III. Civil Procedure and Jurisdiction

William F. Harvey*

A. Jurisdiction, Process, and Venue

1. Personal Jurisdiction.—Several significant cases from the Indiana Court of Appeals and the United States Supreme Court involving personal jurisdiction[1] were decided during the survey period. In *Woodmar Coin Center, Inc. v. Owen*,[2] Woodmar, an Indiana corporation, advertised silver coins for sale in the *Wall Street Journal*. Owen, a Texas resident, telephoned Woodmar regarding the advertisement. The parties conducted

---

*Carl M. Gray Professor of Law and former Dean, Indiana University School of Law—Indianapolis. A.B., University of Missouri, 1954; J.D., Georgetown University, 1959; L.L.M., 1961. The author wishes to extend his appreciation to Diane Dilger Jones for her assistance in the preparation of this Article.

[1]Several opinions regarding subject matter jurisdiction deserve some attention. Cha v. Warnick, 455 N.E.2d 1165 (Ind. Ct. App. 1983), *transfer denied*, March 16, 1984, contains an important interpretation regarding the relationship between the Indiana Medical Malpractice Act, Ind. Code §§ 16-9.5-9-1 to -10 (1982), and the jurisdiction of the trial court. A medical malpractice action was filed before a claim was filed with the Indiana Department of Insurance pursuant to Indiana Code section 16-9.5-9-2. The court of appeals held that the trial court lacked subject matter jurisdiction to enter a default judgment against a physician named in the malpractice action. 455 N.E.2d at 1167.

The opinion of the medical review panel is a prerequisite to subject matter jurisdiction over a health care provider. Pending such an opinion, a court has limited authority to act. Ind. Code §§ 16-9.5-10-1 to -2 (1982). Interpreting the Act, the court found no authority to enter a default judgment. Rather, the proper remedy is dismissal without prejudice because the judicial action was filed before a claim was filed with the Indiana Department of Insurance. 455 N.E.2d at 1167. In short, trial courts have no authority to dismiss for any reason with prejudice until the statutory prerequisites of the Medical Malpractice Act have been met.

In another area, review of administrative action, subject matter jurisdiction analysis plays a critical role. Generally, the exhaustion of available administrative remedies is required before a court can exercise jurisdiction to grant relief. *See, e.g.*, Northside Sanitary Landfill, Inc. v. Indiana Envtl. Mgmt. Bd., 458 N.E.2d 277 (Ind. Ct. App. 1984), *transfer denied*; Carlson v. Miller, 455 N.E.2d 951 (Ind. Ct. App. 1983). The exhaustion doctrine was found to be inapplicable in Ahles v. Orr, 456 N.E.2d 425 (Ind. Ct. App. 1983), in which the legality of an executive order by the Governor of Indiana was attacked. The court of appeals decided that by the express terms of the Indiana Administrative Adjudication Act, the Governor is not an agency subject to the statute. See Ind. Code § 4-22-1-2 (1982).

The court further reasoned that under the doctrine of separation of powers, the judiciary is the only branch of government with the power to declare the Governor's executive order invalid. Consequently, even if this action were within the administrative procedures, the plaintiff would be relieved of the exhaustion requirement because the remedy is inadequate or the action futile in that an administrative body cannot overrule the Governor. 456 N.E.2d at 426.

[2]447 N.E.2d 618 (Ind. Ct. App. 1983), *transfer denied*, August 25, 1983.

substantial negotiations during several telephone calls, with each party initiating some of the calls. During the course of these telephone conversations, the parties apparently agreed on the price, the method of inspection by Owen, and the manner of payment. After Woodmar shipped the coins to Owen's bank for inspection, the coins were returned allegedly because their condition had not been accurately represented to Owen.[3]

Woodmar filed suit in Indiana state court alleging breach of contract. Owen contended that the Indiana court lacked personal jurisdiction over him. The trial court agreed and granted Owen's motion for summary judgment on that basis. On appeal, the central issue for decision was whether Owen had "sufficient minimum contacts" with Indiana to constitute "doing business" under Indiana's long-arm statute.[4]

The court found that three pertinent facts established sufficient "minimum contacts" to permit the exercise of personal jurisdiction over the Texas resident consistent with due process. The key facts included: two telephone calls by Owen to Woodmar which initiated the relationship; the substantial negotiations conducted between the parties; and a contract to purchase the coins entered into by the parties. The court concluded that "Owen purposely availed himself of the benefits and responsibilities of doing business in this State by soliciting, negotiating and forming a contract with an Indiana resident."[5]

Bryan Manufacturing Co. v. Harris[6] involved the sale of real property located in White County, Indiana. The seller, Bryan Manufacturing, an Ohio corporation with its principal office in Michigan, commenced an action for specific performance against the buyers, all residents of Illinois. The parties had negotiated a contract for the sale of the Indiana property through an Illinois real estate agent and had executed the contract in Illinois. The purchasers made two or three trips to Indiana to inspect the property and one of the purchasers appeared before the Monticello Common Council seeking approval of a bond issue relating to the property.[7]

The court found, in a case of first impression in Indiana, that pursuant to Trial Rule 4.4(A)(5),[8] the purchasers, as equitable owners, had a sufficient interest in the land and related contacts with Indiana

---

[3]*Id.* at 619.

[4]*See* IND. R. TR. P. 4.4(A)(1).

[5]447 N.E.2d at 621. The court of appeals, however, found the trial court's error to be harmless in light of its ruling on the statute of frauds question. *Id.*

[6]459 N.E.2d 1199 (Ind. Ct. App. 1984).

[7]*Id.* at 1200.

[8]Trial Rule 4.4(A)(5) provides for long-arm jurisdiction arising from "owning, using, or possessing any real property or an interest in real property within this state." IND. R. TR. P. 4.4(A)(5).

to satisfy the requirements for personal jurisdiction.[9] The court observed that, under Indiana law, upon execution of a contract for the sale of land, equitable title to the property rests in the buyer. As such, the buyers were entitled to all the rights of an owner[10] but also assumed all obligations of ownership. As equitable owner, the buyer assumes the risk of loss and the responsibility for property taxes and receives any appreciation in value. The seller simply retains legal title as a security interest.

Against this background of Indiana law, the court correctly held that the equitable interests of the out-of-state purchasers, together with related contacts with Indiana,[11] were sufficient to create personal jurisdiction for the purpose of specific performance of the contract.[12] The court found that the residence of the seller was not significant because Indiana "has an important interest in providing redress for owners of real property in this state regardless of their residence status."[13]

In a related holding, the court concluded that the buyers were not, however, doing business in Indiana pursuant to Trial Rule 4.4(A)(1). The negotiation and execution of a contract for the purchase of real property, alone, does not constitute "doing business." Furthermore, the buyers' conduct was not advancing any ongoing business.[14]

The United States Supreme Court in *Keeton v. Hustler Magazine, Inc.*[15] sustained in personam jurisdiction over the defendant magazine based on the New Hampshire long-arm statute. Keeton commenced a libel action against Hustler Magazine in New Hampshire District Court based on diversity of citizenship. Hustler Magazine, an Ohio corporation with its principal place of business in California, sold approximately 10,000 to 15,000 copies of *Hustler* magazine in New Hampshire each month.[16]

Both the federal district court and court of appeals held that *the plaintiff* lacked sufficient contact with New Hampshire such that any

---

[9]459 N.E.2d at 1201.

[10]*Id.* at 1203 (citing Carmichael v. Snyder, 209 Va. 451, 455, 164 S.E.2d 703, 706 (1968)).

[11]The related contacts included trips to inspect the property in Indiana and the appearance before the Monticello Common Council seeking approval of a bond issue relating to the property. 459 N.E.2d at 1203.

[12]*Id.*

[13]*Id.*

[14]*Id.* at 1204. *Cf.* Griese-Traylor Corp. v. Lemmons, 424 N.E.2d 173 (Ind. Ct. App. 1981) (single purchase of the stock of an Indiana corporation constituted "doing business"); Suyemasa v. Myers, 420 N.E.2d 1334 (Ind. Ct. App. 1981) (visits to homes of Indiana residents to solicit stock purchases contituted "doing business" even though defendant did not have an office in the state).

[15]104 S. Ct. 1473 (1984).

[16]*Id.* at 1477.

application of New Hampshire's long-arm statute to acquire personal jurisdiction over Hustler would violate due process.[17] The United States Supreme Court disagreed and stated that the proper focus is "'the relationship among *the defendant*, the forum, and the litigation.'"[18] The regular sale of thousands of its magazines in New Hampshire each month was unquestionably sufficient minimum contacts between the state and Hustler Magazine. Keeton sought to recover damages suffered in all states in the one suit in New Hampshire. Therefore, the defendant's contacts with the forum must be evaluated in light of that claim. "[T]he combination of New Hampshire's interest in redressing injuries that occur within the State and its interest in cooperating with other States in the application of the 'single publication rule' demonstrate the propriety of requiring [Hustler] to answer to a multistate libel action in New Hampshire."[19]

The Court squarely held that *the plaintiff's* lack of contacts with the forum state did not defeat jurisdiction which was otherwise proper under New Hampshire law and the due process clause: The "plaintiff's residence in the forum State is not a separate requirement, and lack of residence will not defeat jurisdiction established on the basis of defendant's contacts."[20]

In *Jones v. Calder*,[21] the United States Supreme Court affirmed the assertion of jurisdiction in California over a writer and an editor because their intentional conduct in Florida was calculated to cause injury in California.[22] Jones, an entertainer living and working in California, brought a libel suit in California state court against the writer and editor because of an article concerning her. The article appeared in the *National Enquirer*, a national weekly newspaper with a total circulation of more than 5,000,000, of which approximately 600,000 are sold in California.[23]

The Court approved the "effects" test employed by the California court:[24] "The fact that the actions causing the effects in California were performed outside the State did not prevent the State from asserting jurisdiction over a cause of action arising out of those effects."[25] The Court rejected, however, the notion that first amendment concerns enter into the jurisdictional analysis.[26]

---

[17]Keeton v. Hustler Magazine, Inc., 682 F.2d 33, 33 (1st Cir. 1982), *rev'd*, 104 S. Ct. 1473 (1984).

[18]104 S. Ct. at 1478 (quoting Shaffer v. Heitner, 433 U.S. 186, 204 (1977)) (emphasis added).

[19]104 S. Ct. at 1480 (footnote omitted).

[20]*Id.* at 1481.

[21]104 S. Ct. 1482 (1984).

[22]*Id.* at 1488.

[23]*Id.* at 1484-85.

[24]*Id.* at 1487

[25]*Id.* at 1485-86 (footnote omitted).

[26]*Id.* at 1487.

