Survey of Recent Developments in the Indiana Rules of Trial Procedure in Civil Matters

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I. Introduction

Each civil case which is litigated within the framework of the Indiana Rules of Trial Procedure ("Trial Rule[s]" or "Rule[s]") necessarily involves procedural issues and the application of those Rules. This Survey, however, is limited to those reported decisions within the survey period which involved the interpretation of the civil Trial Rules in some particular and important way by the Indiana appellate courts. A brief overview is also made of amendments which were enacted during the survey period to those Rules affecting appellate practice. Cases decided during the survey period which have involved noteworthy interpretations of the Federal Rules of Civil Procedure are addressed elsewhere in this survey edition.

II. The Right to Trial by Jury

The application of Trial Rule 38(A) was examined several times during the survey period. Rule 38(A) entitles a party to a jury trial as a matter of right, where such a right existed prior to June 18, 1852.[1] Traditionally, the rule in Indiana has therefore been that actions in equity create no right to a trial by jury, while those in law, do.[2] This distinction was addressed during the survey period by the Indiana Court of Appeals in *Howell v. State Farm Fire & Casualty Co.*,[3] a first-party action by insureds against their insurer for the recovery of compensatory damages for damage to property and for the recovery of punitive damages. The plaintiffs also demanded trial by jury. State Farm in its answer raised various affirmative defenses, and sought, by counterclaim, to have the policy rescinded or cancelled based upon the alleged misrepresen-

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1. Ind. R. Tr. P. 38.

2. Hiatt v. Yergin, 152 Ind. App. 497, 513, 284 N.E.2d 834, 843 (1972).

3. 530 N.E.2d 318 (Ind. Ct. App. 1988). Nowhere in the reported opinion does the court of appeals specifically state that the insured timely made a jury trial demand either with respect to the original complaint or with respect to defense of the counterclaim. A jury trial, having been demanded, is inferred only from the court's statement of the issue on appeal ("Whether the trial court reversibly erred in denying [the appellants] a trial by jury"). *Id.* at 319, and by the ensuing discussion within the opinion.

tations of the insureds. The trial court refused the plaintiffs' jury trial demand with respect to the trial of the defendant's counterclaim, and after a trial to the court, found in favor of State Farm and apparently rescinded the policy.[4]

After correctly noting that the determination of whether an action lies in law or in equity can be made only by looking to the true nature of the claims and the pleadings as a whole,[5] the court of appeals reversed the trial court and held that actions on insurance policies are actions at law, not at equity, and are therefore properly triable by jury.[6] The court further held that a party whose jury demand is effectively denied by the trial court need not preserve error by further objection or motion.[7] Trial Rule 39(C), the court held, "makes clear that in proceeding under Rules 38 and 39, a party may predicate error upon the court's action without motion or objection."[8] Accordingly, the court held that the insureds did not waive their right to jury trial by failing to object to the trial court setting the matter for bench trial and by consenting to trial in a particular venue.[9] The case was remanded back to the trial court, for trial by jury of both the original claims as well as the counterclaims.[10]

Similarly, in *Weisman v. Hopf-Himsel, Inc.*,[11] the Indiana Court of Appeals affirmed that the distinction between law and equity, in determining the essential character of an action and thereby whether it is triable by jury on demand of either party, is to be made from the true nature of the litigation and not merely from the headings or titles of the various pleadings.[12] "To determine whether or not a party is entitled to a trial by jury, Indiana courts look beyond the label given a particular action and evaluate the nature of the underlying substantive claim."[13] The court concluded that the essence of the subject matter of the *Weisman* litigation, the foreclosure of a mechanic's lien, was equitable in nature rather than legal.[14] "That the parties to the transaction disagreed as to how much compensation was due . . . does not alter the basic characterization of this action as being a cause in equity."[15] Accordingly,

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4. *Id.*
5. *Id.*
6. *Id.* at 320.
7. *Id.* at 321.
8. *Id.*
9. *Id.*
10. *Id.*
11. 535 N.E.2d 1222 (Ind. Ct. App. 1989).
12. *Id.* at 1229.
13. *Id.*
14. *Id.*
15. *Id.*

the court concluded that the matter was fundamentally equitable in nature and, therefore, not triable by jury.[16]

The *Weisman* court further rejected the contention that those claims which were fundamentally legal in nature, rather than equitable, should have been properly bifurcated from the remaining claims and tried by jury even if the equitable claims were subject to trial only to the court.[17] If "an essential part of a cause of action is equitable, the rest of the case is drawn into equity."[18] Accordingly, a counterclaim sounding in law must be tried in equity, if the original claim is equitable in nature.[19]

III. The Discovery Rules

A. Requests for Admission

The survey period produced two important appellate interpretations of Trial Rule 36. Rule 36 is technically among the "discovery rules," but the essential function of the rule is to establish known facts rather than to discover facts not known to the party propounding the requests.[20]

An abuse of Trial Rule 36 was addressed in *Indiana Construction Service, Inc. v. Amoco Oil Co.*[21] There, a contract between Indiana Construction and Amoco contained an indemnity provision, purportedly entitling Amoco to indemnification from Indiana Construction. An employee of Indiana Construction was injured at a construction site at the Amoco facility, and sued Amoco in federal court. Amoco settled, and then sued Indiana Construction for indemnity in state court. In its answer to that complaint, Indiana Construction asserted that the indemnity provision which was contained within the contract was void and unenforceable, citing Indiana Code section 26-2-5-1.[22] Indiana Con-

