App. 1982).

validity of the Arkansas judgment contending that the Arkansas state court lacked personal jurisdiction over it.[3] In construing Arkansas' long-arm statute, the court decided that the focus for determining minimum contacts should be on the contractual claim,[4] as opposed to the alleged tort,[5] which occurred in Indiana.[6] After examining Lift-A-Loft's course of conduct relating to the transaction underlying the lawsuit, the court concluded that Lift-A-Loft had sufficient minimum contacts with Arkansas to satisfy due process.[7] Therefore, the assertion of personal jurisdiction by the Arkansas state court over the Indiana corporation was not inconsistent with fair play and substantial justice.

Additionally, the court noted that Trial Rule 8(C) places the burden of proving by a preponderance of the evidence the affirmative defense of lack of personal jurisdiction on the defendant.[8] In short, Lift-A-Loft was required to prove that it had insufficient contacts with Arkansas to support the Arkansas court's assertion of personal jurisdiction. Applying minimum contacts analysis, the court of appeals held that Lift-A-Loft failed to meet that burden.[9]

2. Service of Process.—The requirements for service of process were clarified by several decisions during the survey period.[10]

The court of appeals considered an issue which had not been specifically addressed at the appellate level since 1854. In *Idlewine v. Madison County Bank & Trust Co.*,[11] the trial court refused to set aside a default judgment and a foreclosure sale in an action taken against a husband and wife. The issue on appeal was whether service of process was adequate when the wife was not served.

The appellee bank had brought suit to foreclose a mortgage on property owned by the husband and wife as tenants by the entireties. The clerk of the trial court issued a joint summons addressed to the husband

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[3]*Id.* at 988. Negotiations between the parties took place in Arkansas with an oral agreement being made either in Arkansas or Tennessee. Lift-A-Loft sent a letter to Tietloff in Arkansas arranging to pick up Tietloff's forklift. Thereafter, a Lift-A-Loft employee entered Arkansas to transport the forklift to Indiana for evaluation. Additionally, Lift-A-Loft paid for the return shipment of the forklift back to Arkansas. *Id.* at 987.

[4]The contractual claim alleged breach of the oral agreement between the parties, which included an obligation on Lift-A-Loft's part to exercise ordinary care and diligence in the maintenance of the plaintiff's property and to return it in good condition. *Id.* at 990.

[5]The tort claim was based on negligence in storing and caring for Tietloff's forklift. *Id.* at 988.

[6]*Id.* at 988 n.2.

[7]*Id.* at 990-91.

[8]*Id.* at 988. For further discussion of Trial Rule 8(C), see *infra* notes 29-36 and accompanying text.

[9]441 N.E.2d at 988.

[10]In addition to the cases discussed *infra*, see Greene v. Lindsey, 456 U.S. 444 (1982), and Bowmar Instrument Corp. v. Maag, 442 N.E.2d 729 (Ind. Ct. App. 1982) (service of process needed to acquire jurisdiction over a garnishee).

[11]439 N.E.2d 1198 (Ind. Ct. App. 1982).

and wife which was returned unclaimed.[12] A subsequent alias joint summons was then issued. One copy of the alias joint summons was delivered to the residence and one copy was sent by first class mail to the residence pursuant to Trial Rule 4.1(B). The husband received both summons and concealed them from his wife.[13]

The court of appeals, relying on *Hutchens v. Latimer*,[14] held that personal jurisdiction may not be acquired over a person unless and until a copy of the summons is properly served upon *that* person, or that person makes an appearance.[15] Specifically, one copy of a joint summons delivered to the residence where two parties to the suit reside, does not constitute proper service.[16]

The court also held that the saving effect of Trial Rule 4.15(F) is inapplicable when there is no notice or service upon the person or his agent.[17] No notice or service was effected upon the wife in this case. Thus, the clear implication of this case is that each defendant in a case shall be served and the person seeking service shall furnish the clerk with the requisite number of copies of the complaint and summons to effectuate individual service.

3. Venue.—In *Duncan v. Rogers*,[18] the court of appeals affirmed the trial court's refusal to transfer for improper venue. The plaintiff brought a tort action alleging that he had been assaulted and injured in Pike County during a teachers union bargaining session. Plaintiff, a resident of Henry County, commenced the action in Henry County. The defendants filed a motion to transfer for improper venue. The motion was supported by an affidavit which stated that most of the witnesses resided in Pike County, and only the plaintiff resided in Henry County.[19] The court of appeals held that both Pike and Henry Counties qualified as counties where the action could be commenced.[20]

Generally, Trial Rule 75(A)(5) provides that an action against a governmental organization may be brought in the county where the plaintiffs reside, where the governmental organization is located, or where the claim arose. In essence, the defendants were asking the court to "engraft upon the rule a further provision which would require the court to transfer the case, as between qualifying counties, to the most convenient forum in terms of the overall litigation."[21] The court declined to do so and concluded that venue was proper in Henry County.

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[12] *See* IND. R. TR. P. 4.11.
[13] 439 N.E.2d at 1200.
[14] 5 Ind. 67 (1854).
[15] 439 N.E.2d at 1201.
[16] *See* IND. R. TR. P. 4.1.
[17] 439 N.E.2d at 1201.
[18] 444 N.E.2d 1255 (Ind. Ct. App. 1983).
[19] *Id.* at 1256.
[20] *Id.* at 1257.
[21] *Id.* Examining Trial Rule 4.4(C), the court also noted that no injustice resulted from

The case of *In re Goetcheus*[22] illustrates the effect of a motion for a change of judge under Trial Rule 76. In this case, a bank, as guardian for an individual, filed a change of venue from the judge after an intervenor's motion on objections to the bank's final report.[23] The court of appeals noted that a petition to remove a guardian has been expressly recognized as a civil action which entitles the guardian to seek a change of venue from the judge. Additionally, Trial Rule 76, in conjunction with Indiana Code section 34-2-12-1, provides for an automatic change of venue when the time limitations are satisfied.[24]

The court of appeals concluded that the trial court erred in refusing to grant the motion for change of venue and that it was divested of power to continue with the proceedings.[25] Accordingly, the court reversed, with instructions to sustain the motion for change of venue.

The Indiana Supreme Court in *State ex rel. First State Bank v. Porter Superior Court*[26] decided that multiple parties on one side of a lawsuit are not individually and independently entitled to an automatic change of venue under Trial Rule 76. After one of several defendants obtained a change of venue, the co-defendants applied for a second change of venue.[27] The court construed Trial Rule 76 as granting an automatic change of venue to a party, with co-parties considered as one party. The limit to one change of venue applies to all of the litigants on a side, not to each individual litigant.[28] Therefore, the co-defendants were not entitled to a second change of venue.

C. Pleadings and Pre-Trial Motions

1. Trial Rule 8(C): Affirmative Defenses.—In *Indiana Bell Telephone Co. v. Mygrant*,[29] the Indiana Court of Appeals considered whether a general release executed without knowledge of the existence or severity of injuries is binding. Indiana Bell argued that Mygrant abandoned any claim for personal injuries when he executed the agreement. Further, it contended that the effect of the release is a question of law and that the law required that summary judgment be granted in favor of Indiana Bell.[30]

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the trial court's refusal to transfer the case pursuant to the doctrine of forum non conveniens. *Id.* at 1258.

[22]446 N.E.2d 39 (Ind. Ct. App. 1983).