Finally, the United States Supreme Court, in *Helicopteros Nacionales de Colombia, S.A. v. Hall*,[27] refused to sustain jurisdiction in a Texas court over a claim for wrongful death which arose in Peru. Decedents were killed in a helicopter crash in Peru while being transported in Helicoptros Nacionales' (Helicol) aircraft.[28] The Court noted that "[a]ll parties . . . concede that respondents' claims against Helicol did not 'arise out of' and are not related to, Helicol's activities within Texas . . ."[29] for purposes of exercising personal jurisdiction over Helicol pursuant to the Texas long-arm statute.[30] While recognizing that Helicol did some business in Texas, the Court held that "mere purchases, even if occurring at regular intervals, are not enough to warrant a State's assertion of *in personam* jurisdiction over a nonresident corporation in a cause of action not related to those purchase transactions."[31]

It appears the Court is imposing a greater showing of minimum contacts for truly *foreign* defendants since, assuredly, Helicol's contacts with Texas met the traditional minimum contacts requirements.[32]

2. Adequate Notice and Process.—Two cases during the survey period addressed the subject of adequate due process notice requirements in similar default judgment situations. The Indiana Court of Appeals, in *Vanjani v. Federal Land Bank of Louisville*,[33] considered whether notice of sale during the equitable redemption period was required in addition to the previous notice of the commencement of a foreclosure action. The Vanjanis defaulted on a loan secured by a real estate mortgage. A foreclosure action was commenced and the Vanjanis received process by certified mail in Arizona pursuant to Indiana Trial Rule 4.9(B)(2). Both return receipts were apparently signed by the wife who had a limited understanding of English and failed to inform her husband of the certified mail process. A default judgment was entered, the mortgage foreclosed, and the property sold.[34]

The Vanjanis sought to set aside the default judgment and sale alleging that they were entitled to notice of the sale because they could have redeemed the property by paying the judgment at any time prior to sale, compatible with their equitable right of redemption. The Vanjanis argued that an equitable right of redemption is a property right which cannot be extinguished without due process of law and an opportunity to be heard. They contended that additional notice after intitial service

---

[27]104 S. Ct. 1868 (1984).

[28]*Id.* at 1870.

[29]*Id.* at 1872-73 (footnote omitted). *But see id.* at 1877-78 n.3 (Brennan, J., dissenting).

[30]TEX. CIV. CODE ANN. § 2031(b) (Vernon 1964 & Supp. 1982-83).

[31]104 S. Ct. at 1874 (footnote omitted).

[32]*See id.* at 1875 (Brennan, J., dissenting).

[33]451 N.E.2d 667 (Ind. Ct. App. 1983), *transfer denied*, November 16, 1983.

[34]*Id.* at 668-69.

of process regarding the foreclosure action was necessary to satisfy due process requirements.

The court disagreed: "Services of summons by certified mail was had upon [the] Vanjanis at their residence as required by Trial Rule 4.1(A)(1) and absent a showing of excusable neglect[35] they are bound by the proceedings occurring thereafter."[36] By so holding, the court avoided the question regarding notice before the termination of an owner's equitable right of redemption.

In *Mennonite Board of Missions v. Adams*,[37] the United States Supreme Court addressed whether notice by publication and posting provides a mortgagee of real property identified in the public record with adequate notice of a proceeding to sell the mortgaged property for nonpayment of taxes. The case arose in Indiana.[38] Under the relevant law notice by certified mail to the property owner was required, but at the time in question there was no provision for notice by mail or personal service to the mortgagee of the property.[39]

The Court held that constructive notice to a mortgagee identified in the public record did not satisfy the due process requirement of the fourteenth amendment.[40] It recognized that neither notice by publication and posting, nor mailed notice to the property owner, is designed to inform the mortgagee.[41] The Court stated, "Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party . . . if its name and address are reasonably ascertainable."[42] According to the Court, personal service or notice by mail is required regardless of the sophistication of the creditor or the creditor's ability to discover the nonpayment of property taxes.

The Court specifically refused to decide whether a mortgagee must receive notice of its right to redeem before the county auditor executes and delivers a deed to the tax-sale purchaser.[43] Like the similar question raised in *Vanjani*, it was unnecessary to the decision in *Mennonite*.

---

[35]*See* IND. R. TR. P. 60(B).

[36]451 N.E.2d at 670 (citing Hines v. Behrens, 421 N.E.2d 1155 (Ind. Ct. App. 1981); Indiana Suburban Sewers, Inc. v. Hanson, 166 Ind. App. 165, 334 N.E.2d 720 (1975)).

[37]103 S. Ct. 2706 (1983). For a further discussion of this case, see Macey, *Constitutional Law, 1984 Survey of Recent Developments in Indiana Law*, 18 IND. L. REV. 129, 138-41 (1985).

[38]*See* Mennonite Bd. of Missions, Inc. v. Adams, 427 N.E.2d 686 (Ind. Ct. App. 1981), *rev'd*, 103 S. Ct. 2706 (1983).

[39]103 S. Ct. at 2708. A provision was added to the Indiana Code in 1980 to provide such notice, subject to certain statutory requirements. *See* IND. CODE § 6-1.1-24-4.2 (1982).

[40]103 S. Ct. at 2712. *See also* Greene v. Lindsey, 456 U.S. 444 (1982).

[41]*Id.* at 2711 (citing Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 315 (1950)).

[42]103 S. Ct. at 2712.

[43]*Id.* at 2712 n.6.

3. Venue.—Grove v. Thomas[44] is an instructive opinion on the concept of preferred venue contained in Trial Rule 75(A).[45] The plaintiffs were involved in two unrelated automobile accidents on the same day and in the same car, but at different times in different counties. They commenced suit in Cass County where their damaged automobile was usually kept, but where neither accident had occurred. The court of appeals considered whether Cass County was a county of preferred venue under Trial Rule 75(A)(2).[46]

The court noted that a plaintiff may elect to bring suit in any county meeting the criteria established in Trial Rule 75(A)(1) through (9) and that there is no preference *among* such counties. If the plaintiff brings suit in a county of preferred venue, the defendant may not challenge the venue except to the extent that relief is available pursuant to Trial Rules 4.4(C) or 76.[47] The court held that a county in which chattels are regularly located or kept is a county of preferred venue when a complaint includes a claim for injuries to the chattel.[48]

---

[44]446 N.E.2d 641 (Ind. Ct. App. 1983), *transfer denied*, July 26, 1983.

[45]In another case decided during the survey period, Trial Rule 75(A) was determined to be inapplicable. In Frank H. Monroe Heating & Cooling, Inc. v. Rider, 450 N.E.2d 1056 (Ind. Ct. App. 1983), an action in small claims court, the venue provisions of Small Claims Rule 12 were found inconsistent with the provisions of Trial Rule 75(A). In the case of such inconsistency, the Small Claims Rules govern, according to the court's interpretation of Trial Rule 1 and Small Claims Rule 1(A).

[46]Trial Rule 75(A)(2) provides in part: "[Preferred venue lies in] the county where . . . the chattels or some part thereof are regularly located or kept, if the complaint includes a claim for injuries thereto . . . ." IND. R. TR. P. 75(A)(2).

[47]446 N.E.2d at 642. Trial Rule 4.4(C) allows transfer to a more convenient forum while Trial Rule 76 provides for a change of venue in certain circumstances. IND. R. TR. P. 4.4(C), 76.

[48]446 N.E.2d at 643. The other issue presented to the court of appeals involved Trial Rule 19. Plaintiffs contended that the joinder of the defendant parties was proper because complete relief could not be accorded if only one party were present because there would be great difficulty in apportioning the damages between the two defendants. Hence, plaintiffs argued, complete relief could not be accorded without joinder of both defendants. 446 N.E.2d at 643.

The court of appeals disagreed: "Difficulty in apportioning damages between the two defendants does not mean that complete relief cannot be granted." *Id.* Further, plaintiffs failed to show they would be unable to completely recover. Thus, the joinder of parties was not mandatory under Trial Rule 19. 446 N.E.2d at 643.

Joinder under Trial Rule 20(A)(2) was also held improper. 446 N.E.2d at 643. The test for determining whether or not two claims for relief arose from the same transaction or occurrence under Rule 20(A)(2) is one of "logical relationship." The court found no logical relationship between the two accidents that gave rise to the litigation. The accidents were unrelated and independent of each other because they occurred in different counties, seven hours apart. "Injury to the same person is not, standing alone, sufficient to satisfy the logical relationship test." 446 N.E.2d at 643.

In *State ex rel. Wade v. Cass Circuit Court*,[49] the Indiana Supreme Court acknowledged the right to a change of judge under Trial Rule 76[50] and Indiana Code section 34-2-12-1[51] in certain postdissolution proceedings. In a 1981 case, the Indiana Court of Appeals found that the change of judge provision applied to a proceeding to modify visitation rights.[52] The appellate court reasoned that the continuing jurisdiction of the trial court in custody and visitation cases did not prevent a change of judge.[53] In *Wade*, a proceeding to modify support, the Indiana Supreme Court agreed with the 1981 appellate court decision and rejected the claim that a change of venue from the county and a change of judge should be treated alike in postdissolution proceedings.[54]

B. Pleadings and Pre-Trial Motions

1. Trial Rule 15: Amended and Supplemental Pleadings.—A negligence action arising from an auto accident was timely commenced in *Benke v. Barbour*.[55] The plaintiff requested both property and personal injury damages. After the statute of limitations period had run, the plaintiff sought to add his mother as a party-plaintiff. The plaintiff's mother was the owner of the vehicle driven by the plaintiff and thus the proper party to litigate the property damage claim.[56] The trial court allowed the addition, reasoning that the provisions of Trial Rule 15(C)[57]

---

[49]447 N.E.2d 1082 (Ind. 1983).

[50]In civil actions denominated by the legislature, *see* IND. CODE § 34-2-12-1 (1982), a party is entitled a change of venue from the judge or county as a matter of right. IND. R. TR. P. 76(1). Two other cases decided during the survey period concerning a change of venue from the county addressed, respectively, the timeliness of a motion to change and the procedure of striking. *See* State *ex rel.* Baber v. Circuit Court, 454 N.E.2d 399 (Ind. 1983); Abrahamson Chrysler Plymouth, Inc. v. Insurance Co. of N. Am., 453 N.E.2d 317 (Ind. Ct. App. 1983).

[51]Change of venue is permitted, upon proper application of either party, "[w]hen any matter of a civil, statutory or equitable nature not triable by a jury, is pending." IND. CODE § 34-2-12-1 (1982).

[52]K.B. v. S.B., 415 N.E.2d 749 (Ind. Ct. App. 1981).

[53]*Id.* at 757.

[54]447 N.E.2d at 1083 (citing K.B. v. S.B., 415 N.E.2d 749 (Ind. Ct. App. 1981); Rhinehalt v. Rhinehalt, 73 Ind. App. 211, 127 N.E. 10 (1920)).

[55]450 N.E.2d 556 (Ind. Ct. App. 1983).

[56]*Id.* at 557.

[57]Trial Rule 15(C) provides in part:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment:
>
> (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits; and
>
> (2) knew or should have known that but for a mistake concerning the

were satisfied because the new plaintiff's claim arose out of the same conduct and transaction as the original complaint, the defendant had received notice of the claim, and the failure to name the plaintiff's mother originally was a mistake.[58]

The court of appeals surveyed Indiana and federal law to determine whether the amended complaint adding a new plaintiff related back to the date of the original pleading and was not therefore barred by the statute of limitations.[59] The court noted that Trial Rule 15(C) does not specifically address the addition of party-plaintiffs but that the Federal Rules of Civil Procedure Advisory Committee Notes indicate the federal rule applies to plaintiffs. The prior Indiana decisions in the area seemed to be inconsistent with each other but primarily denied any relation back when the addition of new parties constituted a new cause of action.[60] The reasoning was that if relation back were allowed in such cases the defendant would be denied the statute of limitations defense.