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16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* This author has been unable to find Indiana authority addressing the reverse proposition, that is, whether all claims are triable by jury when the essence of the original claim is legal while the essence of the counterclaim is equitable. *See also* Jones v. Marengo State Bank, 526 N.E.2d 709 (Ind. Ct. App. 1988), also decided during the survey period, holding that if an essential part of the cause of action is equitable, the case in its entirety is drawn into equity.
20. Ind. R. Tr. P. 36; *See, e.g.*, F.W. Means & Co. v. Carstens, 428 N.E.2d 251, 256 (Ind. Ct. App. 1982).
21. 533 N.E.2d 1300 (Ind. Ct. App. 1989).
22. (Burns Supp. 1989) (statute declares void and unenforceable, as against public policy, indemnity provisions contained in construction or design contracts except those pertaining to highways, which purport to indemnify the indemnitee against the idemnitee's sole negligence).

struction, the defendant, then propounded to Amoco a series of Rule 36 requests for admission, one of which erroneously requested that Amoco admit that the injuries sustained by the original plaintiff-employee "were sustained as a result of the sole negligence or willful misconduct of Indiana Construction Service, Inc.,"[23] rather than having requested that the injuries were sustained as a result of the sole negligence of Amoco. Amoco then admitted the request; that is, admitted that the injuries to the original plaintiff were caused solely by the negligence of Indiana Construction Service, Inc., as the plaintiff in the indemnity action, and then moved for summary judgment based upon that admission. The trial court thereafter denied Indiana Construction's motion to withdraw Amoco's admission, and granted summary judgment in favor of Amoco. The appeal ensued.

The court of appeals properly reversed the summary judgment. The appellate court observed that the request had been mistakenly drafted to identify Indiana Construction as the negligent party, rather than the intended party, Amoco. While an admission of a Rule 36 request binds the party *answering* the request, and thereby establishes the fact requested *as against the party answering*, "the mere propounding of these requests admits nothing as to the *requesting* party."[24] Because Indiana Construction, the party *propounding*, but *not answering* the requests, never admitted it was negligent, the court of appeals reasoned that the admissions by Amoco did not establish negligence against Indiana Construction.[25] Distinguishing stipulations from requests for admissions, the court of appeals concluded that "[a]n admission does not have the effect of a stipulation, even though T.R. 36 provides matters admitted under that rule are conclusively established."[26]

Shoup v. Mladick[27] provided the court of appeals with further opportunity to interpret Trial Rule 36 during the survey period. In a medical malpractice action against two physicians, physician A admitted in a response to a request for admission propounded by the plaintiffs

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23. *Indiana Constr. Serv.*, 533 N.E.2d at 1301.

24. *Id.*, (emphasis supplied). It is respectfully submitted that Trial Rule 1 provided the court of appeals with an additional basis for extending relief from what unquestionably was an unintentional error in the drafting of the request. Trial Rule 1 states that the Rules which "govern the procedure and practice in all courts, in all suits of a civil nature . . . shall be construed to secure the just, speedy, and inexpensive determination of every action." IND. R. TR. P. 1. Neither the court's entry of summary judgment, nor Amoco's apparent opposition to the effort by Indiana Construction to withdraw the admission, are consistent with the intended policy of the supreme court in the promulgation of Trial Rule 1.

25. *Indiana Constr. Service*, 533 N.E.2d at 1301.

26. *Id.*

27. 537 N.E.2d 552 (Ind. Ct. App. 1989).

that the co-defendant, physician B, had breached the appropriate standard of care. Physician B thereafter received a unanimous medical review panel decision that he was not negligent. Physician B then initiated summary judgment proceedings based upon the unanimous decision of the medical review panel.[28] In opposition to physician B's motion for summary judgment, the plaintiffs argued that the summary judgment must be defeated based upon the assertion by physician A in *his* answers to the plaintiffs' request for admission that physician B was negligent. In upholding the summary judgment of the trial court in favor of physician B, the court of appeals correctly determined that requests for admission of facts addressed to one defendant, physician A, are not binding upon a co-defendant, physician B. "[Trial Rule] 36 admissions," the court held, "apply to and bind [only] the answering party, not a co-defendant."[29]

B. Pretrial Discovery

Brown v. Terre Haute Regional Hospital,[30] addressing the issue of what sanctions may be imposed for the violation of the discovery rules, reaffirmed the right of the trial courts to exclude trial evidence offered by a party who has violated those rules. In *Brown*, three violations of the discovery rules preceded, and served as the basis for, the exclusionary ruling: (1) the plaintiff did not seasonably supplement discovery responses under Trial Rule 26(E); (2) the plaintiff divulged two additional expert witnesses only several days before trial; and, (3) the plaintiff failed to cause an important expert witness to disclose all of that expert witness' opinions in a discovery deposition, even though the trial court had specifically ordered the plaintiff to require that expert to disclose any and all new expert opinions prior to trial.[31] In fact, the trial court had granted the defendant a continuance, once the additional expert witness was identified by the plaintiff shortly before trial, in order to discover all of the expert testimony of that witness pursuant to a discovery deposition.[32]

Trial Rule 26(E)(1) is self-operative, requiring the supplementation of discovery responses without court order or resubmission of the discovery requests, concerning the identity and location of persons having

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28. Failure by a plaintiff to provide admissible expert opinion sufficient to contradict a unanimous medical review panel finding in favor of the health care provider warrants the entry of summary judgment in favor of the provider. Ellis v. Smith, 528 N.E.2d 826 (Ind. Ct. App. 1988).