[23]*Id.* at 40.

[24]*Id.* at 41.

[25]*Id.* at 42.

[26]447 N.E.2d 568 (Ind. 1983).

[27]*Id.*

[28]*Id.* at 569. The decision in *First State Bank* does not affect the rule of State *ex rel.* Crane Rentals, Inc. v. Madison Superior Court, 266 Ind. 612, 365 N.E.2d 1224 (1977). In *Crane*, a second automatic change of venue was available where a second generation of defendants was added at a subsequent time.

[29]441 N.E.2d 481 (Ind. Ct. App. 1982).

[30]*Id.* at 483.

Conversely, Mygrant maintained that he had a viable cause of action for personal injury because the release was based on mutual mistake because both parties were unaware of Mygrant's personal injuries.[31] Mygrant requested rescission of the release or, alternatively, a narrow construction of the release as applying only to his property damages, not his personal injury damages.[32]

After considering pertinent case law and commentary, the court expanded "pure" contract law on mutual assent to consider the intent of the parties.[33] The court concluded that the parties' intent that the release be in full satisfaction of the injured party's claim should be treated as a question of fact to be ascertained from all the surrounding circumstances; therefore, summary judgment was inappropriate.[34] The court then enumerated several pertinent factors to be considered in determining the validity and extent of a release.[35]

While the majority of the court would look to the circumstances surrounding the settlement and release to determine actual mutual assent based on the intent of the parties, the dissent insisted that this approach undermines the purpose of a release—compromise and settlement. Instead, the dissent focused on determining whether there was a mutual mistake by the parties. Accordingly, once that determination is made, the validity of the release is a question of law.[36]

2. Defense to Actions: Prematurity.—In *Mattingly v. Whelden*,[37] the plaintiff filed an action for malicious prosecution on the same day a timely appeal of the underlying cause was perfected. The defendants' motion for summary judgment was granted because the malicious prosecution action had not matured.[38]

Prior to the adoption of the Indiana Rules of Trial Procedure, a premature action was attacked by a plea in abatement.[39] Trial Rule 7(C), which specifically abolished pleas in abatement, provides that "[a]ll objections and defenses formerly raised by such motions shall now be raised pursuant to Rule 12."[40] Because a premature action is not one of the defenses enumerated in Trial Rule 12(B),[41] it must be raised in a responsive pleading or by means of a summary judgment motion[42] as in this case.

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[31] *Id.*

[32] *Id.*

[33] *Id.* at 486, 487.

[34] *Id.* at 487.

[35] *Id.*

[36] *Id.* at 488-89 (Hoffman, J., dissenting).

[37] 435 N.E.2d 61 (Ind. Ct. App. 1982).

[38] *Id.* at 62.

[39] *See* Middaugh v. Wilson, 30 Ind. App. 112, 65 N.E. 555 (1902).

[40] IND. R. TR. P. 7(C).

[41] Of course, certain affirmative defenses listed in Trial Rule 8(C) may be raised under Trial Rule 12(B)(6). *See, e.g.*, Lacey v. Morgan, 152 Ind. App. 119, 282 N.E.2d 344 (1972) (statute of frauds); American States Ins. Co. v. Williams, 151 Ind. App. 99, 278 N.E.2d 295 (1972) (statute of limitations).

[42] IND. R. TR. P. 56.

Because the defense of prematurity does not concern the merits of a claim,[43] it is not a defense with res judicata effect.[44] Therefore, a judgment of dismissal based upon the prematurity of the asserted claim will not bar a timely action if a claim subsequently matures.

3. Trial Rule 15: Amended and Supplemental Pleadings.—a. Amendments.—The decision in *Cato v. David Excavating Co.*[45] illustrates the substantial authority of a trial court to permit amendments to pleadings. The Indiana Supreme Court has previously declared that judicial policy in Indiana favors amendments to pleadings, regardless of context, and such amendments shall be made unless the opposing party shows that harm or prejudice will result.[46] In *Cato*, the trial court permitted the plaintiffs to answer a defendant's counterclaim on the day of trial. The counterclaim was filed in January, 1979, and trial occurred in 1981. On the day of trial, before evidence was introduced, defense counsel asked that all matters in the counterclaim be admitted. In response, the plaintiff's counsel asked the trial court to accept an oral denial of the counterclaim, which the trial court did.[47]

On appeal this procedure was affirmed as being consistent with Trial Rule 15(A) and compatible with Trial Rule 6(B)(2), which permits the court to grant extensions for responsive pleadings. Specifically, the court concluded that there was no showing of reversible error.[48]

b. Relation back of amendments.—In *Lamberson v. Crouse*,[49] the plaintiff amended a complaint to add another defendant after the two-year statute of limitations had run, which was shown on the face of the amended complaint. The plaintiff contended that the amendment was timely under Trial Rule 15(C); however, the trial court dismissed the amended complaint on a Trial Rule 12(B)(6) motion for failure to state a claim.[50] On appeal the court of appeals stated that as long as the named party or parties differ in any form after the amendment, then it is an amendment "changing the party" under Trial Rule 15(C).[51] The court found that the three conditions[52] for changing the party against whom

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[43]RESTATEMENT (SECOND) OF JUDGMENTS § 20 (1982).

[44]*See* Kirkpatrick v. Stingley, 2 Ind. 269, 273 (1850); *see also* Powers v. Ellis, 231 Ind. 273, 277, 108 N.E.2d 132, 134 (1952).

[45]435 N.E.2d 597 (Ind. Ct. App. 1982).

[46]*See, e.g.*, Criss v. Bitzegaio, 420 N.E.2d 1221, 1223 (Ind. 1981); Huff v. Travelers Indemnity Co., 266 Ind. 414, 419, 363 N.E.2d 985, 989 (1977); *see also* State Farm Mutual Automobile Ins. Co. v. Shuman, 175 Ind. App. 186, 192-93, 370 N.E.2d 941, 948 (1977). This judicial policy encourages litigants to bring all matters before the court. *See* Cox v. Indiana Subcontractors Ass'n, 441 N.E.2d 222, 225 (Ind. Ct. App. 1982).

[47]435 N.E.2d at 600.

[48]*Id.* at 602.

[49]436 N.E.2d 104 (Ind. Ct. App. 1982).

[50]*Id.* at 105.

[51]*Id.* at 106.

[52]The conditions are:

(1) [T]he claim asserted in the amended claim arose out of the conduct,

a claim is asserted, listed in Trial Rule 15(C), were present in this case; therefore, the amendment related back to the date of the original claim.[53]

Alternatively, the Trial Rule 12(B)(6) motion to dismiss was improper because "[w]hen no evidence has been heard or no affidavits have been submitted, a 12(B)(6) motion should be granted only where it is clear from the *face* of the complaint that under no circumstances could relief be granted."[54] Although the face of the amended complaint indicated that the action was filed more than two years after the occurrence, a 12(B)(6) motion was inappropriate because it was not certain that the statute of limitations was a defense. Thus, the proper mechanism to challenge the amended complaint would be a summary judgment motion, or a 12(B)(6) motion to dismiss supplemented with affidavits or other materials which would convert the motion into a summary judgment motion.