The court in *Benke* decided that relation back was proper for virtually the same reasons as the trial court had held.[61] The court also noted that modern decisions have been more lenient when an honest mistake is made in naming or choosing the party-plaintiff. To bolster its argument, the court found additional support in the underpinnings of Trial Rule 17(A), which prohibits dismissal of an action until a real party in interest has been given a reasonable time to ratify or join the action.[62] More

---

identity of the proper party, the action would have been brought against him. IND. R. TR. P. 15(C)

[58]450 N.E.2d at 557.

[59]*Id.* at 558. It is, of course, well-settled in Indiana that an amendment to a pleading (as opposed to the addition of parties) relates back to the time of the filing of the original pleading. If the original pleading was timely, then an amendment to that pleading submitted after the statute of limitations has run is also considered timely. A party opposing a proposed amendment offered after the time to amend as of right must do more than merely utter a statement that the party will be prejudiced if the amendment is granted. *See, e.g.*, Allied Mills, Inc. v. P.I.G., Inc., 454 N.E.2d 1240 (Ind. Ct. App. 1983) (permitting amendment of pleadings after the statute of limitations had run to include a plea for recovery of punitive damages).

[60]*See, e.g.*, Lamberson v. Crouse, 436 N.E.2d 104 (Ind. Ct. App. 1982); Parsley v. Waverly Concrete and Gravel Co., 427 N.E.2d 1 (Ind. Ct. App. 1981); Bowling v. Holdeman, 413 N.E.2d 1010 (Ind. Ct. App. 1980); Gibson v. Miami Valley Milk Producers, Inc., 157 Ind. App. 218, 299 N.E.2d 631 (1973).

[61]450 N.E.2d at 559. *Cf.* Wojcik v. Almase, 451 N.E.2d 336 (Ind. Ct. App. 1983), *transfer denied*, November 23, 1983. In dicta, the *Wojcik* court commented that it did not appear that a plaintiff's amended complaint adding a defendant previously named as "Doe Corporation" would relate back so as to avoid the statute of limitations. The comment might be construed to mean that "Doe Corporation defendant" complaints are unacceptable and will not under any condition or circumstance relate back to the time of its original filing. Alternatively, the court simply might have meant that notice under Trial Rule 15(C), in the form of process summons, must be given within the time period of the relevant statute of limitations.

[62]Trial Rule 17(A)(2) provides in part:

expansively, the court noted that essentially the issue is one of fairness, particularly when the defendant was a party and had actual notice before a new party-plaintiff was joined.

2. Trial Rule 13(A): Compulsory Counterclaims.—The opinion in *Daube and Cord v. LaPorte County Farm Bureau Co-operative Ass'n*[63] contains an excellent discussion of how compulsory counterclaims[64] operate when an "open account" is at issue. Daube and Cord, a partnership, maintained an open account for the purchase of feed and other goods from the Co-operative. A dispute arose concerning the quality of certain feed. Daube filed suit against the Co-operative in April, 1980; in the meantime, the parties continued to transact business. The April, 1980 suit was unresolved when Daube became delinquent on the open account and the Co-operative brought the instant suit against Daube on the outstanding balance.[65] Daube claimed the action for the outstanding balance was barred as a compulsory counterclaim to its earlier suit and moved to dismiss.[66]

> No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time after objection has been allowed for the real party in interest to ratify the action, or to be joined or substituted in the action. Such ratification, joinder, or substitution shall have the same effect as if the action had been commenced initially in the name of the real party in interest.

IND. R. TR. P. 17(A)(2).

[63]454 N.E.2d 891 (Ind. Ct. App. 1983).

[64]Trial Rule 13(A) provides:

> A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject-matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if:
>
> (1) at the time the action was commenced the claim was the subject of another pending action; or
>
> (2) the opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this rule.

IND. R. TR. P. 13(A).

Another decision during the survey period, Rees v. Panhandle Eastern Pipe Line Co., 452 N.E.2d 405 (Ind. Ct. App. 1983), *transfer denied*, contains an excellent discussion of the elements of a compulsory counterclaim under Trial Rule 13(A).

[65]454 N.E.2d at 892.

[66]Daube also asserted the affirmative defense of accord and satisfaction. The court disagreed. *Id.* at 894. For other notable decisions during the survey period involving Trial Rule 8(C) affirmative defenses, *see* Apple v. Kile, 457 N.E.2d 254 (Ind. Ct. App. 1983), *transfer denied*, March 16, 1984 (impliedly holding that adverse possession is an affirmative defense under Trial Rule 8(C)); Coleman v. Target Stores, 456 N.E.2d 723 (Ind. Ct. App. 1983) (holding Trial Rule 8(C) applicable in an administrative agency proceeding).

The court of appeals found that the action on the outstanding balance of the open account was not a compulsory counterclaim. The court said that the plaintiff's record did not support his contention that the Co-operative's 1981 suit on the open account arose out of the same transaction or occurrence as his 1980 suit for defective feed. The record disclosed that allegedly defective feed was delivered in August, 1979 and was paid for by December, 1979, before Daube brought suit in April, 1980. The Co-operative's action was initiated in April, 1981. The court found that while both suits were based on the same open account, their logical relationship ended at that point. The defendant's April, 1981 claim was based on transactions which transpired long after the intitiation of plaintiff's suit.[67]

Additionally, the court observed that under Trial Rule 13(A) "[a] pleading shall state as a counterclaim any claim *which at the time of serving the pleading* the pleader has against any opposing party[.] . . ."[68] By its own language then, the Rule does not require parties to plead counterclaims which have not matured at the time they plead even if the claim arises from the same transaction or occurrence. Thus, the Co-operative's action against Daube, based on claims that arose after the filing of the first action, clearly was not a compulsory counterclaim.

The court also held, citing Indiana and federal cases, that the operative effect of Trial Rule 13(A) does not bar a compulsory counterclaim *until the first suit has proceeded to judgment.*[69] Thus, when the first suit has not proceeded to judgment before the defendant's claim is filed, then even if such claim was a compulsory counterclaim it would not be barred.

3. Trial Rules 9 and 9.2: Pleading Special Matters and Pleading and Proof of Written Instruments.—In the case of *Wilson v. Palmer*,[70] Wilson brought suit for damages against several defendants after discovering that a house which he recently purchased was subject to a demolition order. One defendant, the title insurer, moved to dismiss under Trial Rule 12(B)(6) for failure to state a claim upon which relief could be granted.[71]

The court of appeals sustained the dismissal because Wilson's complaint contained only a conclusory statement that the title insurer concealed the demolition order from Wilson and therefore the complaint failed to meet the requirements of Trial Rule 9(B).[72] Strong Indiana

---

[67]454 N.E.2d at 893.

[68]*Id.* (quoting IND. R. TR. P. 13(A) (emphasis added by court)).

[69]454 N.E.2d at 893.

[70]452 N.E.2d 426 (Ind. Ct. App. 1983).

[71]*Id.* at 427.

[72]Trial Rule 9(B) provides in part: "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be specifically averred." IND. R. TR. P. 9(B).

precedent provides that the circumstances which constitute fraud must be specifically alleged consistent with Trial Rule 9(B).[73] Therefore, the court reiterated that "a complaint that fails the requirements of T.R. 9(B) does not state a claim upon which relief can be granted."[74]

In a more noteworthy portion of the opinion, the court recognized that Wilson's claim for breach of contract, founded on a written contract between Wilson and the defendants, required the written contract to be appended to the complaint pursuant to Trial Rule 9.2(A). While it was undisputed that Wilson did not so append the contract, the court held that Wilson's failure to comply with the requirements of Trial Rule 9.2(A) did not warrant dismissal.[75] The court noted that before the 1970 amendments to the Indiana Trial Rules, when suit was brought on a written instrument and the instrument was not included or attached to the complaint, the complaint was subject to demurrer for failure to state a cause of action. That procedure is no longer the law, according to the court, particularly because Trial Rule 9.2(F) permits the trial court to amend a pleading in its discretion,[76] as does Trial Rule 15(A).[77]

---

[73]*See, e.g.*, Cunningham v. Associates Capital Servs. Corp., 421 N.E.2d 681 (Ind. Ct. App. 1981) (listing the circumstances constituting fraud such as the time, the place, the substance of the false representations, the facts misrepresented, and the identification of what was procured by the fraud).

Another recent decision, Employers Ins. of Wausau v. Commissioner of Dep't of Ins., 452 N.E.2d 441 (Ind. Ct. App. 1983), affirmed the *Cunningham* interpretation of Trial Rule 9(B). Additionally, however, the court held that Trial Rule 9(B) is tempered with the language found in Holliday v. Perry, 38 Ind. App. 588, 78 N.E. 877 (1906), where the court held that if the facts alleged *show fraud*, either actual or constructive, then no positive averment of fraud is required. In short, the actual word "fraud" need not be alleged or used, provided that the averments in the complaint are sufficient to establish the fraudulent conduct as a basis for the action. 452 N.E.2d at 446-47.

[74]452 N.E.2d at 428 (citing Cunningham v. Associates Capital Servs. Corp., 421 N.E.2d 681 (Ind. Ct. App. 1981)).

[75]452 N.E.2d at 429.

[76]*Id.* at 429-30. Trial Rule 9.2(F) provides:

> Non-compliance with the provisions of this rule requiring a written instrument to be included with the pleading may be raised by the first responsive pleading or prior motion of a party. The court, in its sound discretion, may order compliance, the reasons for non-compliance to be added to the pleadings, or allow the action to continue without further pleading. Amendments to correct the omission of a required written instrument, an assignment or indorsement therof, or the omission of a denial of the execution of a written instrument as permitted or required by this rule shall be governed by Rule 15, except as provided by subdivision (A) of this rule.

IND. R. TR. P. 9.2(F).

[77]Trial Rule 15(A) provides in part:

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

The court held that under Trial Rule 9.2(A) and (F) a trial court should specifically order the plaintiff to comply with the Rule by amending the complaint to include the omitted instrument.[78] Although the Rule does not directly address the issue, if the plaintiff fails to amend the complaint as ordered within a reasonable time, the complaint should be dismissed after a hearing pursuant to Trial Rule 41(E).[79] If such a dismissal occurs, it will be for the failure to comply with the rules of court or court orders thereunder and not for the failure to state a claim upon which relief can be granted. The distinction is critical in appellate review.

4. Trial Rule 56: Summary Judgment.—a. Standards.—The opinion in *Tippecanoe Sanitary Landfill v. Board of County Commissioners*[80] contains a very clear discussion regarding the grant of a motion for summary judgment and the review of such a grant on appeal. The standard for granting a summary judgment motion under Trial Rule 56(C) includes a two-step inquiry:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits and testimony, if any, show that there is no genuine issue as to any material fact *and* that the moving party is entitled to a judgment as a matter of law.[81]

The trial court must accept as true all the facts alleged by the nonmoving party and resolve all doubts against the movant. Once the motion for summary judgment is made, the nonmoving party must affirmatively allege sufficient facts to establish the existence of factual issues, not merely rely upon allegations in its complaint. Even if the nonmoving party fails to make such a showing, summary judgment is improper

---

> is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be given when justice so requires.