29. *Shoup*, 537 N.E.2d at 553.

30. 537 N.E.2d 54 (Ind. Ct. App. 1989).

31. *Id.* at 58.

32. *Id.*

knowledge of discoverable matters as well as the identity of expert witnesses, the subject matter of the expected testimony of those experts, and the substance of that expert testimony.[33] In *Brown*, the plaintiff complied neither with that rule nor with the court order specifically instructing the plaintiff to disclose, during the deposition of the expert witness, all new expert opinions which had not previously been disclosed.[34] When, during trial, the plaintiff sought to elicit an opinion from that expert witness which had not been previously disclosed during the defendant's discovery deposition of that witness, the trial court properly prohibited that testimony from being presented to the jury. The court of appeals affirmed the exclusionary ruling as a proper exercise of the discretion of the trial court in imposing appropriate discovery sanctions.[35]

In *DeMoss Rexall Drugs v. Dobson*,[36] the court of appeals addressed the discovery issue of whether pre-suit statements obtained by an insurer from its own insured during the investigation of a potential third-party claim against the insured are discoverable once suit is filed against the insured. The defendant had resisted the production of those statements based upon the argument that they were protected either as privileged communication or as part of the work-product doctrine, recognized in Trial Rule 26(B)(3).[37]

The essential facts of the case were that on September 14, 1987, the potential plaintiff went to the defendant's pharmacy to have a prescription filled.[38] The prescription was filled with an incorrect medication, presumably because of error by the pharmacist. The plaintiff thereafter developed adverse reactions to the incorrect medication. On Friday, September 25, 1987, the pharmacy reported the potential claim to its insurer. On the following Monday, three days later, the insurer concluded that this was a potentially difficult claim, and that the claimant had a proven history of presenting at least one other previous claim.[39] Less then two weeks later, on October 5th and 6th, the insurer obtained recorded statements from its insured, including the insured pharmacist.

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33. IND. R. TR. P. 26(E)(1).
34. 537 N.E.2d at 57.
35. *Id.* at 58.
36. 540 N.E.2d 655 (Ind. Ct. App. 1989).
37. *Id.* at 657. *DeMoss* is a case of first impression in Indiana on the issue of whether a third-party is entitled to discover the investigative materials prepared by the defendant's insurer. The *DeMoss* court relied upon CIGNA-INA/Aetna v. Hagerman-Shambaugh, 473 N.E.2d 1033 (Ind. Ct. App. 1985), which had allowed discovery of such materials in a first-party action by an insured against the insurer in a bad-faith action. For the reasons set forth hereinafter, this author believes that the extension of *CIGNA* to the arena of third-party litigation is unsound.
38. *Id.* at 656.
39. *Id.*

The trial court subsequently ruled, once suit was filed, that those pre-suit statements were discoverable by the plaintiff.[40]

The court of appeals concluded that the trial court had not abused its discretion in requiring the production of those statements.[41] Because all privileges bearing upon the rights of discovery in Indiana are statutory in nature, and their creation is solely within the prerogative of the legislature, the court of appeals reasoned that there is no insurer-insured privilege in Indiana unless one is created by legislation.[42] The court concluded, therefore, that the discoverability of the insured's statements was unprotected by any claim of insurer-insured privilege.[43]

Finding no privilege, the court of appeals then considered the second basis for the insurer's objection to the production of the statements, namely, that the insured's statements were "prepared in anticipation of litigation," the prerequisite for the work product protection under Trial Rule 26(B)(3). In evaluating that contention, the court declined to accept the insurer's position that all documents prepared by insurers are immune from discovery under the protection of work product,[44] noting that even under the landmark United States Supreme Court holding in *Hickman v. Taylor*,[45] unprivileged facts obtained by an attorney are freely discoverable so long as they were obtained prior to, or for a purpose other than, anticipation of litigation, and only those facts which are actually obtained by counsel in anticipation of litigation enjoy the conditional work product protection of being discoverable upon a showing of need and unavailability.[46] The court of appeals thereby declined to grant the insurer a greater protection with respect to its work product than legal counsel is entitled to with respect to counsel's own work product under *Hickman v. Taylor*. Relying upon, and reaffirming, *CIGNA-INA/Aetna v. Hagerman-Shambaugh*,[47] the court of appeals concluded that while some insurance investigations are conditionally protected by the work product doctrine, others are not; those which truly are "prepared in anticipation of litigation," the court concluded, are protected, while those which are not obtained in anticipation of litigation, but are merely routine in nature, fall beyond the work product pale of protection and

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40. *Id.*
41. *Id.* at 659.
42. *Id.* at 657.
43. *Id.* The court acknowledged that there may be policy considerations favoring an evidentiary exclusion rule for communications between an insured and its insurer, citing Snodgrass v. Baize, 405 N.E.2d 48, 54 (Ind. Ct. App. 1980), but deferred to the legislature for creation and protection of such a privilege. *Id.*
44. *Id.*
45. 329 U.S. 495 (1947).
46. *DeMoss*, 540 N.E.2d at 657.
47. 473 N.E.2d 1033 (Ind. Ct. App. 1985).