4. Trial Rule 41: Dismissal of Actions.—a. Pre-dismissal hearing.— The Indiana Supreme Court, in *Rumfelt v. Himes*,[55] emphasized that Trial Rule 41(E) clearly requires a pre-dismissal hearing.[56] The trial court dismissed the plaintiff's action without a hearing for failure to comply with the rules of civil procedure and the court's orders.[57] The supreme court concluded that the court of appeals erred in affirming the trial court based on Trial Rule 73, and vacated the opinion.[58]

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transaction, or occurrence set forth in the original claim, and

(2) within the statute of limitations for the claim the party brought in by the amendment

a. received such notice of the institution of the action he will not be prejudiced in maintaining a defense on the merits, and

b. knew or should have known but for a mistake concerning identity of the proper party, the action would have been brought against him.

436 N.E.2d at 105-06 (citing IND. R. TR. P. 15(C)).

[53]436 N.E.2d at 106. Another case decided during the survey period, Klingbeil Co. v. Ric-Wil, Inc., 436 N.E.2d 843 (Ind. Ct. App. 1982), presented a similar statute of limitations problem. However, the parties were clearly in the case before the limitations claim or a statute of limitations bar to the action arose.

[54]State v. Rankin, 260 Ind. 228, 231, 294 N.E.2d 604, 606 (1973), *appeal after remand*, 160 Ind. App. 703, 313 N.E.2d 705 (1974).

[55]438 N.E.2d 980 (Ind. 1982).

[56]Trial Rule 41 (E) provides in part:

Whenever there has been a failure to comply with these rules or when no action has been taken in a civil case for a period of sixty [60] days, the court, on motion of a party or on its own motion shall order a hearing for the purpose of dismissing such case.

The *Rumfelt* decision was followed in Yaksich v. Gastevich, 440 N.E.2d 1138 (Ind. Ct. App. 1982). In *Yaksich*, the trial court dismissed the action because the plaintiff failed to amend the complaint pursuant to an order for a more definite statement. The court of appeals reversed pursuant to Trial Rule 41(E), for failure to provide the plaintiff a mandatory hearing on the motion to dismiss. The dismissal of an action pursuant to Trial Rule 41(E) is with prejudice unless the court's order states otherwise. *See, e.g.*, Davidson v. American Laundry Machinery, 431 N.E.2d 546 (Ind. Ct. App. 1982).

[57]438 N.E.2d at 982.

[58]*Id.* at 984.

Trial Rule 73, which allows the trial court to expedite its business by directing the submission and determination of a motion without an oral hearing, is "a statement of policy by the [Indiana] Supreme Court and not a license to avoid and circumvent the clear, explicit mandates of its rules which are designed to assure justice to the parties."[59] Trial Rule 41(E), explicitly requiring a hearing on a motion to dismiss, controls over a general rule (Trial Rule 73) on the same subject. The dissenting opinion in *Rumfelt* stated that the lower courts should not be overruled because the plaintiff had an opportunity to be heard by submitting pleadings in opposition to the trial court's proposed action.[60]

b. Reinstatement.—In *Lyerson v. Hogan*,[61] the court of appeals addressed the issue of whether a party is entitled to notice of a motion to reinstate after a Trial Rule 41(E) dismissal when that party had not appeared in the action but did have a meritorious defense. The action was commenced in 1973, and the defendant was duly served. The defendant did not appear or plead until 1981. However, in 1975 the action was placed on the call docket and dismissed pursuant to Trial Rule 41. The action was then reinstated by the plaintiff on oral motion. No notice of the reinstatement action was sent to the defendant. A default judgment was entered against the defendant and proceedings supplemental were instituted in 1981.[62]

The court of appeals held that the defendant was not entitled to notice of the motion to reinstate under Trial Rules 41(E) and (F) because those rules did not so provide.[63] The court further observed that notice under Trial Rule 55(B) is required only when the party against whom judgment by default is sought has appeared in the action.[64] Additionally, the court held that a good defense does not alone entitle the defendant to relief from the default, and that presentation of Trial Rule 60(B) grounds to set aside the judgment in the first instance must also be shown.[65]

5. Trial Rule 56: Summary Judgment.—a. Supporting materials.— Several cases decided during the survey period address the problem of materials which must support a motion for summary judgment. In *Freson v. Combs*,[66] the court of appeals discussed the adequacy of supporting affidavits and other materials for a summary judgment motion. The defendant moved for summary judgment but failed to support the motion with affidavits, a transcript, or other evidentiary materials as contemplated by

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[59]*Id.* at 983 (quoting Rumfelt v. Himes, 427 N.E.2d 470, 474 (Ind. Ct. App. 1981) (Staton, J., dissenting), *vacated*, 438 N.E.2d 980 (Ind. 1982)).

[60]438 N.E.2d at 984 (Prentice, J., dissenting).

[61]441 N.E.2d 683 (Ind. Ct. App. 1982).

[62]*Id.* at 684-85.

[63]*Id.* at 686.

[64]*Id.*

[65]*Id.* at 687.

[66]433 N.E.2d 55 (Ind. Ct. App. 1982).

Trial Rules 56(C) and (E). One issue sought to be raised in the motion was the defense of res judicata.[67] The court of appeals stated that the failure to support a motion for summary judgment based upon the defense of res judicata with a certified transcript of the prior judgment is fatal, even though the attorney for the moving party filed an affidavit to that effect.[68] The court observed that materials submitted in support of a motion for summary judgment must be in the form intended, and that unsworn commentary by an attorney does not comply with the rule and will not be considered by the court.[69] Further, a brief filed in support of a summary judgment motion does not comply with the rule, and will not be considered,[70] nor will other unsworn statements or uncertified exhibits qualify.[71]

Only when a motion for summary judgment is supported by an affidavit made on personal knowledge setting forth facts which are admissible into evidence and affirmatively showing that the affiant is competent to testify to matters therein must the adverse party respond by an affidavit setting forth facts to the contrary in order to establish the existence of a genuine issue for trial.[72] Similarly, the court in *Coghill v. Badger*[73] held that affidavits used pursuant to Trial Rule 56(E) should present admissible evidence.[74] Recognizing federal court precedents, the court of appeals further held that the affidavits should follow substantially the same form as if the affiant were giving testimony in court,[75] and portions of affidavits which set forth conclusory facts or conclusions of law cannot be used to support or oppose a motion for summary judgment.[76] The court observed that a trial court must disregard, in a judgment matter, any inadmissible information in the affidavits.[77]

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[67] *Id.* at 58-59.

[68] *Id.* at 59 (citing Lukacs v. Kluessner, 154 Ind. App. 452, 290 N.E.2d 125 (1972)).

[69] 433 N.E.2d at 59 (citing Swartzell v. Herrin, 144 Ind. App. 611, 248 N.E.2d 38 (1969)).

[70] 433 N.E.2d at 59 (citing Schill v. Choate, 144 Ind. App. 543, 247 N.E.2d 688 (1969)).

[71] 433 N.E.2d at 59 (citing Pomerenke v. National Life & Accident Ins. Co., 143 Ind. App. 472, 241 N.E.2d 390 (1968); 3 W. HARVEY, INDIANA PRACTICE § 56.5, at 556 (1970)).

[72] 433 N.E.2d at 59.

[73] 430 N.E.2d 405 (Ind. Ct. App. 1982).

[74] *Id.* at 406. *See also* Carroll v. Lordy, 431 N.E.2d 118 (Ind. Ct. App. 1982) (conclusions and opinion are no longer per se excluded at trial or in affidavits submitted with a motion for summary judgment; therefore, the trial court has discretion to permit such evidence).