IND. R. TR. P. 15(A).

[78]452 N.E.2d at 430.

[79]Trial Rule 41(E) provides:

> 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 court shall enter an order of dismissal at plaintiff's costs if the plaintiff shall not show sufficient cause at or before such hearing. Dismissal may be withheld or reinstatement of dismissal may be made subject to the condition that the plaintiff comply with these rules and diligently prosecute the action and upon such terms that the court in its discretion determines to be necessary to assure such diligent prosecution.

IND. R. TR. P. 41(E).

[80]455 N.E.2d 971 (Ind. Ct. App. 1983), *transfer denied*, February 17, 1984.

[81]IND. R. TR. P. 56(C) (emphasis added). *See* Nahmias v. Trustees of Ind. Univ., 444 N.E.2d 1204 (Ind. Ct. App. 1983), *transfer denied*, June 27, 1983 (considering the second step of the inquiry).

unless the movant demonstrates it is entitled to judgment as a matter of law.[82]

Therefore, the review standard on appeal is accordingly established. The appellate court is also engaged in a two-step analysis. First, the appellate court must be satisfied that there was no genuine issue of material fact in dispute and, second, that the moving party is entitled to judgment as a matter of law.

b. Supporting materials.—In *McCullough v. Allen*,[83] an action by a medical doctor (McCullough) against an attorney (Allen) for abuse of process and malicious prosecution, a summary judgment motion was granted in favor of the attorney. The summary judgment motion was supported by the affidavit of an Indiana attorney stating that Allen acted reasonably in bringing the original action and that the claim of Allen's client was worthy of litigation. McCullough appealed the trial court's grant of summary judgment, contending that the affidavit merely stated the attorney's legal conclusion and, therefore, was improper under Trial Rule 56(E) which requires that affidavits must "set forth such facts as would be admissible in evidence."[84]

The court of appeals found, however, that the trial court properly admitted the affidavit, stating that "a qualified attorney's legal opinion as to an ultimate fact in issue is admissible, unless it addresses matters within the common knowledge and experience of ordinary persons."[85] The court found that the affidavit in this case clearly did not state matters of common knowledge. In a malicious prosecution action, the court acknowledged, only an expert familiar with the law and with the standards employed by reasonable attorneys could testify whether a reasonable attorney would consider a claim worthy of litigation. Because the affiant was qualified to give such an opinion, this case was not affected by the general rule that a court may not enter summary judgment upon an affidavit stating conclusions of law or opinions by one not qualified to give such testimony. Therefore, the affidavit was properly relied upon.[86]

C. Parties and Discovery

1. Trial Rule 19: Joinder of Claims and Remedies.—In *State v.*

---

[82]455 N.E.2d at 974 (citing Osborne v. State, 439 N.E.2d 677, 684 (Ind. Ct. App. 1982); Nationwide Mut. Ins. Co. v. Neville, 434 N.E.2d 585, 589 (Ind. Ct. App. 1982); Associates Fin. Servs. Co. v. Knapp, 422 N.E.2d 1261, 1264 (Ind. Ct. App. 1981); Moll v. South Cent. Solar Sys., Inc., 419 N.E.2d 154, 159 (Ind. Ct. App. 1981); Kendrick Memorial Hosp. v. Totten, 408 N.E.2d 130, 134 (Ind. Ct. App. 1980)).

[83]449 N.E.2d 1168 (Ind. Ct. App. 1983).

[84]IND. R. TR. P. 56(E).

[85]449 N.E.2d at 1170 (citing State v. Bouras, 423 N.E.2d 741, 745 (Ind. Ct. App. 1981); Rosenbalm v. Winski, 165 Ind. App. 378, 385-86, 322 N.E.2d 249, 254 (1975)).

[86]449 N.E.2d at 1170.

Merino,[87] the plaintiff brought an action against certain state employees in their individual capacities. The plaintiff sought damages for personal injuries sustained when his car left the road and struck a guard rail.[88]

The defendants' motion to join the State as a party-defendant, pursuant to Trial Rule 19,[89] was granted. Later the State's motion for summary judgment, based upon lack of notice as required by the Indiana Tort Claims Act,[90] was granted. Eventually, the plaintiff's motion to correct errors, requesting that the judgment be vacated and the State dismissed as a party defendant, was granted.

The issue on appeal was whether or not, under Trial Rule 19(A)(2)(a),[91] the State should have been joined as a party defendant. In making its determination, the court interpreted Indiana Code section 34-4-16.5-5(b) which provides that a governmental entity shall pay a judgment rendered against an employee "when the governor, in the case of a claim or suit against a state employee, . . . determines that paying the judgment . . . is in the best interest of the governmental entity."[92] The court found that rather than mandating payment of a judgment by the State, the provision conditions payment upon the Governor's determination that paying the judgment is in the best interest of the State. The court concluded that the State's interest is, therefore, conditional at best.

The court also noted that the State failed to demonstrate that disposition of the action in its absence might impair its ability to protect its interest. Nowhere was it shown that the individual party defendants were incapable of raising any issue or defense which the State might raise.[93] The court concluded that absent those showings, it could not say that any of the State's interests in the litigation mandated joinder pursuant to Trial Rule 19(A)(2)(a).

In *Indiana Civil Rights Commission v. City of Muncie*,[94] the Civil Rights Commission argued that the trial court did not have jurisdiction

---

[87]456 N.E.2d 437 (Ind. Ct. App. 1983).

[88]*Id.* at 438.

[89]IND. R. TR. P. 19.

[90]IND. CODE § 34-4-16.5-1 to -19 (1982).

[91]456 N.E.2d at 438. Trial Rule 19(A)(2) provides:

> A person who is subject to service of process shall be joined as a party in the action if
>
> (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may:
>
> (a) as a practical matter impair or impede his ability to protect that interest, or
>
> (b) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

IND. R. TR. P. 19(A)(2).

[92]IND. CODE § 34-4-16.5-5(b) (1982).

[93]456 N.E.2d at 439.

[94]459 N.E.2d 411 (Ind. Ct. App. 1984), *transfer denied*, May 18, 1984.

to consider an appeal from the Commission's findings. This assertion was based on the fact that the original complainant was not joined as a party to the review proceedings.

The court of appeals upheld the superior court's jurisdiction based on an interpretation of Trial Rule 19(A)(2)(a).[95] The appeals court said that even if the original complainant was an indispensable party, it did not follow that an action must be dismissed simply because the indispensable party was not named.[96] Instead, the court said, the Civil Rights Commission should have joined the original complainant pursuant to Trial Rules 14(A)(2)[97] and 20(A)(2),[98] or the orginal claimant should have sought to intervene under Trial Rule 24.[99] Another correct procedure is a discretionary order by the trial court that the person be made a party to the action or that the action should continue without the person.[100] Since neither the Commission nor the complainant took positive action

---

[95]*See supra* note 91.

[96]459 N.E.2d at 416. Trial Rule 19(B) provides the standard for determining when joinder is not feasible:

> Notwithstanding subdivision (A) of this rule when a person described in subsection (1) or (2) thereof is not made a party, the court may treat the absent party as not indispensable and allow the action to proceed without him; or the court may treat such absent party as indispensable and dismiss the action if he is not subject to process. In determining whether or not a party is indispensable the court in its discretion and in equity and good conscience shall consider the following factors:
>
> (1) the extent to which a judgment rendered in the person's absence might be prejudicial to him or those already parties;
>
> (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided;
>
> (3) whether a judgment rendered in the person's absence will be adequate;
>
> (4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

IND. R. TR. P. 19(B).

[97]Trial Rule 14(A) provides in pertinent part: "A defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him." IND. R. TR. P. 14(A).

[98]Trial Rule 20(A)(2) provides:

> All persons may be joined in one [1] action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of, or arising out of, the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action.

IND. R. TR. P. 20(A)(2).

[99]459 N.E.2d at 416. Trial Rule 24 provides for permissive intervention and intervention as of right. *See* IND. R. TR. P. 24. *See also* Developmental Disabilities Residential Facilities Council v. Metropolitan Dev. Comm'n, 455 N.E.2d 960 (Ind. Ct. App. 1983) (containing a comprehensive discussion of Trial Rule 24 intervention).

[100]459 N.E.2d at 416 (quoting Lutheran Hospital v. Department of Pub. Welfare, 397 N.E.2d 638, 647 (Ind. Ct. App. 1979)).

to secure the joinder of the complainant as a party to the action, the trial court did not err in denying the Commission's motion to dismiss.[101]

2. Trial Rule 23: Class Actions.—In *Shallenberger v. Hope Lutheran Church*,[102] the court of appeals considered a question of first impression in Indiana. The issue was whether or not a trial court can restrict the plaintiff's contact with members of the proposed class to communications in the form of a court-approved preliminary notice to all members of the proposed class.

The trial court order required a consultation of all parties in the case and the preliminary approval of a specific notice prior to contacting proposed members of the plaintiff's class.[103] In effect, the order required plaintiff to seek the approval of the defendants before communicating with members of the proposed class.

The court cited and extensively discussed the case of *Gulf Oil Co. v. Bernard*,[104] in which the United States Supreme Court disapproved a restrictive "gag order" as an abuse of the trial court's discretionary power. The Indiana Appellate Court likewise disapproved the trial court's restrictions on communications with prospective class members, but did not reach any constitutional question. It held that the trial court abused its discretion because the record was devoid of any facts or authority to support the order.[105] The court, borrowing from *Bernard*, inferred that a trial court might impose such an order if it were sufficiently supported by factual findings and legal arguments demonstrating the need for such a restriction.[106]

3. Discovery Rules.—a. Workproduct privilege.—The United States Supreme Court, in the case of *F.T.C. v. Grolier, Inc.*,[107] provided an important interpretation of the work product privilege under Federal Rule of Civil Procedure 26(b)(3). Its interpretation is directly applicable to Indiana Trial Rule 26(B)(3)[108] which contains the same language as the federal rule. *Grolier* involved an interpretation of exemption 5 of the Freedom of Information Act (FOIA) which exempts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency."[109] It

---

[101]459 N.E.2d at 416.

[102]449 N.E.2d 1152 (Ind. Ct. App. 1983). In another recent case involving class actions, the Indiana Court of Appeals held that a complaint could not be entertained for failure to exhaust administrative remedies even though two counts of the complaint were denominated as class actions pursuant to 42 U.S.C. § 1983. May v. Blinzinger, 460 N.E.2d 546 (Ind. Ct. App. 1984), *transfer denied*, June 14, 1984.

[103]449 N.E.2d at 1154.

[104]452 U.S. 89 (1981).

[105]449 N.E.2d at 1156.

[106]*Id.* at 1155.

[107]103 S. Ct. 2209 (1983).

[108]IND. R. TR. P. 26(B)(3).

[109]5 U.S.C. § 552(b)(5) (1982).

is well established that the exemption was intended to include the attorney work product rule. The specific issue was whether an attorney's work product must be disclosed on a demand made under the FOIA after the litigation which produced the attorney's work product had ended.

