IV. Civil Procedure and Jurisdiction

*William F. Harvey**

A. Jurisdiction and Service of Process

In *In re Public Law No. 305 and Public Law No. 309 of Indiana Acts of 1975*,[1] the Indiana Supreme Court clearly maintained its control over procedural practices in the courts. Public Laws 305 and 309 required judicial notice to be taken of municipal, city, and town ordinances,[2] a practice clearly contrary to prior Indiana procedure which did not permit judicial notice of such ordinances because the lack of organized codification in many cities requires time-consuming searches to find the relevant ordinance.[3] The court held that pursuant to Indiana Code section 34-5-2-1,[4] procedural rules and cases decided by courts take precedence over statutes enacted by the legislature concerning procedural issues.[5] Finding the judicial notice requirements of Public Laws 305 and 309 to be procedural, the court held them invalid. The opinion does not state that the legislature may not pass statutes concerning procedure, but it does hold that, insofar as statutes conflict with judge-made procedural rules and court precedents, they will not be controlling.[6] Where the procedural

---

*Dean, Indiana University School of Law—Indianapolis. A.B., University of Missouri, 1954; J.D., Georgetown University, 1959; LL.M., Georgetown University, 1961.

The author wishes to extend his appreciation to Brian Bell and Phyllis McGurk for their assistance in the preparation of this discussion.

[1]334 N.E.2d 659 (Ind. 1975), also discussed in Marple, *Evidence*, *infra* and Marsh, *Constitutional Law*, *infra*.

[2]Pub. L. No. 305, § 48, 1975 Ind. Acts 1667 (repealed 1976); IND. CODE § 33-5-43.1-12 (Burns Supp. 1976).

IND. CODE § 33-11.6-4-11 (Burns Supp. 1976) contains a similar provision, but was not ruled invalid because it applies to small claims courts of first class cities, which are not courts of record and are subject to de novo review. 334 N.E.2d at 661.

[3]Indianapolis Traction & Terminal Co. v. Hensley, 186 Ind. 479, 115 N.E. 934 (1917); *see also* McClurg v. Carte, Inc., 255 Ind. 110, 262 N.E.2d 854 (1970).

[4]IND. CODE § 34-5-2-1 (Burns 1973) gives the supreme court power to adopt and rescind rules of practice and procedure and provides that "all laws in conflict therewith shall be of no further force or effect."

[5]334 N.E.2d at 662.

[6]"The above-noted provisions [Public Laws 309, 305] are invalid for the reason that they concern procedural matter contrary to procedure previously adopted by this Court." *Id.*

rule and the statute are compatible, the former will not preempt the latter.

Certain lawsuits require notice to public officials as a precondition to a court's jurisdiction. In *Sendak v. Debro*[7] the plaintiff failed to notify the attorney general of a declaratory judgment action questioning the constitutionality of a state statute.[8] After learning from a newspaper reporter that the Monroe County Superior Court had declared unconstitutional a statute requiring freehold status for nomination to public office,[9] the attorney general filed a motion to intervene which was granted, and motions to correct error and for a new trial which were denied. The supreme court reversed the decision of the trial court with instructions to grant a new trial, explicitly refusing to hear the case on the merits. Justice DeBruler, writing for the unanimous court, agreed with the holding in *State ex rel. Blake v. Madison Circuit Court*[10] that the notice requirement was both mandatory and jurisdictional,[11] and rejected the appellee's novel argument that Trial Rule 57 supersedes the notice requirement of the statute. The court stated that the statute and rule are not incompatible, because each deals wih different aspects of declaratory judgments; therefore the rule does not supersede the statute.[12]

In *Board of Commissioners v. Briggs*,[13] a tort action was brought against the county for personal injury allegedly resulting from improper maintenance of warning signs on the highway. The plaintiff failed to file a claim with the county auditor before suit, as required in Indiana Code section 17-2-1-4.[14] Because of

---

[7]343 N.E.2d 779 (Ind. 1976).