[75] 430 N.E.2d at 406 (citing Jameson v. Jameson, 176 F.2d 58, 60 (D.C. Cir. 1949); Universal Film Exchanges, Inc., 37 F.R.D. 4 (S.D.N.Y. 1965); Seward v. Nisson, 2 F.R.D. 545 (D. Dela. 1942)).

[76] 430 N.E.2d at 406 (citing Bsharah v. Eltra Corp., 394 F.2d 502 (6th Cir. 1968); Algear v. United States, 252 F.2d 519 (5th Cir. 1958); 10 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2738 (1973)).

[77] 430 N.E.2d at 407.

b. Creation of factual issues.—The Indiana Supreme Court, in *Gaboury v. Ireland Road Grace Brethren, Inc.*,[78] addressed a question of first impression, whether a trial court may assess a witness' credibility on a motion for summary judgment.[79] The plaintiff commenced a tort action to recover for injuries sustained in a motorcycle accident which occurred when the plaintiff entered a driveway owned by defendant church and struck a cable. The plaintiff's deposition indicated that he was aware of or knew of the church property and intended to turn there. However, in an affidavit opposing defendant's motion for summary judgment, the plaintiff stated that he could not ascertain where the end of the road was located and that he was not aware he had entered the church property.[80]

The specific issue presented was whether an issue of fact was created when the plaintiff's affidavit differed from statements made in his deposition, thus preventing the entry of summary judgment for the defendant. The supreme court held that issues of fact cannot be created in this manner, stating that "contradictory testimony contained in an affidavit of the nonmovant may not be used by him to defeat a summary judgment motion where the only issue of fact raised by the affidavit is the credibility of the affiant."[81]

c. Procedural requirements.—In *Midwest National Gas Corp. v. Locke Stove Co.*,[82] the trial court entered summary judgment in favor of one defendant without setting a time for hearing on the motion. One of the issues raised on appeal was whether the trial court erred in not setting a time for hearing as required by Trial Rule 56(C).[83]

The appellee argued that no error could be raised because the plaintiff failed to request a hearing on the motion as required by the Clark Circuit Court local rules.[84] The court of appeals held that the local rule was inconsistent with Trial Rule 56(C) and that under Trial Rule 81, as recently interpreted in *Otte v. Tessman*,[85] local courts cannot have rules inconsistent with the Indiana Rules of Trial Procedure.[86]

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[78]446 N.E.2d 1310 (Ind. 1983).

[79]*Id.* at 1314.

[80]*Id.* at 1312.

[81]*Id.* at 1314 (quoting Wachovia Mortgage Co. v. Autry-Barker-Spurrier Real Estate, Inc., 39 N.C. App. 1, 8, 249 S.E.2d 727, 732 (1978)).

[82]435 N.E.2d 85 (Ind. Ct. App. 1982).

[83]*Id.* at 86.

[84]*Id.* at 86-87.

[85]426 N.E.2d 660 (Ind. 1981). For a full discussion of the case, see Harvey, *Civil Procedure and Jurisdiction, 1982 Survey of Recent Developments in Indiana Law*, 16 IND. L. REV. 57, 66 (1983).

[86]435 N.E.2d at 87. *See also* Armstrong v. Lake, 447 N.E.2d 1153 (Ind. Ct. App. 1983) (Marion County Local Rule 14(A), requiring a six-person jury, is contrary to Trial Rule 48, allowing juries of less than twelve persons). The legislature recently enacted a provision which provides for a six-member jury in all civil cases. *See* IND. CODE § 34-1-20.5-1 (Supp. 1983).

D. Parties and Discovery

1. Trial Rule 23: Class Actions.—The Indiana Supreme Court expansively interpreted the trial court's authority to superintend a class action under Trial Rule 23 in *State ex rel. Harris v. Scott Circuit Court*.[87] The specific question raised was whether a trial court has discretionary authority under Trial Rule 23 to appoint counsel to represent absent class members. The case arose in an original action seeking a mandate and prohibition against a trial court which the Indiana Supreme Court denied.

Relying on cases interpreting Federal Rule 23,[88] the court held that the trial judge has wide discretion to assure adequate representation. Thus, a trial court may appoint separate counsel to protect the interests of absent class members and may also appoint additional counsel to represent the interests of subclasses in a class action litigation.[89] Therefore, the supreme court sustained the appointment of counsel to represent approximately 7,000 absent class members over the objection of counsel who represented the nine named plaintiffs.[90]

2. Trial Rule 24: Intervention Requirement.—In *Hepp v. Hammer*,[91] the court of appeals considered whether a nonparty may appear and defend on behalf of a named defendant, that is, whether a nonparty to an action may enter a special appearance to challenge the trial court's jurisdiction over the named defendant. In this medical malpractice action, counsel for the defendant's insurance carrier entered a special appearance solely for the purpose of quashing the summons by publication and dismissing the cause, which the trial court permitted.[92] The court of appeals reversed, pointing out that the attorney entered an appearance for the insurance company, rather than on behalf of the defendant, that his representation did not change, and that the insurance company was not a party to the case.[93]

The court noted that the trial rules provide only one method by which a nonparty may become an active litigant in an action, which method is established in Trial Rule 24.[94] A nonparty cannot appear and defend

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[87]437 N.E.2d 952 (Ind. 1982).

[88]In Skalbania v. Simmons, 443 N.E.2d 352, 357 (Ind. Ct. App. 1982), the court stated that federal cases decided under Federal Rule 23 are persuasive authority in interpreting Trial Rule 23.

[89]437 N.E.2d at 953 (citing Cullen v. New York State Civil Service Comm'n, 566 F.2d 846 (2d Cir. 1977); Howard v. McLucas, 87 F.R.D. 704 (M.D. Ga. 1980); Esler v. Northrop Corp., 86 F.R.D. 20 (W.D. Mo. 1979); Armstrong v. O'Connell, 416 F. Supp. 1325 (E.D. Wis. 1976); 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1765 (1972)).

[90]437 N.E.2d at 954.

[91]445 N.E.2d 579 (Ind. Ct. App. 1983).

[92]*Id.* at 580-81.

[93]*Id.* at 581.

[94]*Id.*

without any other showing in the record.[95] The insurance company did not file a petition to intervene in the case. Thus, the trial court erred in not sustaining the plaintiff's motion to strike the insurance company's appearance and all the pleadings.[96]

3. Discovery Rules.—a. Trial Rule 30: Deposition on oral examination.—i. Attorney's deposition. In a will contest action, *In re Estate of Niemiec*,[97] the court of appeals considered whether an attorney who had formerly represented one of the parties could be required to give deposition testimony involving the testator's affairs. The trial court entered a protective order under Trial Rule 26(C) against the taking of the deposition. The court of appeals reversed the trial court on that issue, holding that the attorney was obliged to give deposition testimony under Trial Rules 30 and 45, even though the client was a party to the litigation.[98] The court noted that Indiana Code section 34-1-14-5[99] and Disciplinary Rule 4-101(B)[100] do not prohibit taking an attorney's deposition. Rather, an attorney must simply refrain from testifying during his deposition as to confidential communications and advice given to clients.[101] Additionally, a party is not required to show good cause for taking an attorney's deposition; good cause is only required under Trial Rule 26 for the issuance of a protective order.[102]

ii. Notice. In the criminal case of *Ryan v. State*,[103] the prosecution argued against the admission of a deposition into evidence because the State was not given a reasonable opportunity to be present when the deposition was taken. The State argued that only twenty-seven hours notice

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[95]The court reiterated the meaning of an amicus curiae appearance in Indiana. The court observed that an amicus is an advisor to the court, is not a party to the suit, and has no control over it. The amicus has no rights in the matter and cannot file a pleading or a motion of any kind, cannot reserve or make an exception to any ruling of the trial court, and cannot prosecute an appeal. In short, according to Indiana law, an amicus curiae can do nothing other than give advice to the court, and no party to the action has a cause to complain if the court grants to this stranger the privilege of being heard, because no action of the amicus can affect the legal rights of the party to the action. *Id.* at 581-82.