The federal court of appeals had held that four documents developed during prior litigation could not be withheld on the basis of the work product privilege unless the party opposing disclosure (the FTC) could show that "litigation related to the terminated action exists or potentially exists."[110] This interpretation of Federal Rule 26(b)(3) was reversed. The Supreme Court said that the history of the Rule was essentially silent on the question, "[b]ut the literal language of the Rule protects materials prepared for *any* litigation or trial as long as they were prepared by or for a party to the subsequent litigation."[111] Specifically, the Court held that "under Exemption 5 [of the FOIA], attorney work-product is exempt from mandatory disclosure without regard to the status of the litigation for which it was prepared."[112]

b. Trial Rule 26: Termination of discovery.—The case of *Coster v. Coster*,[113] contains an excellent discussion related to a trial court's power to terminate discovery at the request of a party. In a marital dissolution action the wife requested information from her husband, which was supplied by the husband during a four year period. The husband answered sets of interrogatories, provided financial statements, met with his wife's attorney, and testified at pre-trial discovery hearings and at trial concerning anticipated or prospective income or value in the husband's business. The husband moved for and obtained an order by the trial court which terminated all discovery.[114]

That order was sustained on appeal and the court's comments interpreting Trial Rule 26 are significant. The appellate court observed that discovery must be accorded a broad and liberal scope to provide all parties with information essential to the proper litigation of all relevant issues, to eliminate surprise, and to promote settlement. Discovery, however, like all matters of procedure, has ultimate and necessary boundaries. In ruling on issues of discovery, the trial court has a broad discretion which will not be upset on appeal absent a showing of apparent abuse of discretion and prejudicial error.[115]

---

[110]Grolier Inc. v. F.T.C., 671 F.2d 553, 556 (D.C. Cir. 1982), *rev'd*, 103 S. Ct. 2209 (1983).

[111]103 S. Ct. at 2213 (citing 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2024, at 201 (1970)).

[112]103 S. Ct. at 2215. The concurring opinion believed it was unnecessary for the majority to base its decision on an FOIA interpretation, in view of the holding regarding Federal Rule of Civil Procedure 26(b)(3). *Id.* at 2217 (Brennan, J., concurring).

[113]452 N.E.2d 397 (Ind. Ct. App. 1983).

[114]*Id.* at 399-400.

[115]*Id.* at 400.

The court stated that it is within the discretion of the trial court to place bounds on the extent of discovery; thus, the trial court may require that discovery be completed by a certain date to prevent delay of trial, or a trial court may refuse to continue a trial date in order that further discovery be conducted. The court of appeals observed that the trial court has inherent power to prescribe the terms and conditions of discovery, or to change or modify its orders as subsequent events may warrant. The trial court may also deny a request for further discovery on an issue when it determines that sufficient information has been exchanged to prepare a party's case on that issue, or when a trial court determines that the information sought already has been provided through prior discovery proceedings.[116] The court recognized that the broad discretion allowed a trial court in ruling on discovery matters, coupled with the harmless error doctrine under Trial Rule 61,[117] will bar reversal of a case because of discovery error or claimed mistake except "in the unusual case."[118] The court found no abuse of discretion since very substantial information had been provided to the wife by the husband prior to the termination of all discovery.[119]

c. Trial Rule 30(D): Termination of deposition cross-examination.—Briggs v. Clinton County Bank & Trust Co.[120] involved extensive litigation among the parties concerning an estate. One of the questions on appeal was based on the trial court's order requiring the noninitiating party to pay for any further cross-examination during the taking of a deposition. The order effectively terminated the deposition, thereby implicating Trial Rule 30(D).[121] The noninitiating party claimed he had a right to fully

---

[116]*Id.*

[117]Trial Rule 61 provides:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order in anything done or omitted by the court or by any of the parties is ground for granting relief under a motion to correct errors or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order or for reversal on appeal, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

IND. R. TR. P. 61.

[118]452 N.E.2d at 400.

[119]*Id.* at 401.

[120]452 N.E.2d 989 (Ind. Ct. App. 1983), *transfer denied*, December 14, 1983.

[121]Trial Rule 30(D) provides:

> At any time during the taking of the deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the county where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26(C).

cross-examine the witness at the expense of the initiating party.[122]

The court of appeals noted that no Indiana precedent was available regarding the propriety of assessing costs against a party who has not initiated the deposition. Additionally, the trial rules are silent with respect to the party who may be required to bear the cost of a deposition.[123]

Generally, the party instigating a deposition pays for the costs necessarily incurred as a result of the deposition, such as transportation costs, stenographic reporter's fees, transcription costs, and filing fees. However, under appropriate circumstances the trial court has discretion to require the noninitiating party to pay for discovery costs when, as here, it determines that the discovery process has been abused.[124] The record indicated that the deponent had given six hours of direct examination testimony and sixteen hours of cross-examination testimony before the trial court imposed the conditions on continuation of the cross-examination.[125]

The appellate court upheld the trial court's order, finding no abuse of discretion.[126] The court noted that its holding was clearly consistent with other discovery rules relating to sanctions and the award of expenses and attorney's fees when the discovery process is abused.[127]

> If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 37(A)(4) apply to the award of expenses incurred in relation to the motion.

IND. R. TR. P. 30(D).

[122]452 N.E.2d at 1008.

[123]*Id.*

[124]*Id.* at 1009. (citing Kolosci v. Lindquist, 47 F.R.D. 319 (N.D. Ind. 1969)).

[125]452 N.E.2d at 1009.

[126]*Id.* Additionally, the trial court committed no error when it read the deposition in question to examine the conduct of cross-examination solely with reference to a procedural matter and not with regard to the merits of the action. *Id.* Of course, Indiana case law requires that a deposition be published and admitted into evidence in order to be considered. Gumz v. Starke County Farm Bureau Co-op. Ass'n, 271 Ind. 694, 395 N.E.2d 257 (1979); Augustine v. First Fed. Sav. & Loan Ass'n, 270 Ind. 238, 384 N.E.2d 1018 (1979).

The procedure outlined in Newton v. State, 456 N.E.2d 736, 744 n.6 (Ind. Ct. App. 1983), concerning depositions and discovery evidence should be carefully noted. In *Newton*, a criminal case, the defendant argued that a seven-year-old witness gave trial testimony inconsistent with her deposition testimony. The court's review of the record showed that defendant had moved to publish the deposition, but later failed to offer the deposition or any parts thereof into evidence after it had been published. The court concluded that it was bound by the record on appeal and the appellant's arguments or allegations of contradictory testimony were outside the record and could not be considered. 456 N.E.2d at 744 n.6.

[127]452 N.E.2d at 1009 n.4. *See, e.g.*, IND. R. TR. P. 37(A)(4). The Trial Rule does not permit an award of expenses and attorney fees in connection with obtaining the termination or limitation of a deposition, but does not specifically authorize an award for the cost of a portion of a deposition itself.

d. Trial Rules 34 and 37: Pre-trial preparation requirement.—In *Aamco Transmission v. Air Systems, Inc.*,[128] defendant Aamco was prevented from making an in-court examination or production of certain profit and loss summaries of the plaintiff company during trial. The trial court reasoned that such conduct was trial preparation and that such trial preparation work was impermissible during trial.[129]

Aamco filed a pre-trial request for the production of all income ledgers to which the plaintiff failed to respond; yet Aamco did not move under Trial Rule 37(A)[130] to compel the plaintiff to comply with its request. Additionally, the request did not comply with the provisions in Trial Rule 34, concerning the production of documents, because it failed to specify a reasonable time, place, and manner for making the inspection.[131] However, the principal attention given in the appellate court was to the fact that Aamco neglected to follow through with pre-trial discovery devices by failing to move for a Trial Rule 37 order.

The court of appeals sustained the trial court's refusal to permit Aamco to conduct in-court production of the documents. Aamco's neglect to carry through with discovery, when it might have been entitled to a pre-trial order compelling plaintiff's response at trial, led the court of appeals to sustain the trial judge's broad discretion with respect to discovery permitted during the course of trial.[132]

The court emphasized that a trial court's discovery rulings will not be reversed without a showing of prejudice by the moving party, and that Aamco could not do so because it also failed to take advantage of Trial Rule 45(B) which provides for a subpoena to command the production of books, documents, and papers.[133] The court noted that if the defendant had adopted the subpoena procedure, a court order would have been unnecessary.[134]

D. Trials and Judgments

1. Trial Rule 41: Voluntary Dismissal by Court Order.—The case of *Board of Commissioners v. Nevitt*,[135] contains a unique interpretation of the relationship between Trial Rules 15 and 41(A). Nevitt and his

---

[128]459 N.E.2d 1215 (Ind. Ct. App. 1984), *transfer denied*, June 5, 1984.

[129]*Id.* at 1219.

[130]Trial Rule 37(A) allows a party to move the trial court for an order compelling discovery. *See* IND. R. TR. P. 37(A).

[131]*See* IND. R. TR. P. 34(B). The scope of Trial Rule 34 is fairly broad. *See, e.g.*, Allied Mills, Inc. v. P.I.G., Inc., 454 N.E.2d 1240, 1243 (Ind. Ct. App. 1983) (By request pursuant to Trial Rule 34, a shareholder's financial annual reports are properly discoverable when punitive damages are sought.).

[132]459 N.E.2d at 1220.

[133]*See* IND. R. TR. P. 45(B).

[134]459 N.E.2d at 1220.

[135]448 N.E.2d 333 (Ind. Ct. App. 1983), *transfer denied*, December 13, 1983.

wife brought suit against the Cass County Board of Commissioners (Board) and a county employee for personal injuries suffered by Nevitt. On the day before the trial, Nevitt was granted leave to file an amended complaint under Trial Rule 15(A), dropping his claim against the Board. Nevitt's wife, however, did not similarly drop her claim against the Board. The county employee was given notice of the amended complaint on the morning of the trial. The employee's attorney moved for a continuance, but that motion was denied. After a bench trial, the court entered judgment for Nevitt against the county employee for $2,750,000 and for Nevitt's wife against the driver and Cass County for $100,000.[136]

The court of appeals examined Trial Rules 15(A) and 41(A)(2),[137] as well as several decisions in the area, and decided that the proper procedure in this situation is for a plaintiff to seek a voluntary dismissal under Trial Rule 41(A). The court reasoned that a construction of Trial Rule 15 which would allow a plaintiff to dismiss his claim against one party by amending his complaint under these circumstances would nullify the "terms and conditions" requirement that may be imposed by the court under Trial Rule 41(A)(2). Therefore, the court held that "a plaintiff who wishes to drop a defendant from his suit may not do so by amending his complaint, but must seek a voluntary dismissal under T.R. 41(A)."[138] Additionally, the court decided to treat the trial court's dismissal under Trial Rule 15 as if it were a dismissal under Trial Rule 41(A)(2), rather than remanding the case to the trial court for reconsideration.[139]

After treating the trial court amendments as a dismissal under Trial Rule 41(A)(2), the court concluded that the dismissal was a final, appealable judgment as defined in Trial Rule 54(A),[140] a point upon which there was no previous Indiana authority. The dismissal of the Board, the court reasoned, resulted in the Board receiving a judgment within the meaning of the Indiana Tort Claims Act. Therefore, any further action against the employee was barred.[141] The court also reasoned that its conclusion was not altered by Trial Rule 54(B) because that Rule has no bearing on what constitutes a judgment under the Tort Claims Act.[142]

---

[136]*Id.* at 335-36.