[8]IND. CODE § 34-4-10-11 (Burns 1973) provides:

> When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance or franchise is alleged to be unconstitutional, the attorney-general of the state shall also be served with a copy of the proceeding and be entitled to be heard.

[9]IND. CODE § 17-4-28-1 (Burns 1974).

[10]244 Ind. 612, 193 N.E.2d 251 (1963).

[11]343 N.E.2d at 781.

[12]*Id.* at 782.

[13]340 N.E.2d 373 (Ind. Ct. App. 1976).

[14]IND. CODE § 17-2-1-4 (Burns 1974) provides:

"No court shall have original jurisdiction of any claim against any county in this state, in any manner, except as provided for in this act [§ 17-2-1-1—17-2-1-4]." The entire act provides the procedure to be followed:

(1) Claim is filed with the county auditor;

(2) County commissioners examine merits of the claim and allow or disallow

the defendant's failure to raise this procedural issue until his petition for rehearing, the First District Court of Appeals refused to reverse the verdict for the plaintiff. In doing so, the court distinguished two lines of Indiana cases concerning waiver of jurisdiction.

There are two theories regarding jurisdiction and waiver. *Cooper v. County Board of Review*,[15] a 1971 decision of the court of appeals, holds that subject matter jurisdiction cannot be waived and may be raised at any time during the action. On the other hand, *Bass Foundry & Machine Works v. Board of Commissioners*[16] and other supreme court cases[17] hold that in courts of general jurisdiction there is a presumption of jurisdiction, and that a claim of lack of jurisdiction is a matter of defense only and therefore waivable.[18] The court of appeals found the distinc- to be based upon the different theories of the cases. In *Cooper*, the plaintiff sought a statutory tort remedy, in which jurisdiction is specific.[19] In *Bass Foundry*, the plaintiff sought recovery for a common law tort, requiring only a court of general jurisdiction. Notice required for common law torts is merely a procedural condition precedent to recovery and hence subject to waiver, whereas notice required in the legislation creating a statutory tort is jurisdictional and non-waivable.[20] Thus, the court of

---

in whole or part at their discretion;
(3) Appeal is made to the circuit or superior court within 30 days. If the claim is denied in whole or part the appeal, at the appellant's option, can be a de novo action.

[15]150 Ind. App. 232, 276 N.E.2d 533 (1971).

[16]115 Ind. 234, 17 N.E. 593 (1888).

[17]State *ex rel.* Johnson v. Reeves, 234 Ind. 225, 125 N.E.2d 794 (1955); Pittsburgh, C. C. & St. L. Ry. v. Gregg, 181 Ind. 42, 102 N.E. 961 (1914); McCoy v. Able, 131 Ind. 417, 30 N.E. 528 (1892); Board of Comm'rs v. Arnett, 116 Ind. 438, 19 N.E. 299 (1889); Board of Comm'rs v. Leggett, 115 Ind. 544, 18 N.E. 53 (1888).

[18]*See* Thompson v. City of Aurora, 325 N.E.2d 839 (Ind. 1975), *noted in* Harvey, *Civil Procedure and Jurisdiction, 1975 Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 66, 71-72 (1975) [hereinafter cited as Harvey, *1975 Survey*].

[19]340 N.E.2d at 377.

[20]The court cites *Bass* for the proposition that:

> [I]n cases of the latter class, and all others analogous thereto, it has been uniformly ruled that the complaint need not show the jurisdictional facts upon its face. Of course, the rule is different in respect to courts of inferior or limited jurisdiction, *or where a court of general jurisdiction is exercising a mere statutory power and is not exercising a jurisdiction which was according to the course of the common law.*

Id., *quoting from* Bass Foundry & Machine Works v. Board of Comm'rs, 115 Ind. at 242, 17 N.E. at 596 (emphasis by the *Briggs* court).

appeals applied the *Cooper* rule in *Briggs*. The one case not conforming to this analysis, *Foster v. County Commissioners*,[21] was modified to comport with the *Briggs* analysis.