become freely discoverable even without the prerequisite showing of substantial need and unavailability under Trial Rule 25.[48]

In attempting to define and distinguish documents which are prepared in anticipation of litigation from those which are not, the court then purportedly fashioned a "purpose test": "[I]f the document can fairly be said to have been prepared or obtained *because of the prospect of litigation* and not, even though litigation may already be a prospect, because it was generated as part of the company's regular operating procedure,"[49] then the document is conditionally protected by the work product doctrine and becomes subject to adversarial discovery only upon a showing of need and unavailability. Applying that test, the court concluded that the statements in question had *not* been obtained *because* of litigation, but instead had been obtained by the insurer merely as the product of its regular operating procedures and were, therefore, discoverable.[50] The facts which appeared to have influenced the court in reaching its conclusion that the statements obtained by the insurer from its own insured were obtained as part of "regular operating procedures" rather than "in anticipation of litigation" were: (a) the statements had been obtained by the insurer from its insured less than two weeks after the insurer was notified of the claim; (b) the investigation had just begun when the statements were obtained; and, (c) the insurer had not yet decided to refuse to pay the claim prior to the insurer obtaining the statements.[51]

Certainly, standards enumerated by the courts which must then be applied to essentially fact-sensitive inquiries present the potential for incorrect application as those standards are then applied to particular sets of facts. Such will be the case when other courts apply *DeMoss* in the future. That is because the factual criteria utilized by the *DeMoss* court are not in fact determinative, nor even altogether relevant, as to whether an insurer's investigation truly is being performed *because of* the prospect of litigation or, conversely, whether such investigation is "merely" being performed as part of routine, regular investigations. The criteria used by the court to distinguish between that investigation which

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48. *DeMoss*, 540 N.E.2d at 658. This author suggests that a preferred approach derives from Almaguer v. Chicago, Rock Island & Pac. R.R., 55 F.R.D. 147 (D. Neb. 1972); Ashmead v. Harris, 336 N.W.2d 197 (Iowa 1983); and Fireman's Fund Ins. Co. v. McAlpine, 120 R.I. 744, 391 A.2d 84 (1978). These cases correctly disallowed discovery of an insurer's investigation work in a third-party action, on the common basis that the "seeds of litigation have been sown" once the insured reports the occurrence to his insurer, which triggers the commencement of the defense.

49. *DeMoss*, 540 N.E.2d at 658 (emphasis supplied).

50. *Id.*

51. *Id.*

is merely "regular operating procedure" from that which is truly "prepared in anticipation of litigation" is, in fact, fictitious. In reality, the only true reason for an insurer undertaking the investigation of any claim is *because of* the prospect of litigation; once a claim is presented, essentially all investigation which the insurer performs is *because of* that very "prospect of litigation." Due to that prospect, and because of the fact that insurers, by the very essence of their business and existence, are regularly involved in the "routine" business of the investigation of prospective litigation as part of the obligations to their insureds which arise from the insurance contract, the insurer establishes "regular operating procedures" to obtain sufficient information with which to assess the potential liability to its insured, which is represented by the claim asserted and by the reality of prospective litigation which that claim represents.

Likewise, whether or not the insurer has yet decided to decline payment of the claim seems questionable as a determinative element of whether investigation is being pursued because of the prospect of litigation. It is the claim itself which represents the prospect of litigation, not the insurer's decision to decline voluntary payment of that claim. In practice, a decision "to pay a claim" is further conditional upon whether the monetary valuation of the liability, and not merely the existence of the liability itself, can be mutually agreed upon rather than resolved by the actual filing of a lawsuit. Whether or not a decision has yet been made by the insurer to "accept" the claim, or not "to pay the claim," therefore, is realistically of little value in distinguishing *why* the insurer is investigating the claim, and it is that determination which the *DeMoss* court fails to articulate and satisfactorily define.[52]

In practice, *DeMoss* may operate to discourage cost effective and sound insurance claims practices, instead creating less efficient and more expensive practices which are necessitated in order to better insulate investigation by the insurer from subsequent discovery once suit is filed. For example, if investigation which is performed by the insurer after the claim is denied is more likely to be protected from discovery than that which is performed before a decision has been made to deny the claim, as the *DeMoss* opinion would suggest, an incentive to the insurer

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52. Because *DeMoss* concluded that the insurer's statements obtained from its own insureds were not work product, 540 N.E.2d at 658, the court was not required to address the next question; that is, whether the plaintiff had established the dual prerequisites under IND. R. TR. P. 26(B)(3) of substantial need and inability without undue hardship "to obtain the substantial equivalent of the materials by other means." This author suggests that those foundational prerequisites could not easily be satisfied if the plaintiff could otherwise proceed with the discovery from the insured defendant by way of depositions, interrogatories, and other discovery procedures.

is created to deny claims outright before commencing the investigation of a claim. The result may be increased litigation.

Likewise, the retention of legal counsel by the insurer in the early stages of the investigation, and the involvement by that counsel in the fact gathering process, would seem to produce relevant evidentiary proof that the investigation is being performed because of the prospect of litigation rather than as a routine exercise of insurer operations. Litigation costs may thereby increase in order to better protect the insurer's ability to conduct nondiscoverable investigation prior to suit being filed. In short, the criteria of the court for establishing protected discovery may result in additional litigation cost to the insurance industry, and ultimately to the public which that industry serves, without truly establishing relevant *factual criteria* for distinguishing discoverable, "routine" investigation from that which is investigation obtained only in anticipation of litigation and, therefore, undiscoverable unless the dual criteria of substantial need and unavailability can be established.