[96]*Id.* at 582.

[97]435 N.E.2d 570 (Ind. Ct. App. 1982).

[98]*Id.* at 572.

[99]IND. CODE § 34-1-14-5 (1982) provides in pertinent part: "The following persons shall not be competent witnesses: . . . Attorneys, as to confidential communications made to them in the course of their professional business, and as to advice given in such cases."

[100]MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(B) provides:

Except when permitted under DR 4-101(C), a lawyer shall not knowingly:

(1) Reveal a confidence or secret of his client.

(2) Use a confidence or secret of his client to the disadvantage of the client.

(3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

[101]435 N.E.2d at 572.

[102]*Id.*

[103]431 N.E.2d 115 (Ind. 1982).

was given for the taking of the deposition in Tennessee, which was insufficient.[104]

The supreme court agreed and held that twenty-seven hours notice of a deposition to be taken in Tennessee is not reasonable notice as required by Trial Rule 30(B).[105] The court stated that the party entitled to notice of a deposition must have time to make arrangements for traveling to the place of the deposition and to seek a protective order if necessary.[106] Such time was not afforded here, and the court concluded that the trial court did not abuse its discretion in barring the use of the deposition.

In *Front v. Lane*,[107] neither the defendant nor the defense counsel appeared for a deposition taken in the case. At least one week before the scheduled deposition, the defendant was informed of the proposed deposition by his attorney. The defense attorney withdrew from the case before the deposition, so the plaintiff's attorney sent written notice of the deposition directly to the defendant. The notice, however, was not received until after the deposition was taken.[108]

The defendant later argued that the plaintiff should not have been permitted to use the deposition at trial because the defendant did not personally receive prior written notice. The court of appeals disagreed, holding that it would reverse a trial court's admission of a deposition only for an abuse of discretion.[109] The court also observed that the defendant did not deny that he had actual notice at least one week before the deposition was taken.[110] The defendant could not allege or prove that he was misled even though Trial Rule 30(B)(1) requires reasonable written notice to each party of the taking of a deposition. The court observed that the purpose of the discovery rules, allowing liberal discovery procedure, was accomplished and held that the trial court did not err in admitting the deposition.[111]

b. Trial Rule 32: Use of deposition in court proceedings.—The decision in *City of Indianapolis v. Swanson*[112] addressed the meaning of the phrase "managing agent" in Trial Rule 32(A)(2). The defendant City objected because the plaintiff did not show that the witness was a managing agent under this trial rule or was unavailable for trial. The court of appeals stated that the pertinent inquiry to determine whether a person serves as a managing agent for a deposition is not the person's title but the

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[104] *Id.* at 116.
[105] *Id.*
[106] *Id.*
[107] 443 N.E.2d 95 (Ind. Ct. App. 1982).
[108] *Id.* at 98.
[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] 436 N.E.2d 1179 (Ind. Ct. App. 1982).

function performed in furtherance of the party's activities and interests.[113] An individual is deemed a managing agent under the rule only if that person has a general power to exercise his judgment and discretion in dealing with certain matters of the corporation or principal.[114]

The court held that the deposition should not have been admitted on the ground that the deponent was a managing agent because the witness lacked managerial discretion to execute his ideas.[115] In this particular instance, the witness was instructed only to investigate the scene, report to his superiors with facts and recommendations, and then implement the decisions of his superiors. Thus, the key to "managing agent" appears to be managerial discretion.

The Indiana Supreme Court has held that before a trial court can consider the testimony found in a deposition, in ruling on motions before or during trial, the deposition must be published.[116] An important qualification to the publication rule developed in *South v. Colip*[117] in a discussion about a motion to publish.

Trial Rule 30(E)(4) provides, generally, that in the event a deposition is not returned to the officer within 30 days after it is submitted to the witness, a certificate of that fact shall be filed with the court along with the deposition. In that event, any party may use a copy of the deposition as if the original had been signed by the witness. *South v. Colip* appears to conclude that when a deposition has not been returned at the time a motion to publish is filed, then the deposition need not have been filed in order to be used.[118] Thus, Trial Rule 30(E)(4) affects the use of a deposition in court proceedings and the publication requirements which are established by case law.

c. Trial Rule 37: Sanctions.—In the criminal case of *Glover v. State*,[119] the trial court, over the defendant's objections, refused to exclude the testimony of two witnesses who failed to appear for a deposition. The Indiana Supreme Court observed that Trial Rules 30 and 31 provide for the taking of depositions of witnesses and a deposition upon oral examination; that both provide that the attendance of a witness may be compelled by subpoena pursuant to Trial Rule 45(D); and that an individual may be held in contempt under Trial Rule 45(F) for failure to obey a subpoena.[120] The court reasoned that the defendant had an oppor-

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[113] *Id.* at 1184.

[114] *Id.*

[115] *Id.*

[116] Augustine v. First Federal Sav. & Loan Ass'n, 270 Ind. 238, 240-41, 384 N.E.2d 1018, 1020 (1979). Publication is defined as "the breaking of the sealed envelope containing the conditional examination and making it available for use by the parties or the court." *Id.* at 240, 384 N.E.2d at 1020 (quoting Swartzell v. Herrin, 144 Ind. App. 611, 617-18, 248 N.E.2d 38, 42 (1969)).

[117] 437 N.E.2d 494 (Ind. Ct. App. 1982).

[118] *Id.* at 497. *See also* Jarvis v. State, 441 N.E.2d 1, 6-7 (Ind. 1982).

[119] 441 N.E.2d 1360 (Ind. 1982).

[120] *Id.* at 1362-63.

tunity to compel the witnesses to attend the deposition but did not take full advantage of the available methods to compel the witnesses' attendance.[121] Thus, the defendant's failure to avail himself of all available processes precluded the discretionary imposition of sanctions.

In a case illustrating the cogent sanctions available under Trial Rule 37, the United States Supreme Court, in *Insurance Corp. of Ireland v. Compagnie des Bauxites*,[122] decided that Federal Rule 37(b)(2) may be used to support a finding of personal jurisdiction when the defendant has failed or refused to comply with certain discovery orders concerning the facts relating to personal jurisdiction in the action. The plaintiff brought a diversity action against several insurance companies who raised the defense of lack of personal jurisdiction. The plaintiff attempted to use discovery to establish facts relating to personal jurisdiction, but the defendants repeatedly failed to comply with the trial court's orders for production of requested information relevant to the jurisdictional issue. Eventually, the district court entered an order pursuant to Federal Rule 37(b)(2)(A) that, because of the repeated failure to comply with the discovery orders, the court did acquire personal jurisdiction.[123]

The Supreme Court reasoned that personal jurisdiction arose from the due process clause and necessarily involved an "individual liberty interest."[124] Therefore, the requirement of personal jurisdiction may be intentionally waived, or for various reasons a defendant may be precluded or estopped from raising the issue.[125] The obstreperous conduct of the defendants in failing to comply with the discovery orders which would have enabled the court to decide the jurisdictional issues precluded this defense. Otherwise, a defendant could avoid litigation by simply refusing to disclose information necessary for finding personal jurisdiction.