[137]*See* IND. R. TR. P. 15(A) and 41(A)(2) (providing, respectively, for amendments to pleadings and voluntary dismissal by court order).

[138]448 N.E.2d at 338 (footnote omitted).

[139]*Id.*

[140]*See* IND. R. TR. P. 54(A).

[141]The Indiana Tort Claims Act provides: "A judgment rendered with respect to or a settlement made by a governmental entity bars an action by the claimant against an employee whose conduct gave rise to the claim resulting in that judgment or settlement." IND. CODE § 34-4-16.5-5(a)(1982).

[142]*See* IND. R. TR. P. 54(B). In so holding, the court extended several similar opinions. *See, e.g.*, Burks v. Bolerjack, 427 N.E.2d 887 (Ind. 1981); Teague v. Boone, 442 N.E.2d 1119 (Ind. Ct. App. 1982); Coghill v. Badger, 418 N.E.2d 1201 (Ind. Ct. App. 1981).

It is here suggested that these interpretations become quite difficult because they occurred in the context of a suit against a governmental agency. A better disposition in an appellate court decision interpreting a trial court rule for the first time, especially one resulting in the curtailment of trial court discretion under a still different rule, would be to remand to the trial court. A remand would permit the trial court to redetermine whether to exercise the discretion it initially invoked. This would seem particularly true in this case, where Nevitt's wife continued the litigation against the county. It would seem quite improbable for the county to suggest prejudice, insofar as the county might claim it had no opportunity to defend against a claim arising from the occurrence which precipitated both lawsuits.

2. Trial Rule 50: Judgment on the Evidence.—The quantum of evidence necessary for a plaintiff to avoid a directed verdict at the close of his evidence was addressed in *American Optical Co. v. Weidenhamer.*[143] Initially, the court agreed that the case was governed by the rules enunciated in *Mamula v. Ford Motor Co.*[144] The *Mamula* court stated, in essence, that the motion for a judgment on the evidence will be granted after considering only the evidence most favorable to the party against whom the motion is made, and then only when there is a *total absence of evidence* or legitimate inference in favor of the nonmoving party upon the issues.[145]

The supreme court reinterpreted the *Mamula* language. It said that in determining whether or not evidence is sufficient for that purpose, both qualitative and quantitative analyses are necessary. If opposite conclusions could be reasonably drawn, then it cannot be said that the evidence was insufficient.[146] The key word is "reasonable," although in several opinions words such as "substantial" or "probative" have been used. Such words, the court stated, are helpful in articulating the methodology in Trial Rule 50 cases because they focus a trial court's attention upon the qualitative aspects of the issue. They may also tend to promote objectivity in these situations.[147]

Quantitatively, evidence may fail only if it is absent. Qualitatively, however, evidence fails when it cannot be said, with reason, that the intended inference may logically be drawn. This may occur either because

---

[143]457 N.E.2d 181 (Ind. 1983). For additional analysis of this case, see Liebman, *Products Liability, 1984 Survey of Recent Developments in Indiana Law*, 18 IND. L. REV. 299, 300 (1985).

[144]150 Ind. App. 179, 181, 275 N.E.2d 849, 851 (1971). The *Huff* standard is inapposite because that case involved a judgment on the evidence after the jury had returned a verdict.

[145]*Id.* (quoting Hendrix v. Harbelis, 248 Ind. 619, 623, 230 N.E.2d 315, 318 (1967); Rouch v. Bisig, 147 Ind. App. 142, 147-48, 258 N.E.2d 883, 886 (1970)).

[146]457 N.E.2d at 184.

[147]*Id.*

of an absence of credible witnesses or because the intended inference may not be drawn without undue speculation.[148]

The court, in using such words as "quantitatively" and "qualitatively" referred, of course, to the sufficiency of the evidence present, and not to its admissibility. The *Mamula* standard appears to have been very substantially rewritten by the Indiana Supreme Court in *American Optical*.

3. Trial Rule 55(B): Default Judgment.—Horsley v. Lewis[149] concerned the applicability of the three day notice and hearing provision of Trial Rule 55(B) when an attorney enters an appearance, files a responsive pleading, and then withdraws from the case. Lewis commenced an action against Horsley, who entered an appearance by an attorney; the attorney filed a responsive pleading and a denial. The case was set for trial after a status conference. Thereafter, Horsley's attorney withdrew from the case. He notified Horsley of that fact, and advised him that a default judgment could be entered against him. No further appearance was made by Horsley's counsel. Subsequently, Lewis filed an affidavit for default. On the same day the trial court entered the default judgment. No three day notice of the motion for default was served on Horsley.[150]

In its opinion, the appellate court clarified the distinction between the appearance or withdrawal of an attorney as opposed to the litigant. If a party withdraws his appearance with permission of the court, the court is divested of jurisdiction. But if an attorney merely withdraws his own appearance, the party remains before the court.[151] Because the responsive pleading was filed and not later withdrawn, the court concluded that the litigant (Horsley) had appeared for purposes of Trial Rule 55(B) and therefore notice of default was required.[152] The default judgment was reversed because such notice was not given. The court distinguished *Stewart v. Hicks*,[153] where an entry of appearance by counsel *without filing an answer*, and the subsequent withdrawal of the appearance, made the defendant vulnerable to default without notice.

The decision of the court of appeals in *Hampton v. Douglass*[154] is closely related to the question addressed in *Horsley*. *Hampton*, a paternity action, entailed a judgment by default after the merits had been closed. Since no answer is required in a paternity action, the issues are closed

---

[148] *Id.*

[149] 448 N.E.2d 41 (Ind. Ct. App. 1983).

[150] *Id.* at 42.

[151] *Id.* at 43 (quoting State ex rel. Durham v. Marion Circuit Court, 240 Ind. 132 136, 162 N.E.2d 505, 507 (1959)).

[152] 448 N.E.2d at 43. *See* IND. R. TR. P. 55(B).

[153] 395 N.E.2d 308 (Ind. Ct. App. 1979).

[154] 457 N.E.2d 618 (Ind. Ct. App. 1983). For a further discussion of this cae, see King, *Domestic Relations, 1984 Survey of Recent Developments in Indiana Law*, 18 IND. L. REV. 211, 240 (1985).

by operation of law after the complaint is filed. The defendant had appeared but his counsel withdrew and neither the defendant nor his counsel appeared in court for trial on the trial date. The mother moved for default, received it due to the defendant's failure to attend the trial on the appointed date, and offered some evidence concerning expenses for the support award. Although the three day notice as required under Trial Rule 55(B) was not given, that issue was not dispositive because the court distinguished and disagreed with the *Horsley* decision on that question.

The court held that once the issues were closed, either by filing a responsive pleading or by operation of law, judgment by default is improper even if the defendant fails to appear for trial.[155] The trial court must proceed to hear the plaintiff's evidence as though the defendant was present and, if a prima facie case is established, then the trial court may render a judgment on liability only. Because a prima facie case was not established in *Hampton*, the court of appeals set aside the default, distinguishing *Horsley* in its opinion. The court based its holding on a 1931 court of appeals decision[156] and stated that default, as it is defined by the Indiana courts, would never be appropriate in paternity cases.

Presumably, under the reasoning in *Hampton*, a default judgment is never appropriate in any case in which the defending or answering party has appeared, even when the three day notice has been given, unless the moving party presents a prima facie case. If *Hampton* stands for this proposition, the decision is open to serious question. First, it seems contrary to the discretion allowed to the trial court by Trial Rule 55(B) when the three day notice has been given. The last sentence of Rule 55(B) plainly provides the trial court with discretion to enter judgment without the plaintiff showing a prima facie case if the facts in the particular case warrant such a proceeding. Second, *Hampton* places the serious and diligent party at a distinct disadvantage while favoring the careless, negligent, or obstinately absent party. Where the defaulting party has notice but fails to show, a three day or longer delay of the entire proceeding would occur. If the plaintiff is present and ready for trial, a delay of even three days would mean the plaintiff must bear the full expense for readiness and presumably repeat the process at least once again.

If the court had held that setting a trial date three days beyond the date of notice complies with the three day notice requirement under Trial Rule 55(B), then certainly the trial court would have the ability to enter a default if the party, failing to appear after notice, is not

---

[155]*Id.* at 619.

[156]Indiana State Bd. of Medical Registration v. Packard, 93 Ind. App. 171, 177 N.E. 870 (1931).

present. The remaining question would be whether or not the trial court must force the plaintiff to establish a prima facie case on "liability" in every case. If so, and *Hampton* appears to so require, then the last sentence of Rule 55(B) is eviscerated along with the discretion it vested in the trial court. This would mean that Trial Rule 55(B) had no effect on the 1931 court of appeals decision, or that none is to be recognized. However, the Rule plainly gives more discretion than *Hampton* intimates. Further, the Indiana Supreme Court decision of *Seibert Oxidermo, Inc. v. Shields*[157] regarding Trial Rules 55(C) and 60 is pertinent.

4. Collateral Estoppel.—In a unique opinion on collateral estoppel during the survey period, the Indiana Court of Appeals appeared to sanction the doctrine of nonmutual collateral estoppel, at least to a limited extent. *Board of Commissioners v. Whistler*[158] considered whether or not the trial court, in an action against a retirement fund, erred in failing to find the Board of Commissioners collaterally estopped from litigating an issue they had already lost in a prior action against the county auditor.

The court accepted without comment that three of the four requirements of collateral estoppel were unquestionably met: "(1) a court of competent jurisdiction rendered the judgment, (2) the issue . . . was determined in the first judgment, and (3) the judgment in the first case was on the merits."[159] The only real controversy concerned the identity of parties requirement.[160] The court resolved this issue with little difficulty, finding that "Indiana courts have carved out an exception to the identity of parties requirement when the judgment concerns local government."[161] Thus, the court held collateral estoppel applied against the government entity as a plaintiff despite the lack of identity of parties in the two suits.[162]

---

[157]446 N.E.2d 332 (Ind. 1983).

[158]455 N.E.2d 1149 (Ind. Ct. App. 1983), *transfer denied*, March 9, 1984.

[159]*Id.* at 1155 (citing Moxley v. Indiana Nat'l Bank, 443 N.E.2d 374 (Ind. Ct. App. 1982); Glass v. Continental Assurance Co., 415 N.E.2d 126 (Ind. Ct. App. 1981); Peterson v. Culver Educ. Found., 402 N.E.2d 448 (Ind. Ct. App. 1980)).

[160]*See* Peterson v. Culver Educ. Found., 402 N.E.2d 448 (Ind. Ct. App. 1980); Mayhew v. Deister, 144 Ind. App. 111, 244 N.E.2d 448 (1969).

[161]455 N.E.2d at 1155.

> "The authorities are almost unanimous in holding that, in the absence of a showing of fraud or collusion, a judgment against an officer of a local government, respecting matters which are of general and public interest, entered in an action where there was a bona fide controversy, is binding and conclusive upon all residents, citizens, and taxpayers of the local government."

Id. at 1155 (quoting Simmons v. Woodward, 217 Ind. 15, 20, 26 N.E.2d 37, 39 (1940)). *See also* Oviatt v. Behme, 238 Ind. 69, 147 N.E.2d 897 (1958).