It is suggested that the court of appeals should distinguish unprotected, routine investigation from protected discovery performed in anticipation of litigation by requiring an inquiry as to the *ultimate purpose* of the investigation rather then merely focusing on the particular stage or status of the claim when the controverted discovery has been conducted. If the ultimate purpose of the insurer in performing particular discovery or investigation is to obtain information because of the reasonable prospect of third-party litigation, which is initially represented by the notice of a potential claim and the occurrence of an event which has given rise to that claim, whether or not the claim has yet been denied, then the product of that investigation should be conditionally protected as having been obtained "in anticipation of litigation or of trial" and, thus, within the conditional work product protective pale. Under such a test, the free flow of information at least between an insurer and its own insured in the pre-suit investigation phase of a claim would be unfettered by the prospect of unnecessary subsequent disclosure. The insurer thereby would not be discouraged from performing investigation which the prospect of litigation requires but which may produce information adverse to the interests of its own insured, and to its own interests, in the ultimate disposition of the claim.

Under such an "ultimate purpose" standard, the information obtained for the purpose of evaluating a claim in anticipation of litigation would still remain discoverable upon the satisfaction of the showing of need and unavailability. Yet the insurer is provided the conditional protection needed for frank and complete claims investigation and evaluation, which are both the right and the duty of the insurer under the contract of insurance with its insured. *DeMoss*, as part of the unfortunate

progeny of *CIGNA-INA/Aetna v. Hagerman-Shambaugh*,[53] impairs those procedures and rights unnecessarily. Certainly statements which investigators may have obtained on behalf of a plaintiff as part of the "routine" investigation prior to counsel reaching a final decision on whether or not to file suit, and especially statements given to those investigators directly by the plaintiff, should not be discoverable work product by the defense absent at least the foundational showing of the absence or waiver of a privilege or of substantial need and other unavailability of that information. In turn, the investigation which an insurer performs in order to protect its own insured, and especially statements obtained from its own insured within the contractual relationship of the policy of insurance, should enjoy no less work product protection against compulsory disclosure once suit is filed. *DeMoss* should be reconsidered.

IV. Personal Jurisdiction

In *Alberts v. Mack Trucks, Inc.*,[54] the court considered the question of which party carries the burden of proof in establishing the presence or absence of personal jurisdiction once a motion to dismiss the complaint is filed pursuant to Trial Rule 12(B)(2). In *Alberts*, the plaintiff, an Indiana resident, filed suit in Indiana to recover damages arising out of a personal injury accident which had occurred in Illinois.[55] The complaint alleged that one of the defendants, Mack Truck, "is a corporation doing business in Indiana," and that the other defendant, National Seeding Company, "does business in Ohio."[56] The complaint did not allege that National Seeding had otherwise participated or engaged in any of the activities by which long-arm jurisdiction could be invoked pursuant to Trial Rule 4.4. Both defendants filed motions to dismiss for lack of personal jurisdiction under Trial Rule 12(B)(2), and the trial court granted both motions after conducting an unrecorded hearing.[57] Neither the plaintiff, nor either of the defendants, submitted any evidence by affidavit or otherwise on the jurisdictional issue which both motions addressed. After the trial court granted both motions, the plaintiff filed his motion to correct errors and, in support thereof, submitted the affidavit of his counsel pursuant to Trial Rule 59(H)(1). The affidavit, however, only contained the argument which plaintiff's counsel had presented at the unrecorded dismissal hearing; no facts were set forth in the affidavit.[58]

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53. 473 N.E.2d 1033 (Ind. Ct. App. 1985).
54. 540 N.E.2d 1268 (Ind. Ct. App. 1989).
55. *Id.* at 1269.
56. *Id.* at 1271-72.
57. *Id.* at 1269.
58. *Id.* at 1270.

On appeal, the court of appeals first held that counsel's affidavit which was attached to the motion to correct errors was meaningless because its content was merely the disclosure of unsworn arguments which had been made by counsel during the dismissal hearing.[59] Noting that Trial Rule 59(H)(1) permits the filing of affidavits to establish *facts* which are not reflected in the record, if the motion to correct errors is based upon evidence outside of the record, the court concluded that "[t]he unsworn commentary of an attorney is inadequate to establish facts in evidence before the court."[60]

The court next determined that Mack Trucks, as a party challenging jurisdiction in a court of general jurisdiction, had the burden of establishing the absence of adequate jurisdictional grounds *unless* the lack of that jurisdiction is apparent on the face of the complaint itself.[61] At bar, the complaint in fact had alleged that "Mack Trucks, Inc., is a corporation doing business in the State of Indiana," an allegation which the court concluded was sufficient to invoke the long-arm jurisdiction under Trial Rule 4.4.[62] Because those allegations in the complaint were sufficient to establish a *prima facie* jurisdictional claim, and because Mack Trucks had not come forth with any evidence sufficient to contradict those jurisdictional allegations, the court concluded that Mack had failed to carry *its* burden "to at least go forward with evidence" under Trial Rule 12(B)(2) to establish the *absence* of jurisdiction.[63]