Two cases decided during the survey period dealing with service of process bring into focus Trial Rule 4.15(F).[22] *Glennar Mercury-Lincoln, Inc. v. Riley*[23] resulted in a default judgment against the defendant for failure to appear. The Second District Court of Appeals upheld the judgment, concluding that the plaintiff's service procedure was sufficient to allow the trial court to have found that the method chosen was reasonably adequate to accomplish service.[24] In the course of the opinion, the statutory requirement that service be reasonably calculated to inform was distinguished from "actual knowledge" of the suit. "Reasonably calculated" flows from proper service as required by Trial Rule 4, and, even though the party served has no actual knowledge of the suit, the court has jurisdiction.[25] On the other hand, if the defendant acquires actual knowledge of the suit through means other than proper service under Trial Rule 4, the court does not necessarily acquire jurisdiction.[26] As a limitation on this general distinction, the court in dictum stated that actual knowledge is relevant in determining adequacy of service under Trial Rule 4.15(F), but is insufficient in itself to meet the requirement.[27]

Indiana's "long-arm" statute permits service on out-of-state residents. In *Chulchian v. Franklin*[28] the plaintiff brought a malicious prosecution action in federal court against the district attorney and justice of the peace of Las Vegas, Nevada after the Nevada officials had caused the plaintiff to be arrested and incarcerated in Muncie, Indiana, on kidnapping charges. The federal district court dismissed the action for lack of personal jurisdiction, holding that "long-arm" jurisdiction is limited to claims

---

[21]325 N.E.2d 223 (Ind. Ct. App. 1975). *See also* Harvey, *1975 Survey, supra* note 18, at 70.

[22]IND. R. TR. P. 4.15(F) provides:

> No summons or the service thereof shall be set aside or be adjudged insufficient when either is reasonably calculated to inform the person to be served that an action has been instituted against him, the name of the court, and the time within which he is required to respond.

[23]338 N.E.2d 670 (Ind. Ct. App. 1975).

[24]*Id.* at 676.

[25]*Id.* at 675, *citing* Milosavljevic v. Brooks, 55 F.R.D. 543 (N.D. Ind. 1972).

[26]338 N.E.2d at 675, *citing* Wuchter v. Pizzutti, 276 U.S. 13 (1928).

[27]338 N.E.2d at 675. In Chesser v. Chesser, 343 N.E.2d 810 (Ind. Ct. App. 1976), the court applied the rule of *Glennar Mercury-Lincoln* to reverse a default judgment in a dissolution of marriage proceeding. For a discussion of *Chesser*, see Proffitt, *Domestic Relations, infra.*

[28]392 F. Supp. 203 (S.D. Ind. 1975).

arising from acts of defendants specifically enumerated in Trial Rule 4.4(A).[29] None of the acts complained about occurred in Indiana, and therefore no "long-arm" service is proper in such actions.

The defense in *Kinslow v. Cook*[30] relied on Indiana Code section 34-1-1-8, which created a preference for the father of a deceased minor as the plaintiff in a wrongful death action, to dismiss an action brought by the mother of the deceased minor.[31] The mother, in the complaint, made no showing that the minor's father was incapable of bringing the claim, as required by the statute. The First District Court of Appeals reversed the trial court's dismissal, holding that the statutory language "in case of his death, or desertion of his family, or imprisonment"[32] was constitutionally defective because it arbitrarily precluded the mother from proving her rights and duties concerning the deceased child.[33] Hereafter,

---

[29]*Id.* at 205. IND. R. TR. P. 4.4(A) provides:

> Any person or organization that is a nonresident of this state, a resident of this state who has left the state, or a person whose residence is unknown, submits to the jurisdiction of the courts of this state as to any action arising from the following acts committed by him or his agent:
> (1) doing any business in this state;
> (2) causing personal injury or property damage by an act or omission done within this state;
> (3) causing personal injury or property damage in this state by an occurrence, act or omission done outside this state if he regularly does or solicits business or engages in any other persistent course of conduct, or derives substantial revenue or benefit from goods, materials, or services used, consumed, or rendered in this state;
> (4) having supplied or contracted to supply services rendered or to be rendered or goods or materials furnished or to be furnished in this state;
> (5) owning, using, or possessing any real property or an interest in real property within this state; or
> (6) contracting to insure or act as surety for or on behalf of any person, property or risk located within this state at the time the contract was made;
> (7) living in the marital relationship within the state notwithstanding subsequent departures from the state, as to all obligations for alimony, custody, child support, or property settlement, if the other party to the marital relationship continues to reside in the state.

[30]333 N.E.2d 819 (Ind. Ct. App. 1975). For a further discussion of this case, see Marsh, *Constitutional Law, infra.*

[31]Ch. 112 § 1, 1951 Ind. Acts 107, *as amended,* IND. CODE § 34-1-1-8 (Burns Supp. 1976), provided, in pertinent part: "A father, or in the case of his death, or desertion of his family, or imprisonment, the mother, or in case of divorce the person to whom custody of the child was awarded, may maintain an action for the injury or death of a child . . . ."

[32]*Id.*

[33]333 N.E.2d at 822-23. The appellee also argued that the prevention of double recovery was a legitimate governmental objective. The court recog-

actions for the wrongful death of a minor child may be brought by either parent. The Indiana legislature somewhat limited the result in *Kinslow* by amending the statute in 1975 to allow the action to be brought by either parent as long as the other parent is joined in some manner.[34] The purpose of this amendment is to prevent double recovery while satisfying constitutional requirements by allowing either parent to bring the action.

When a party commences an action and objection is made to his interest, the action cannot be dismissed until the real party in interest has a reasonable time to ratify, to be joined, or to be substituted in the action. The real party's action relates back to the filing of the complaint.[35] The case of *Childs v. Rayburn*[36] raised the issue of what constitutes a reasonable time. The original wrongful death complaint was filed by the minor deceased's father as administrator of the estate. Four years later, at the close of the plaintiff's evidence during the trial, the defendant moved for judgment on the evidence, alleging that the administrator was not the proper party to bring the action. While provisionally granting the defendant's motion, the trial court allowed the plaintiff to amend the pleading to include the real party in interest,

---

nized the validity of the argument, but found that the means chosen to accomplish the statutory objective was purely arbitrary and irrational. *Id.* at 821. The subsequent amendment to the statute eliminates the possibility of double recovery by forcing joinder of both husband and wife in some capacity. *See* note 34 *infra*. The court also suggested that double recovery can be prevented by the ease with which parties may be joined under the trial rules. 333 N.E.2d at 821 n.4.

[34]

> The father and mother jointly, or either of them by naming the other parent as a co-defendant to answer as to his or her interest, or in case of divorce or dissolution of marriage the person to whom custody of the child was awarded, may maintain an action for the injury or death of a child . . . .

IND. CODE § 34-1-1-8 (Burns Supp. 1976).

[35] IND. R. TR. P. 17(A) provides in part:

> Every action shall be prosecuted in the name of the real party in interest.
>
> . . . .
>
> (2) When a statute provides for an action by this state on the relation of another, the action may be brought in the name of the person for whose use or benefit the statute was intended.
>
> 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.