The court of appeals, in *Hosts, Inc. v. Wells*,[126] discussed the mechanisms which must be utilized for an award of attorney's fees for abuse of discovery. Suit was brought on a promissory note in which there was no provision authorizing the recovery of attorney's fees upon default.[127] The trial court granted summary judgment to the creditors and awarded $1,800 in attorney's fees and interest at the statutory rate. The court of appeals noted that Indiana has adhered to the general rule that, absent an express agreement or a special statute, a successful litigant is not entitled to an award of attorney's fees.[128] In a footnote and over strong dissent, the court further observed that there was no motion in the trial court for an award of attorney's fees by the plaintiffs, nor was a hearing

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[121] *Id.* at 1363.
[122] 456 U.S. 694 (1982).
[123] *Id.* at 699.
[124] *Id.* at 702.
[125] *Id.* at 704.
[126] 443 N.E.2d 319 (Ind. Ct. App. 1982).
[127] *Id.* at 320.
[128] *Id.* at 321.

held as contemplated by Trial Rule 37(A)(4).[129] The court of appeals reversed the award of attorney's fees because the request was made for the first time in a motion to correct error. The better procedure is to request attorney's fees according to the requirements set forth in Trial Rule 37(A)(4).[130]

E. Trials and Judgments

1. Voir Dire Examination.—In *Barnes v. State*,[131] several questions asked in voir dire were at issue. An inquiry by the prosecuting attorney suggested that the defendant or some of the witnesses in a murder case were homosexuals. The prospective jurors were asked if that would preclude them from fairly judging the case. The defense counsel later asked one juror whether all human beings share "pet peeves of one kind or another" and whether that would preclude fair judgment.[132]

The comments of the Indiana Supreme Court on these questions are significant because they go beyond the specific question raised. The court stated that an individual's "personal habits or characteristics, as well as questions of race, religion, creed and politics" can raise questions regarding impartiality.[133] It is not improper to ask prospective jurors if their own personal feelings could be influenced by certain facts.[134] The purpose of this type of procedure is to assure the parties that the jury is impartial and unprejudiced.[135]

2. Small Claims—Jurisdictional Limitation on Transfer.—In *Clark v. Richardson*,[136] an action was commenced in small claims court and subsequently transferred to the municipal court, where the defendant demanded a jury trial. The judgment in the municipal court was in the plaintiffs' favor for $2,560.06 which exceeded the $1,500 jurisdictional limit then imposed upon the small claims court.[137] Although the defendant argued that it was error for the court to award an amount in excess of the limits of the court in which the claim originated, the court of ap-

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[129] *Id.* n.1.

[130] IND. R. TR. P. 37(A)(4) provides in part:

If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

[131] 435 N.E.2d 235 (Ind. 1982).

[132] *Id.* at 237.

[133] *Id.* at 238.

[134] *Id.*

[135] *Id.*

[136] 444 N.E.2d 868 (Ind. Ct. App. 1983).

[137] *Id.* at 869, *See* IND. CODE § 33-11.6-4-2 (1982) (since amended to permit claims

peals held that the jurisdictional limit of the receiving court, rather than the originating court, applies.[138]

3. Declaratory Judgment.—In *General Discount Corp. v. Weiss Machinery Corp.*,[139] the parties entered into an agreed judgment; however, their dispute continued. One party filed a petition for declaratory relief for an interpretation of the agreed judgment, which the trial court permitted.[140]

The court of appeals majority reasoned that a declaratory judgment action was appropriate because an agreed judgment is contractual in nature. Thus, the agreed judgment is not appealable because it does not represent the judgment of the court, which simply performs the ministerial duty of recording the agreement of the parties.[141]

The strong dissenting opinion objected, reasoning that the effect of the declaratory judgment action was a collateral attack upon a final judgment. Citing precedent to the effect that an agreed judgment cannot be appealed, the dissent asserted that a declaratory judgment action was not available for a collateral attack ostensibly to interpret an agreed judgment.[142] Rather, the party should have appealed under Trial Rule 60(B)(7).

F. Appeals

1. The Relationship Between Trial Rules 59 and 60.—In *Seibert Oxidermo, Inc. v. Shields*,[143] the Supreme Court of Indiana rendered an opinion of extraordinary significance and resolved a conflict among the district courts of appeals over the proper procedure to challenge a default entry and a default judgment.[144]

The plaintiff brought a damage action for $760,000 against defendant Siebert Oxidermo. The defendant failed to answer. After the entry of default and the default judgment, a hearing was held on damages, and $760,000 was awarded. The defendant then entered an appearance and moved to set aside the default judgment on the basis of excusable neglect. After a hearing, the trial court denied the motion and entered findings of fact and conclusions of law. A motion to correct error was filed and eventually denied. The defendant filed numerous motions to set

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not exceeding $2,000 by Act of Mar. 23, 1981, Pub. L. No. 284, § 2, 1981 Ind. Acts 2298, 2298).

[138]*Id.* at 869. As a general matter, effective January 1, 1983, Small Claims Rule 8(C) was amended to require a corporation to appear by counsel only for claims over three hundred dollars ($300.00). Previously, a corporation was required to be represented by an attorney in small claims court regardless of the amount of the claim.

[139]437 N.E.2d 145 (Ind. Ct. App. 1982).

[140]*Id.* at 147.

[141]*Id.* at 151.

[142]*Id.* (Staton, J., dissenting).

[143]446 N.E.2d 332 (Ind. 1983).

[144]*See generally* Note, *Trial Rules 59 and 60(B)—Clearing the Murky Waters of Post-judgment Relief?* 16 IND. L. REV. 539 (1983), which is an excellent discussion of this problem.

aside the default, and upon denial of each, filed a motion to correct error.[145] The defendant then filed a timely praecipe.[146]

The Indiana Supreme Court, after both parties sought transfer, exhaustively reviewed the area and the court of appeals opinions. The court held that

> the proper procedure in the Indiana Rules of Trial Procedure for setting aside an entry of default or grant of default judgment thereon is to first file a Rule 60(B) motion to have the default or default judgment set aside. Upon ruling on that motion by the trial court the aggrieved party may then file a Rule 59 Motion to Correct Error alleging error in the trial court's ruling on the previously filed Rule 60(B) motion. Appeal may then be taken from the court's ruling on the Motion to Correct Error.
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> . . . [W]here a judgment has been granted after an entry of default, Rule 55(C) and 60(B), when read together, clearly allow a Rule 60(B) motion to be filed to begin the attempt to set aside the default judgment at any time within one year after that judgment has been granted, *including during the first sixty [60] days thereafter.*[147]

The court rendered important interpretations concerning the use of Trial Rule 60(B) motions to raise issues on appeal after a motion has been filed challenging the entry of a default judgment. In this case several Trial Rule 60(B) motions were filed. One question raised in a subsequent Trial Rule 60(B) motion concerned excessive damages. The supreme court found that the issue should have been raised in the first Trial Rule 60(B) motion and in the motion to correct error which was filed subsequent to the denial of the first Trial Rule 60(B) motion.[148] Because Oxidermo failed to raise the issue initially, the court of appeals erred in addressing the issue of damages in its opinion, when the only errors saved for appeal were those raised in the first Trial Rule 60(B) motion and the ac-

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[145]See the procedural history set out in the opinion. 446 N.E.2d at 333.