Although concluding that Mack Truck had failed to carry its burden of coming forth with evidence to refute the claim of jurisdiction, the court reasoned that the co-defendant, National Seeding Company, had no such duty of presenting evidence in support of its Trial Rule 12(B)(2) jurisdictional motion.[64] With respect to National Seeding Company, the court noted that the complaint had only alleged that National Seeding "did business in Ohio," and that the complaint lacked any allegation on its face of any facts sufficient to invoke jurisdiction under Trial Rule 4.[65] Accordingly, the court concluded that it was the plaintiff, and not National Seeding, which was encumbered with the burden of coming forward with evidence concerning jurisdiction.[66] Because the plaintiff had not made sufficient allegations in the complaint concerning the basis of jurisdiction against National Seeding, and further that the plaintiff there-

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59. *Id.*
60. *Id.* (citing Freson v. Combs, 433 N.E.2d 55, 59 (Ind. Ct. App. 1982)).
61. *Id.* at 1271.
62. *Id.*
63. *Id.*
64. *Id.* at 1272.
65. *Id.*
66. *Id.*

after had not come forward with evidence to establish proof of some jurisdictional basis against National Seeding once National Seeding filed its motion to dismiss based upon the absence of jurisdiction, the court concluded that the jurisdictional motion was proper and should be granted.[67]

While *Alberts* principally addressed the issue of which party has the burden of coming forward with evidence concerning the presence or absence of jurisdiction, *Omnisource Corp. v. Fortune Trading Co.*,[68] also decided during the survey period, addressed the analytical steps which must be taken for the determination of whether jurisdiction has been established under the Indiana Long-Arm Statute and what evidentiary quality must be met in order to invoke that jurisdiction. In *Omnisource*, the Fortune Company, with its principal place of business in Maryland, solicited Omnisource by telephone to sell scrap metal to Fortune. Subsequently, an oral agreement was reached between Fortune and Omnisource for the furnishing of the scrap metal. None of Fortune's representatives were ever in Indiana, all of the scrap metal was physically located outside of Indiana, and the metal was sold and shipped to Japan and Taiwan.[69]

Upon the foregoing facts, the court of appeals concluded that there were sufficient minimum contacts with the state of Indiana in order to invoke the long-arm statute.[70] Specifically, the court held that a two-step jurisdictional analysis must be used.[71] First, a determination must be made whether a defendant has "purposefully established minimum contacts with the forum state" and, if that condition is satisfied, the next determination is whether the assertion of personal jurisdiction also "would comport with fair play and substantial justice."[72] The court then reviewed those factors which must be considered in determining whether, in fact, "fair play and substantial justice" have been met: (1) the nature and quality of the contacts with the forum state; (2) the quantity of contacts with the state; (3) the relationship between those contacts and the cause of action; (4) the interest of the forum state in providing a forum for its residents; and, (5) the convenience of the parties.[73]

Jennings v. Jennings[74] required the court of appeals to determine whether Indiana courts could acquire *in personam* jurisdiction over a

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67. *Id.*
68. 537 N.E.2d 43 (Ind. Ct. App. 1989).
69. *Id.* at 43-44.
70. *Id.* at 45.
71. *Id.* at 44.
72. *Id.* (citing Woodmar Coin Center, Inc. v. Owen, 447 N.E.2d 618, 621 (Ind. Ct. App. 1983)).
73. *Id.* at 44-45.
74. 531 N.E.2d 1204 (Ind. Ct. App. 1988).

foreign defendant based solely upon the Indiana residency of the plaintiff. The plaintiff and defendant were divorced in Kansas in 1980. Thereafter, the wife moved to Indiana and, in 1982, commenced child support proceedings against her former husband in an Indiana court. At that time, the husband was a resident of Illinois, and was served with the support petition and summons in Illinois by certified mail. A default judgment was subsequently obtained against him in the Indiana court. He did not participate or otherwise appear in the support proceedings.[75]

In 1987, the husband then attacked the 1982 default judgment on the ground that the judgment was void because the Indiana court lacked personal jurisdiction over him, as an Illinois resident.[76] In the 1987 proceedings to set aside the default judgment, the trial court acknowledged that it in fact had lacked *in personam* jurisdiction over the defendant in the 1982 proceedings, but nevertheless held that the defendant had "waived the jurisdictional issue" because he had received *notice* of the 1982 hearing and proceedings and had then failed to object to those proceedings.[77] The trial court, in essence, then ruled that defective jurisdiction could nevertheless be cured by the failure to timely object.[78]

The court of appeals affirmed that the trial court did not have personal jurisdiction over the defendant at the time it had entered the 1982 default, finding that the presence of the former wife and the parties' children in Indiana is not sufficient alone for an Indiana court to obtain *in personam* jurisdiction over the Illinois husband.[79] And while personal jurisdiction may be waived,[80] and would have been deemed waive here pursuant to Trial Rules 12(B)(2) and 12(H)(1) had the husband actually appeared and participated in the hearing, the court concluded that the husband had, in fact, not waived his rightful objection to personal jurisdiction by merely failing or refusing to appear and participate in the 1982 hearing.[81] "A defendant is always free to ignore the judicial proceedings, risk a default judgment, and then challenge that judgment on jurisdictional grounds in a collateral proceeding."[82]