[162]455 N.E.2d at 1156. *Accord* United States v. Stauffer Chem. Co., 104 S. Ct. 575 (1984) (government estopped to litigate same issue against separate plants of the same company).

The *Whistler* opinion must be compared with a recent United States Supreme Court case holding that the federal government may not be collaterally estopped from relitigating issues adjudicated *against it as a defendant*, when actions are brought by different parties as plaintiffs.[163] The result in *Whistler* then would seem to be substantially qualified when the government is a party-defendant, as a matter of policy, by the Supreme Court's decision.

E. Appeals

1. Trial Rule 60: Relief from Judgment or Order.—a. Mistake, surprise, excusable neglect.—Two recent cases involving Trial Rule 60(B) deserve careful attention. In *Boles v. Weidner*,[164] the plaintiff was injured in an automobile accident and brought suit against the defendants. The defendants were served with a complaint and summons, yet no appearance was made for the defendants. The plaintiff moved and received a default judgment for damages. Approximately nine months later, the defendants entered an appearance and moved to set aside the judgment, stating that the summons and complaint were given to their local insurance agency which was to notify the Hartford Insurance Group, defendants' insurer. The defendants said that "a breakdown in communications" between the local agency and Hartford resulted in Hartford not receiving notice of the suit.[165]

The trial court granted the motion to set aside, based on the communications breakdown and observed that the plaintiff's counsel did not notify the insurance carrier (Hartford) of the suit.[166] Reversing the trial court, the Indiana Court of Appeals stated that it was not the duty of the plaintiff's counsel to notify the defendant's insurance carrier of the lawsuit.[167]

On transfer to the Indiana Supreme Court, the trial court's judgment was sustained on the ground that, although it was not the responsibility of the plaintiff's counsel to give notification to the insurance carrier, it was permissible for the trial court to consider that factor in the exercise of its discretion in setting aside a default judgment pursuant to Trial Rule 60(B)(1).[168] The court sustained the general proposition that because of the "breakdown in communications" between the agent and the carrier, "neither of them was aware that the lawsuit was pending without the proper response of hiring an attorney and entering an appearance."[169]

---

[163]United States v. Mendoza, 104 S. Ct. 568 (1984).

[164]449 N.E.2d 288 (Ind. 1983).

[165]*Id.* at 289.

[166]*Id.*

[167]440 N.E.2d 720, 722 (Ind. Ct. App. 1982), *rev'd*, 449 N.E.2d 288 (Ind. 1983).

[168]449 N.E.2d at 290.

[169]*Id.* at 291. *See also* Lipscomb v. Markward, 457 N.E.2d 613 (Ind. Ct. App. 1983).

The gist of the *Boles* decision in the supreme court is that a "mistake in communication" existed even though the defendants received all of the notice to which they were entitled, and even though the plaintiff did not participate in, or cause the "failure of communication" between the insurance agent and the insurance carrier. This conclusion is significant in measuring the next opinion.

In *American Fletcher National Bank v. Pavilion, Inc.*,[170] also on transfer from the Indiana Court of Appeals, relief was sought under Trial Rule 60(B)(1) and (8). Plaintiff (AFNB) sought judgment on a promissory note. A bench trial resulted in a judgment for the defendants. AFNB filed a motion to correct error, which the trial court overruled. A notice of the motion's disposition from the clerk's office showed a handwritten date. That date was not the date of the ruling on the motion to correct error; rather, it was the date on which the card was mailed. However, the attorney representing AFNB thought the date on the notice was the date of the court's ruling. As a result, AFNB attempted to perfect an appeal by filing the record of proceedings which the clerk of the court of appeals refused as untimely.[171]

AFNB sought relief under Trial Rule 60 asking for a *nunc pro tunc* entry to change the date of the ruling on the motion to correct error, which the trial court granted. Eventually, AFNB perfected its appeal and the defendants cross-appealed. The court of appeals held that the trial court did not abuse its discretion in granting AFNB's Trial Rule 60(B) motion and, therefore, the appeal was timely perfected.[172]

The supreme court decided, however, that the trial court erred in granting AFNB relief under Trial Rule 60(B)(1) and (8).[173] The reasoning of the supreme court was that no mistake occurred because there was no misinformation from the clerk to the party's attorney. Rather, the court characterized the notice as incomplete information. Moreover, there was neither a lack of notice to the attorney involved nor an affirmative or direct manifestation of false information from the clerk's office.[174]

---

[170]453 N.E.2d 156 (Ind. 1983).

[171]*Id.* at 156-57.

[172]434 N.E.2d 896, 898 (Ind. Ct. App. 1982), *rev'd*, 453 N.E.2d 156.

[173]453 N.E.2d at 159. Trial Rule sections 60(B)(1) and (8) provide:

> On motion and upon such terms as are just the court may relieve a party or his legal representative from an entry of default, proceeding, or final judgment, including a judgment by default, for the following reasons:
>
> (1) mistake, surprise, or excusable neglect;
>
> (8) any reason justifying relief from the operation of the judgment, other than those reasons set forth in sub-paragraphs (1), (2), (3), and (4).

IND. R. TR. P. 60(B)(1), (8).

[174]453 N.E.2d at 159. The supreme court specifically distinguished and interpreted its decision in Soft Water Utilities, Inc. v. LeFevre, 261 Ind. 260, 301 N.E.2d 745 (1973). In *Soft Water*, a party's attorney was given misinformation from the clerk which the court stated was affirmatively misleading.

The court held that the trial court abused its discretion in granting AFNB's Trial Rule 60(B) motion to set aside and reenter the denial of the motion to correct error. Thus, the court concluded that AFNB did not perfect a timely appeal and dismissed the appeal.[175]

The decision appears to substantially qualify the relief fomerly available under *Soft Water Utilities, Inc. v. LeFerre*.[176] Under *Soft Water Utilities* and its progeny, the scope of appellate review of a trial court's decision on a Trial Rule 60(B) motion was limited to an abuse of discretion standard. After *Pavilion* where the notice of a court's ruling, order, or judgment is at issue, relief under Trial Rule 60(B)(8) appears to be available only when there was some positive act of misinformation or a misleading misrepresentation by the clerk's office which caused the lack of understanding and the entry of a judgment from which relief is sought. Central to the *Pavilion* decision was Trial Rule 72(D), which provides in part that lack of notice of entry by the clerk does not affect the time for appeal.[177] Clearly, the supreme court interpreted Trial Rule 72(D) as a limitation upon the trial court's discretion to grant relief even when it is clear that a genuine mistake, as in *Pavilion*, is present. This trend[178] is troublesome because the appellate courts are changing the usual rule that a Rule 60 motion is an appeal to the discretion of the trial court, and that the lower court decision will be disturbed only for an abuse of discretion.[179]

Although there was no misinformation or lack of notice, there was certainly a "failure of communication" which was even greater than the failure in the *Boles* decision. There is not, it seems, a principled explanation for the distinction in cases involving Rule 72(D) requiring affirmative misinformation before allowing relief under Rule 60(B)(8).[180] If a failure of communication between two insurance company offices, or between an insured and an insurer, may be a basis for relief under Rule 60(B), as in *Boles*, it is difficult to reconcile why a failure of communication between the clerk's office and an attorney cannot result in relief to the attorney's client. The only reasoned explanation offered by the Indiana Supreme Court concerns an attorney's duty to check the

---

[175]453 N.E.2d at 159.

[176]261 Ind. 260, 301 N.E.2d 745 (1973). *See, e.g.*, State *ex rel.* Janesville Auto v. Superior Court, 270 Ind. 585, 387 N.E.2d 1330 (1979); First Nat. Bank & Trust Co. v. Colling, 419 N.E.2d 1326 (Ind. Ct. App. 1981).

[177]*See* IND. R. TR. P. 72 (D). *See also* Patton Elec. Co. v. Gilbert, 459 N.E.2d 1192 (Ind. Ct. App. 1984); McIlwain v. Simmons, 452 N.E.2d 430 (Ind. Ct. App. 1983); Spence v. Supreme Heating & Air Conditioning Co., 442 N.E.2d 1144 (Ind. Ct. App. 1982); Bilchert v. Brosoky, 436 N.E.2d 1165 (Ind. Ct. App. 1982).

[178]*See* cases cited *supra* note 177.

[179]*See, e.g.*, Matherly v. Matherly, 457 N.E.2d 220 (Ind. 1984).

[180]*Compare* American Fletcher Nat. Bank & Trust Co. v. Pavilion, 453 N.E.2d 156 (Ind. 1983) *with* Matherly v. Matherly, 457 N.E.2d 220 (Ind. 1984) *and* Boles v. Weidner, 449 N.E.2d 288 (Ind. 1983).

court records and learn of court entries. One can grant that general duty but reply that an attorney for a defendant has a duty to file an answer to a complaint which is timely filed. The failure to perform that duty is not different from the failure under Rule 72(D), but Indiana cases make a clear, hard, and inexplicable distinction between the two conditions under Trial Rule 60(B).

b. Repetitive motions and modification of an injunction.—In *Saint Joseph's Hospital v. Women's Pavilion*,[181] repetitive motions under Trial Rule 60(B) were at issue. Such repetitive motions are very strongly discouraged, or will not be considered, unless certain qualifications are clearly shown.[182] The facts of *Saint Joseph's Hospital* meet one such qualification; namely, where the movant is unaware of certain facts or consequences at the time the first motion is filed, a second motion will be considered.[183] In this case, a modification of law occurred after the denial of the movant's first motion under Trial Rule 60(B).

Accordingly, the court of appeals held that the movant could not have requested relief in the first motion on the basis of a change in law and, therefore, was not preempted or foreclosed from seeking relief pursuant to a second motion under Trial Rule 60(B).[184] Only where an extraordinary change has occurred will a second or repetitive motion under Trial Rule 60(B) be entertained or reviewed on appeal pursuant to appellate review principles.

Additionally, because of a change in the law under a decision in the court of appeals, one party in the case filed a motion seeking modification of an injunction. The modification was granted by the trial court.[185]

On appeal, the court of appeals stated that, although it could find no Indiana precedent specifically providing for relief from judgments of prospective application (such as injunctions) when the law has subsequently changed, there was no sufficient reason to limit the application of Trial Rule 60(B)(7) when equity demanded otherwise.[186] The court noted that the Indiana provision is the functional equivalent of Federal

---

[181]451 N.E.2d 1126 (Ind. Ct. App. 1983).

[182]*See, e.g.*, Siebert Oxidermo Inc. v. Shields, 446 N.E.2d 332 (Ind. 1983).

[183]451 N.E.2d at 1128.

[184]*Id.* at 1129.

[185]*Id.* at 1127.

[186]*Id.* at 1130. Trial Rule 60(B)(7) provides:

> On motion and upon such terms as are just the court may relieve a party or his legal representative from an order, entry of default, proceeding, or final judgment, including a judgment by default, for the following reasons:
>
> (7) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application . . . .

IND. R. TR. P. 60(B)(7).