[146]*Id.* at 333-34.

[147]*Id.* at 337 (emphasis added). In so holding, the court expressly overruled a number of court of appeals decisions. Mathis v. Moorehouse, 433 N.E.2d 814 (Ind. Ct. App. 1982); Sowers v. Sowers, 428 N.E.2d 245 (Ind. Ct. App. 1981); Dawson v. St. Vincent Hosp. & Health Care Center, 426 N.E.2d 1328 (Ind. Ct. App. 1981); *In re* Marriage of Robbins, 171 Ind. App. 509, 358 N.E.2d 153 (1976). Pre-Finished Moulding & Door, Inc. v. Insurance Guidance Corp., 438 N.E.2d 16 (Ind. Ct. App. 1982) was overruled to the extent that the case held that an appeal may be taken directly from the ruling on a Trial Rule 60(B) motion. The court also noted that a Trial Rule 60(B) motion may not be used as a substitute for a direct appeal based upon a timely Trial Rule 59 motion to correct error after a trial on the merits. *See, e.g.*, Breeze v. Breeze, 421 N.E.2d 647 (Ind. Ct. App. 1981).

[148]Rule 60(B)(2) provides that the motion to set aside a default judgment may be based upon "any ground for a motion to correct error." Rule 59(A)(3) states that one basis for a motion to correct error is excessive or inadequate damages. 446 N.E.2d at 338.

companying Trial Rule 59 motion to correct error.[149] Oxidermo argued that Indiana case law permitted a subsequent Trial Rule 60(B) motion if the ground raised was unknown or unknowable to the movant at the time of the first Trial Rule 60(B) motion. The supreme court agreed with that statement in general, but observed that "[t]he additional grounds for relief alleged by Oxidermo in the second and third motions were either discoverable at the time the first Rule 60(B) motion was filed or related to an alleged substantive defense available to Oxidermo . . . ."[150]

The court discouraged the repetitive filing of Trial Rule 60(B) motions by a party suffering a default judgment and observed that when the grounds found under Trial Rule 60(B)(1) through (4) are available, then the party has up to one year from the date of the entry of default or grant of default judgment to make such a motion.[151] The court said it did not wish to encourage defendants or appellants "to hastily file a Rule 60(B) motion as soon as they discover one ground for relief under the Rule and then take their time about discovering and raising other Rule 60(B) grounds and bombarding the court with more such motions."[152] Thus, the court concluded that although there was appellate jurisdiction in the case, the issue of excessive damages was not reviewable by the appellate court because the defendant failed to raise the issue in the first motion filed under Trial Rule 60(B).[153]

Finally, the court adopted an unpublished court of appeals memorandum decision which held, generally, that the trial court did not err as a matter of law in refusing to excuse Oxidermo for neglect[154] and that the trial court properly overruled a claim of error raised for the first time in a motion to correct error.[155]

2. Trial Rule 59: Motion to Correct Error—Timeliness.—The Indiana Supreme Court reviewed the timeliness of a motion to correct error in *Fancher v. State*.[156] In *Fancher*, the defendant filed a motion to correct error which was overruled the next day. Within sixty days of the defendant's conviction, a second or "supplemental motion to correct error" was filed, which was also overruled. A praecipe on behalf of the defendant was then filed thirty-one days after the trial court overruled the first motion to correct error.[157] The court of appeals, in an unpublished opinion, dismissed the defendant's appeal. Although an opinion was written

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[149]446 N.E.2d at 338.

[150]*Id.*

[151]*Id.*

[152]*Id.* at 339.

[153]*Id.*

[154]*Id.* at 340.

[155]*Id.* at 341. *See* Bradburn v. State, 256 Ind. 453, 269 N.E.2d 539 (1971); Macauley v. Funk, 172 Ind. App. 66, 359 N.E.2d 611 (1977).

[156]436 N.E.2d 311 (Ind. 1982).

[157]*Id.* at 312.

in the supreme court, a motion to transfer was denied because the appeal was not timely perfected.[158]

The Indiana Supreme Court stated that "[a] motion to reconsider or to rehear a motion to correct errors does not extend the time for taking an appeal."[159] This rule is a corollary of the general principle that Trial Rule 59 contemplates only one motion to correct error for each appellant. Once a timely motion to correct error has been *denied*, the court stated, then the time for perfecting an appeal begins to run.[160]

However, an exception exists when or if the trial court responds to the motion by amending, modifying, or altering its final judgment. Then, a party adversely affected may perfect an appeal[161] or file another motion to correct error and thereby extend the time for perfecting the appeal.[162]

3. Trial Rule 60(B): Relief from Judgment.—In *Spence v. Supreme Heating, Inc.*,[163] the clerk of the court failed to give notice of a ruling on a motion to correct error, and the losing party did not file a praecipe for an appeal. Later, that party filed a Trial Rule 60(B) motion which the trial court granted without notice or a hearing.[164] The court of appeals held that a Trial Rule 60(B) motion requires notice and a hearing, and that failure to comply with these requirements constituted reversible error.[165] This case manifests the dangers of not strictly complying with the dictates of the trial rules.[166]

In *Mattingly v. Whelden*,[167] the court of appeals considered a question of first impression in Indiana, whether the newly discovered evidence which forms the basis of a Trial Rule 60(B)(2) motion must exist at the time of the contested decision. The court adopted the interpretation given Federal Rule 60(b)(2) and stated that insofar as Trial Rule 60(B)(2) is concerned, the evidence referred to must have been in existence at the time of the judgment.[168]

4. Appellate Jurisdiction.—a. Appellate Rule 15(N): Relief granted on appeal.—The opinion in *Cunningham v. Hiles*[169] is important in ap-

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[158]*Id.*

[159]*Id.* (citing Mohney v. State, 159 Ind. App. 246, 249-50, 306 N.E.2d 387, 390 (1974)).

[160]436 N.E.2d at 312.

[161]*See* IND. R. TR. P. 59(F).

[162]*See* Breeze v. Breeze, 421 N.E.2d 647 (Ind. 1981).

[163]442 N.E.2d 1144 (Ind. Ct. App. 1982).

[164]*Id.* at 1145.

[165]*Id.*

[166]*See* Otte v. Tessman, 426 N.E.2d 660 (Ind. 1981); *see also* Rumfelt v. Himes, 438 N.E.2d 980 (Ind. 1982); Cox v. Indiana Subcontractors Ass'n, 441 N.E.2d 222 (Ind. Ct. App. 1982); Midwest Natural Gas Corp. v. Locke Stove Co., 435 N.E.2d 85 (Ind. Ct. App. 1982).

[167]435 N.E.2d 61 (Ind. Ct. App. 1982). *See supra* notes 37-44 and accompanying text.

[168]435 N.E.2d at 65.