The court further noted that although a person may be estopped from challenging a void judgment if he has used it to his benefit, there

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75. *Id.* at 1205.
76. *Id.*
77. *Id.* at 1206.
78. *Id.*
79. *Id.* at 1205. The Indiana Court of Appeals observed, however, in Persinger v. Persinger, 531 N.E.2d 502 (Ind. Ct. App. 1987), that an Indiana court does have sufficient jurisdiction to adjudicate a marital dissolution without acquiring personal jurisdiction over the absent party. *Id.*
80. Willman v. Railing, 529 N.E.2d 122 (Ind. Ct. App. 1988).
81. *Jennings*, 531 N.E.2d at 1206.
82. *Id.* at 1205.

was no evidence in this case that the husband had ever ratified that judgment by using it to his advantage or had otherwise manifested any intention to treat that judgment as valid.[83] There was, therefore, no jurisdictional waiver by estoppel.

V. Pleading and Parties

The survey period also brought two important interpretations of the relation-back operation of Trial Rule 15. In *Waldron v. Wilson*,[84] the Indiana Supreme Court addressed the issue of whether a plaintiff, having mistakenly named individual defendants rather than the corporation which the individual defendants owned and controlled, could name that corporation as the proper defendant, under the relation-back provisions of Trial Rule 15 even after the applicable statute of limitations had expired. The individual defendants were also officers and employees of the corporation.[85]

The original complaint had been filed on the last day before the two-year statute of limitations had expired, alleging that the individual defendants had committed acts of negligence. In their answer, the individual defendants essentially acknowledged that they were the correct defendants. Thereafter, the individual defendants were permitted by the trial court to amend their answer to assert that the activities in question actually were those of the corporation which they controlled, rather than their individual activities. The trial court then denied plaintiff's motion to amend his complaint to add the corporate entity as an additional defendant, ruling that the proposed amended complaint could not relate back to the date the original complaint was filed because notice to the proposed corporate defendant "came after the applicable statute of limitations had expired."[86]

The Indiana Supreme Court reversed, holding that Trial Rule 15(C)(1) does not require process or that a summons be served upon the correct defendant, identified in the amended complaint, prior to the expiration of the statute of limitations.[87] "What is required is such notice of the institution of the action that the added defendant will not be prejudiced in maintaining his defense on the merits."[88] In reaching its conclusion, the court noted that service upon the new defendant would have been effective and timely had the original complaint correctly included the

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83. *Id.*
84. 532 N.E.2d 1154 (Ind. 1989).
85. *Id.* at 1154-55.
86. *Id.* at 1155.
87. *Waldron*, 532 N.E.2d at 1156.
88. *Id.*

new corporate defendant rather than mistakenly identifying only the individual defendants.[89] The court further was persuaded, apparently, by the fact that the insurer of the corporate defendant had received notice prior to the expiration of the statute of limitations, and that, *ipso facto*, notice was also thereby received by the insured itself.[90]

In his dissent, Chief Justice Shepard concluded that Trial Rule 15(C) literally and clearly requires that a party which is sought to be added as an additional defendant after the applicable statute of limitations has expired must have received notice of the suit "within the period provided by law for commencing the action against him," and that the facts presented to the court clearly established that the corporate defendant had not received notice of the suit prior to the expiration of the applicable statute of limitations.[91]

In *Smith v. McFerron*,[92] the plaintiff was operating a motor vehicle which was rear-ended by a Pontiac Sunbird driven by James McFerron, who lived with his parents, Fredonna and Neal McFerron. The Sunbird was insured under a policy of insurance issued to Neal McFerron, as the owner of the vehicle. The complaint, timely filed, incorrectly alleged that the Sunbird was operated by Neal, rather than by James, when the accident occurred. The summons and complaint were sent by certified mail to the McFerron residence, and were accepted and signed for on behalf of Neal by Fredonna. James, the actual driver of the Sunbird when the accident occurred, became aware that his mother had received the summons and complaint that day, and that his mother had informed his father of receipt of the complaint and summons. James, furthermore, became aware that day of the substance of the allegations set forth in the complaint.[93]

After the statute of limitations expired, Neal filed his answer, denying that he was the operator of the vehicle and identifying his son, James, as a nonparty who was responsible for the collision. The trial court refused to permit the plaintiff to amend the complaint to add James as a party defendant.[94] On appeal, the court of appeals held that the trial court had arbitrarily, and thus improperly, refused to allow the plaintiff to file an amended complaint to add James as a party defendant after the statute of limitations had expired.[95] That arbitrary refusal was deemed to be an abuse of discretion, because all of the requirements

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89. *Id.*
90. *Id.*
91. *Id.* at 1158 (Shepard, C.J., dissenting, quoting IND. R. TR. P. 15(c)).
92. 540 N.E.2d 1273 (Ind. Ct. App. 1989).
93. *Id.* at 1273-74.
94. *Id.* at 1274.
95. *Id.*

of Trial Rule 15(C) had otherwise been met.[96] Relying upon *Waldron*[97] and *Czarnecki v. Lear Siegler, Inc.*,[98] the court of appeals concluded that James had in fact received actual notice of the claim within the applicable two-year statute of limitations and, therefore, within the time required by Trial Rule 15(C).[99] Accordingly, the court of appeals reversed the trial court and permitted the plaintiff to amend the complaint, after the statute of limitations had expired, holding that the filing of the amended complaint would relate back to the date on which the original complaint had been filed and thereby defeat the statute of limitations.[100]