Rule 60(b)(5), and that federal precedent supported a broad application of the "no longer equitable" clause.[187]

2. Appellate Jurisdiction.—Affidavits with Petitions to Transfer.— The opinion in *Indiana Education Employment Relations Board v. Mill Creek Classroom Teachers*[188] contains an important holding concerning the use of affidavits with regard to petitions to transfer from the Indiana Court of Appeals to the Indiana Supreme Court. A dispute arose between the parties because the school board did not maintain the status quo and withheld salary increases provided under a prior contract, pending agreement on a new contract. The court of appeals held that the case became moot because the parties had reached an agreement which included the payment in full of all incremental changes withheld during the negotiations, and therefore denied the appeal.[189]

However, on transfer the supreme court noted that the law in Indiana is well-settled that although a specific issue may be moot among parties in the case, the fact that it recurs year after year and is of great public interest is sufficient to allow the issue to be considered on its merits. Because of the general public interest in encouraging harmonious labor relations between a school board and its employees and the recurring nature of the issue, the court concluded that the case should be considered on its merits and proceeded to address the question.[190]

The evidence which caused the supreme court to conclude that the issue was not moot, although an agreement was reached among the parties to the action, was presented to the court by means of affidavits accompanying the petition to transfer from the court of appeals. Although the supreme court agreed that the issue was moot with respect to the parties in the instant case, the affidavits showed "that salary increments have been denied to teachers during the status quo period in at least twelve school corporations during the last two years."[191] Note well that this evidence did not concern the dispute between the parties; rather, the information concerned other school systems where those same conditions had occurred.

F. Statutory and Rule Amendments[192]

1. Appellate Rule 2(C): Court of Appeals PreAppeal Conference.— The Indiana Supreme Court amended Appellate Rule 2(C) effective March

---

[187]451 N.E.2d at 1130 (citing Public Serv. Comm'n v. Schaller, 157 Ind. App. 625, 299 N.E.2d 625 (1973)).

[188]456 N.E.2d 709 (Ind. 1983). For a further discussion of this case, see Archer, *Labor Law, 1984 Survey of Recent Developments in Indiana Law*, 18 Ind. L. Rev. 291, 297 (1985).

[189]*Id.* at 710-11.

[190]*Id.* at 712.

[191]*Id.* at 711.

[192]*See* Harvey, *The Judicial Assault on the Attorney-Client Relationship: Thoughts on the 1983 Amendments to the Federal Rules of Civil Procedure*, 1 BENCHMARK 17

8, 1984. The amendment requires that in civil appeals taken to the court of appeals the appellant shall file, within ten days of filing the praecipe with the clerk of the trial court, a copy of the praecipe, a copy of the motion to correct error and the ruling thereon, a statement of the nature of the case, and the judgment entered with the clerk of the supreme court and the court of appeals. *The failure to file this pre-trial document within the ten day period prescribed will forfeit the right to appeal.*

There is some history behind this amendment. The rule in its original form did not require the forfeiture of an appeal if the copies of the praecipe and the other documents were not filed in the office of the clerk of the court of appeals. However, the court of appeals began to administer the rule in that manner. It dismissed approximately a dozen cases, all of which were transferred to the supreme court. That court, in essence, reinstated all the cases. Immediately after the issuance of the order, however, the supreme court amended Rule 2(C). Thus, there is another jurisdictional prerequisite to perfecting an appeal to the court of appeals in civil cases.

2. Punitive Damages.—Indiana Code section 34-4-30-1 was amended during the survey period:

> If a person suffers a pecuniary loss as a result of a violation of IC 35-43, he may bring a civil action against the person who caused the loss for:
>
> (1) an amount *not to exceed* three (3) times his actual damages;
>
> (2) the costs of the action; and
>
> (3) a reasonable attorney's fee.[193]

The change in this section is substantial as the previous language provided for treble damages[194] while the statute now allows a maximum of three times actual damages.

The same legislative act also established a new section:

> it is not a defense to an action for punitive damages that the defendant is subject to criminal prosecution for the act or omission that gave rise to the civil action. However, a person may not recover both:
>
> (1) punitive damages; and
>
> (2) the amounts provided for under section 1 of this chapter.[195]

The new section also established a standard of proof in cases involving punitive damages, which is proof by "clear and convincing evidence"

(Mar.-Apr. 1984) (the author's criticism of amendments to Federal Rules of Civil Procedure 7, 11, 16, and 26 which were enacted during the survey period).

[193]Act of Feb. 29, 1984, Pub. L. No. 172-1984, § 1, 1984 Ind. Acts 1462 (codified as amended at IND. CODE § 34-4-30-1 (Supp. 1984)).

[194]IND. CODE § 34-4-30-1 (1982).

[195]Act of Feb. 29, 1984, Pub. L. No. 172-1984, § 2, 1984 Ind. Acts 1462 (codified at IND. CODE § 34-4-30-2 (Supp. 1984)).

of all the facts that are relied upon by the person or plaintiff to support his recovery for punitive damages.[196]

3. Collection of Witness Fees.—A new article, Indiana Code 33-17, was added as part of an attempt to recodify the laws relating to circuit court clerks.[197] Of particular interest is chapter 12, relating to the collection of fees belonging to individuals, which provides for the collection and disbursement of witness fees by the clerk.[198] While this chapter was purportedly intended as a recodification of existing law, it is not. Moreover, the statutory provision is directly contrary to Trial Rule 45(G)[199] and previous practice whereby the attorney paid the fee directly to the witness. Consequently, the legislature should strive to resolve this inconsistency; however, as a matter of procedure, the Trial Rules govern.

---

[196]Act of Feb. 29, 1984, Pub. L. No. 172-1984, § 3, 1984 Ind. Acts 1462 (codified at IND. CODE § 34-4-30-2 (Supp. 1984)).

[197]Act of Mar. 1, 1984, Pub. L. No. 171-1984, § 1, 1984 Ind. Acts 1393, 1393-1415 (codified at IND. CODE 33-17 (Supp. 1984)).

[198]Act of Mar. 1, 1984, Pub. L. No. 171-1984, § 1, 1984 Ind. Acts 1393, 1413-15 (codified at IND. CODE § 33-17-12-1 to-3 (Supp. 1984)).

[199]Trial Rule 45(G) provides:

> Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person who shall be required to attend outside his county of residence as provided in section (C), and by so tendering to him the fees for one [1] day's attendance and the mileage allowed by law. Such tender shall not be required to be made to a party who is subpoenaed or to an officer, employee, agent or representative of a party which is an organization, including the estate or any governmental organization, who is being examined upon any matter connected in any way with his employment or with duties to the organization.

IND. R. TR. P. 45(G).

APPENDIX A

INDIANA JUDICIAL REPORT FOR 1983
TOTAL CASES FILED IN 1983
SUMMARY

	Circuit, Superior, & Probate Courts	Marion Municipal Courts	County Courts & County Court Function Courts	Total
Felony	14,146	-0-	7,386	21,532
Misdemeanor	2,661	-0-	61,075	63,736
Criminal*	-0-	53,377*	-0-	53,377*
Re-Docketed Criminal	3,944	3	5,055	9,002
Juvenile	28,596	-0-	-0-	28,596
Civil (Plenary)	54,907	10,729	3,389	69,025
(Small Claims)	-0-	-0-	98,625	98,625
Re-Docketed Civil	15,155	6,191	52,945	74,291
Dissolution	43,158	-0-	-0-	43,158
Re-Docketed Dissolution	32,557	-0-	-0-	32,557
Probate/Adoption	20,949	-0-	-0-	20,949
Non-Felony Traffic**	-0-	-0-	111,412	111,412
Infractions**	-0-	99,769	180,023	279,792
Guardianship	5,914	-0-	-0-	5,914
Other	10,432	-0-	4,001	14,433
TOTAL	232,419	170,069	523,911	926,399

*Marion Municipal Courts' criminal caseload is combined and includes misdemeanors and felonies.
**By reason of reporting procedures, a clear distinction cannot be made between Non-Felony Traffic cases and Infractions.

APPENDIX B

INDIANA JUDICIAL REPORT FOR 1983

TOTAL CASES DISPOSED IN 1983

SUMMARY

	Circuit, Supperior, & Probate Courts	Marian Municipal Courts	County Courts & County Court Function Courts	Total
Felony	15,088	-0-	6,116	21,204
Misdemeanor	2,652	-0-	61,931	64,583
Criminal*	-0-	42,776*	-0-	42,776*
Re-Docketed Criminal	3,515	3	4,512	8,030
Juvenile	27,491	-0-	-0-	27,491
Civil (Plenary)	59,315	12,012	3,346	74,673
(Small Claims)	-0-	-0-	100,555	100,555
Re-Docketed Civil	12,539	5,439	49,807	67,785
Dissolution	43,640	-0-	-0-	43,640
Re-Docketed Dissolution	31,048	-0-	-0-	31,048
Probate/Adoption	19,394	-0-	-0-	19,394
Non-Felony Traffic**	-0-	-0-	111,571	111,571
Infractions**	-0-	94,562	173,340	267,902
Guardianship	4,982	-0-	-0-	4,982
Other	9,950	-0-	3,564	13,514
TOTAL	229,614	154,792	514,742	899,148

*Marion Municipal Courts' criminal caseload is combined and includes misdemeanors and felonies.

**By reason of reporting procedures, a clear distinction cannot be made between Non-Felony Traffic cases and Infractions.

APPENDIX C

INDIANA JUDICIAL REPORT FOR 1983

1983 METHOD OF DISPOSITION

SUMMARY

	Circuit, Superior, & Probate Courts	Marion Municipal Courts	County Courts & County Court Function Courts	Total
Jury Trial				
Felony	1,050	-0-	113	1,163
Misdemeanor	31	-0-	148	179
Criminal*	-0-	532*	-0-	532
Civil (Plenary)	719	71	19	809
(Small Claims)	-0-	-0-	-0-	-0-
Non-Felony Traffic	-0-	-0-	85	85
TOTAL	1,852	622	365	2,839
Bench Trials				
Felony	1,190	-0-	506	1,696
Misdemeanor	217	-0-	6,109	6,326
Criminal*	-0-	14,456*	-0-	14,456
Juvenile	14,876	-0-	-0-	14,876
Civil (Plenary)	15,876	3,044	545	19,465
(Small Claims)	-0-	-0-	21,631	21,631
Re-Docketed Civil	6,427	-0-	19,990	26,417

Dissolution	29,877	-0-	-0-	29,877
Re-Docketed Dissolution	21,063	-0-	-0-	21,063
Non-Felony Traffic	-0-	-0-	3,291	3,291
Infractions	-0-	50,850	3,578	54,428
TOTAL	113,752	68,350	55,540	237,642
Settled	13,380	1,350	25,335	40,065
Guilty Pleas				
Felony	8,435	-0-	3,771	12,206
Misdemeanor	1,775	-0-	36,901	38,676
Criminal*	-0-	12,414*	-0-	12,414
Non-Felony Traffic	-0-	-0-	29,766	29,766
Infractions	-0-	30,658	46,052	76,710
Dismissed	4,553	32,247	80,097	116,897
Default	15,466	4,790	51,830	72,086
Violations Bureau	-0-	-0-	162,564	162,564
Venued Out	5,775	219	362	6,356
Transferred Out	1,396	-0-	1,322	2,718
Closed	8,553	-0-	-0-	8,553
Failure to Appear	-0-	-0-	9,341	9,341
TOTAL	229,614	154,792	514,742	899,148

*Marion Municipal Courts' criminal caseload is combined and includes misdemeanors and felonies.