[169]439 N.E.2d 669 (Ind. Ct. App. 1982) (on rehearing).

pellate cases in which there is a review of the record, or even perhaps of the evidence, to determine whether relief should be granted.[170] In *Cunningham*, the plaintiff obtained an injunction which was not honored. Later, the plaintiff's request for a contempt citation against the defendant for failure to comply with the injunction was denied. The court of appeals reversed the trial court and ordered that the defendant be cited for contempt within ten days.[171] The defendant appealed that court's disposition contending that the contempt citation was beyond the scope, competency, and purview of the Indiana Rules of Appellate Procedure.[172]

In construing Appellate Rule 15(N)(6) which allows the "[g]rant [of] any other appropriate relief,"[173] the court of appeals held that "[t]he dispositional alternatives available under A.R. 15(N) are coextensive with those which the trial court may grant in acting upon a motion to correct errors."[174] Therefore, the contempt citation was within the authority of the appellate court.

b. Appellate Rule 8.1: Time for filing briefs.—The trial court, in *City of South Bend v. Bowman*,[175] dismissed a criminal action against the defendant, holding that a city ordinance was unconstitutionally vague. The appellant, City of South Bend, perfected a timely appeal and filed its brief. However, no appellee brief was filed. The court of appeals held that "[w]hen the appellee fails to file a brief, the Court of Appeals may reverse if the appellant makes a prima facie showing of reversible error."[176]

However, in *Doe v. Hancock County Board of Health*[177] a contrary result was reached. In *Doe*, the appellee miscalculated the deadline and filed its brief one day late. The court of appeals denied the appellee's verified petition to file a belated brief which resulted in the dismissal of the case under Appellate Rule 8.1(A).[178] The Indiana Supreme Court granted the appellant's petition to transfer without opinion and dismissed the action over a strong dissent.[179] The dissent disapproved of the dismissal on a procedural technicality stating that *"[t]he action of this Court in*

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[170]An example of such a case is an appeal from the granting or denial of most motions under Trial Rule 60, where relief might be granted in the appellate court as easily as in the trial courts, although *Cunningham* is not a Trial Rule 60 case.

[171]439 N.E.2d at 675 (quoting Cunningham v. Hiles, 435 N.E.2d 49, 54 (Ind. Ct. App. 1982)).

[172]439 N.E.2d at 675.

[173]IND. R. APP. P. 15(N)6.

[174]439 N.E.2d at 675 (citations omitted).

[175]434 N.E.2d 104 (Ind. Ct. App. 1982).

[176]*Id.* at 105 (citing Underwood v. Donahue, 423 N.E.2d 722 (Ind. Ct. App. 1981)).

[177]436 N.E.2d 791 (Ind. 1982).

[178]*Id.* at 791.

[179]*Id.* If the Appellee fails to file a timely brief, the court, in its discretion, may hear the appeal. Apparently, the Indiana Supreme Court found no abuse of discretion. *See, e.g.*, State *ex rel.* Amer. Reclamation & Refining Co. v. Klatte, 256 Ind. 566, 270 N.E.2d 872 (Ind. 1971).

dismissing the matter on a technical basis effectively deprives the appellants of their constitutional rights of appellate review."[180]

G. Rule Amendments

1. Trial Rule 53.1: Failure to Rule on Motion.—The amendment to Trial Rule 53.1 is the first major change in the rule since 1974 and was adopted without commentary or reports from the Supreme Court Rules Committee. Section (A) sets the time limits for ruling and establishes the bases for transferring a case directly to the supreme court from the trial court *upon application by an interested party.*

Section (B) establishes the four instances in which provisions of Trial Rule 53.1(A) do not apply. While the first three exceptions were found in the previous rule, the fourth exception is new in 1983. It provides that the "failure to rule on motion" rule has no application to a repetitive motion, a motion to reconsider, a *motion to correct error* (which is the principle change in this rule), a petition for post-conviction relief, or to ministerial post-judgment acts. It was clearly the intention of the supreme court to remove the motion to correct error from the effect of Trial Rule 53.1. In doing so, the court established a new rule, Trial Rule 53.3, which is specifically applicable to motions to correct error.[181]

Section (C), which is applicable to Trial Rules 53.1, 53.2, and 53.3, defines the specific time when a ruling shall be deemed to have been made. The apparent purpose of this definitional rule is to require that a public entry or a public record be made of the court's ruling within the specified time provisions.

Section (E) gives an interested party absolute power to initiate the withdrawal of an entire case from a sitting judge if the judge fails to rule consistently with Trial Rule 53.1(A). The amended version of this rule does contemplate some discretion on the part of the clerk unlike the preceding version of the rule.[182]

2. Trial Rule 53.2: Time for Holding Issue Under Advisement.—Trial Rule 53.2 was rewritten in its entirety by the supreme court effective January 1, 1983, but remains similar to the previous rule. However, following the 1983 amendment the rule lacks the earlier provision where the judge determined an issue and a record of that determination was duly made prior to any action having been taken to effect the removal of the submission of the case, and the appointment of a special judge.

3. Trial Rule 53.3: Time Limitation for Ruling on Motion to Correct Error.—Trial Rule 53.3 is entirely new in 1983. It establishes time provisions and limitations for rulings on motions to correct error. Clearly,

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[180]436 N.E.2d at 791 (Hunter, J., dissenting) (emphasis in original).

[181]*See infra* notes 183-85 and accompanying text.

[182]*See* State *ex rel.* Indiana Suburban Sewers, Inc. v. Hanson, 260 Ind. 477, 480, 296 N.E.2d 660, 662 (1973).

the rule must be cross-read with Trial Rule 59. The rule provides a definition for overruling a motion to correct error. More specifically, a motion is deemed denied if it is not ruled upon in a certain period of time.[183] Most importantly, the failure to rule on a motion to correct error is not a basis for withdrawing a case from a trial judge. The rule provides exceptions[184] to the automatic denial found in Trial Rule 53.3(A) and the court may extend the time limitations for ruling on the motion no more than thirty days.[185]

Trial Rules 53.4 and 53.5, formerly Trial Rules 53.3 and 53.4 respectively, were merely renumbered by the 1983 amendments. The change in the rules' designation number did not affect their meaning or the case law concerning the rules.

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[183]IND. R. TR. P. 53.3(A) provides:

In the event a court fails for forty-five (45) days to set a motion to correct error for hearing, or fails to rule on a motion to correct error within thirty (30) days after it was heard or forty-five (45) days after it was filed, if no hearing is required, upon application of any interested party, the pending motion to correct error may be deemed denied.

[184]IND. R. TR. P. 53.3(B) provides:

The time limitation for ruling on a motion to correct error established under Section (A) of this rule shall not apply where:

(1) The party has failed to serve the judge personally; or

(2) The parties who have appeared or their counsel stipulate or agree on record that the time limitation for ruling set forth under Section (A) shall not apply; or

(3) The time limitation for ruling has been extended by Section (D) of this rule.

[185]IND. R. TR. P. 53.3 (D) provides:

The Judge before whom a Motion to Correct Error is pending may extend the time limitation for ruling for a period of no more than thirty (30) days by filing an entry in the cause advising all parties of the extension. Such entry must be in writing, must be filed before the expiration of the initial time period for ruling set forth under Section (A), and must be served on all parties. Additional extension of time may be granted only upon application to the Supreme Court as set forth in Trial Rule 53.1(D).