VI. Amendments to Those Trial Rules Relating to Appeals

Effective January 1, 1989, the Indiana Supreme Court adopted significant changes to a series of trial and appellate rules relating to the initiation and prosecution of civil appeals. Effective February 16, 1989, the court adopted a further set of rule amendments governing appeals. The February amendments superseded the January amendments. To facilitate an orderly transition to the amended rules, the court entered a March 16, 1989 order permitting appealing parties to operate under either the January 1, 1989 amendments or the February 16, 1989 amendments with respect to appeals from any judgment (or sentencing) received before January 1, 1989. The court recommended that the February 16, 1989 version be utilized. For the appeal of any judgment entered after July 1, 1989, the appeal is governed by the February 16, 1989 amendments.

The amendments to Trial Rule 59 probably represent the most significant trial rule changes during the survey period because of the central importance of this rule to the appellate process. The changes essentially convert the motion to correct errors from a mandatory procedure to an optional procedure under most circumstances. Prior to the 1989 amendments, the denial by the trial court of the motion to correct errors served as the basis for the civil appeal; the motion was required to be filed within sixty (60) days after the entry of a final judgment or an appealable final order. The praecipe was then required to be filed with the trial court, designating the content of the record of proceedings, within thirty (30) days after the court ruling on the motion to correct errors.[101] A copy of the motion to correct errors was further required

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96. *Id.*
97. 532 N.E.2d 1154 (Ind. 1989).
98. 471 N.E.2d 299 (Ind. 1984).
99. *McFerron*, 540 N.E.2d at 1275.
100. *Id.* at 1276.
101. Ind. R. App. P. 2.

to be included in the record of proceedings on appeal in all civil appeals from a final judgment.[102] The appellant's brief was also generally limited to those errors which had been set forth in the motion to correct errors.[103] The motion to correct errors essentially represented the specification of errors for appeal, and errors not contained in the motion to correct errors were generally considered waived.

Under the 1989 amendments to Trial Rule 59, a motion to correct errors is no longer necessary except when a party seeks to address (1) newly discovered material evidence, including alleged jury misconduct, capable of production within thirty (30) days after final judgment which, with reasonable diligence, could not have been discovered and produced at trial, or (2) a claim that a monetary award is excessive or inadequate.[104] All other issues and grounds for appeal which have been preserved during trial may now be asserted and addressed directly in the appellate brief rather than in the motion to correct errors, although a motion to correct errors, at the option either of the court or of any party, may still be made under amended Trial Rule 59(B). If a motion to correct errors is filed under the amended rule, the motion need only address one or both of the grounds set forth in amended Trial Rule 59(A)(1) or (2), and all other grounds for appeal may then simply be set forth for the first time in the appellant's brief on appeal. If a motion to correct errors is filed, a statement in opposition may be filed within fifteen (15) days after service of the motion.

Amendments to Trial Rules 50 and 53.3 were also made because of the changes to Trial Rule 59. Trial Rule 50(A)(6), pertaining to directed verdicts, was amended to permit the trial court to enter a judgment on the evidence, upon its own motion, at any time before final judgment, or before the filing of the praecipe for the record of proceedings; or, if a motion to correct errors is required, then at any time before the court enters its order or ruling upon the motion to correct errors. The change made by the amendment is to provide the additional grounds for permitting the trial court, on its own motion, to enter a judgment on the evidence prior to any party filing a praecipe, in order to make Trial Rule 50(A)(6) consistent with the changes in Trial Rule 59, which eliminate the necessity of a motion to correct errors except in those cases specifically set forth therein.

Trial Rule 53.3 has been amended to provide that the pending motion to correct errors shall be deemed denied if: the trial court fails to set the motion to correct errors for hearing within forty-five (45) days after

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102. IND. R. APP. P. 7.2.
103. IND. R. APP. P. 8.3.
104. IND. R. TR. P. 59.

it was filed; the trial court fails to rule on the motion to correct errors within forty-five (45) days after it was filed; the trial court fails to rule on the motion to correct errors within forty-five (45) days after the hearing thereon or within forty-five (45) days after it was filed if no hearing thereon is required. Under the previous version of Trial Rule 53.3, the denial of the motion to correct errors was deemed to be established under those same timing requirements *only* upon application of a party and not by operation of the rule itself. Former Trial Rules 53.3(e) and (f), pertaining to the obligations of the clerk to make appropriate entries concerning whether the trial court has ruled upon the motion to correct errors within the requisite time period, have been eliminated in their entirety under the 1989 amendments.

During the survey period, amendments were also made to Appellate Rules 2, 3, 4, 7.2, 8.3, and 14. This Article is limited to significant changes in trial procedure and to the Trial Rules which have occurred during the survey period, and does not address these significant changes in the appellate rules which have also occurred during the survey period. The amended appellate rules interface with the amended Trial Rules relating to preservation of grounds for appeal, and all amendments should be reviewed conjunctively by the bar and judiciary when considering issues relating to appellate procedure under the 1989 Rule amendments.

VII. Conclusion

The author hopes that the foregoing discussion of these noteworthy cases and Rule changes will be of assistance to the judiciary and bar in their use, application and future consideration of these cases and amended Rules.