[36] 346 N.E.2d 655 (Ind. Ct. App. 1976).

the father as guardian of the deceased.[37] After the amendment, the trial court denied the defendant's motion for judgment on the evidence. The First District Court of Appeals affirmed the trial court's action, holding that the substitution of parties was prompt and without confusion, that the evidence and proof involved were unchanged by the amendment, and that no parties were added or removed.[38] Additional support for the holding was the fact that the defendant failed to prove prejudice or to request a continuance as permitted under Trial Rule 15(A).[39] Because of the relation back of the amendment pursuant to Trial Rule 17(A)(2), no statute of limitations objection was possible.[40]

The Second District Court of Appeals decision in *Cordill v. City of Indianapolis*[41] is controversial since it creates practical difficulties for litigation attorneys. The action was in eminent domain, which essentially entails two stages: (1) approval of the taking, and (2) a subsequent approval of the compensation for the taking.[42] The defendant made no objection to the taking, but he did object to the compensation. However, his objection was not filed within ten days as required by statute[43] because his attorney did not receive notice from the court clerk that the appraisal had been filed. Although the attorney claimed to have filed an appearance, there was no such entry in the court record. The court of appeals held that when a proper appearance is not entered in the record, the clerk has no duty to serve the order.[44] In dictum, Judge White stated that as a practical matter the attorney has a duty to see that his appearance is both "filed and recorded," even to the extent of anticipating that the clerk will make mistakes.[45] Judge Sullivan dissented, stating that the spirit of Trial Rule 5(A) requires service on the parties either directly, if the party is not represented, or indirectly through the attorney.[46] In Judge Sullivan's opinion, the requirement of both filing and supervising

---

[37]IND. CODE § 34-1-1-8 (Burns Supp. 1976). The trial court used Trial Rule 15(A) in permitting the amendment.

[38]346 N.E.2d at 661.

[39]*Id.*

[40]*Id.* at 661-62, *citing* IND. R. TR. P. 17(A)(2).

[41]345 N.E.2d 274 (Ind. Ct. App. 1976).

[42]IND. CODE § 32-11-1-8 (Burns 1973), *as amended, id.* (Burns Supp. 1976).

[43]The statute was amended in 1975 to require giving notice of the filing of the appraiser's report to all known parties to the action and their attorneys and extends the time for objection from 10 to 20 days. IND. CODE § 32-11-1-8 (Burns Supp. 1976), *amending id.* (Burns 1973).

[44]345 N.E.2d at 276-77.

[45]*Id.* at 278.

[46]*Id.* at 280 (Sullivan, J., dissenting).

the entrance of appearance places an unconscionable burden on the attorney.[47]

Once a trial court has assumed jurisdiction, it can relinquish it in certain circumstances. In *Indiana State Fair Board v. Hockey Corp. of America,*[48] the Second District Court of Appeals dealt with the effect of a change of venue on the original trial court's jurisdiction. The law is that until complete vesting of jurisdiction occurs in another court,[49] a moving party may waive its right to change of venue.[50] After the defendant Fair Board's motion for change of venue was granted, and the new county of venue was selected, the plaintiff's motion to vacate the change of venue was granted and the case proceeded to trial in the original county. The defendant Fair Board raised lack of jurisdiction on appeal. The court of appeals held that the defendant, by allowing the suit to proceed to trial in the original court without objection, had waived the right to change of venue and noted that waiver is especially applicable when the objection to resumption of full jurisdiction is made after the non-moving party has presented his case at trial.[51]

In *Glennar Mercury-Lincoln, Inc. v. Riley,*[52] the Second District Court of Appeals held that even though a change of venue is pending, a codefendant can voluntarily submit to the jurisdiction of the original court. This is an extension of the rule of *Indianapolis Dairymen's Co-Op v. Bottema*[53] in which the party moving for the change of venue voluntarily submitted to the original court's jurisdiction before perfecting the change of venue. In *Glennar Mercury-Lincoln,* the codefendant submitted to the jurisdiction of the court by filing a Trial Rule 60 motion to set aside a default judgment.

State ex rel. Indianapolis-Marion County Building Authority v. Superior Court[54] was an original action to compel the granting of a special judge, pursuant to Indiana Code section 34-5-1-1, to preside over a trial involving another judge's order that the city supply equipment and provide employee compensation. In response to the county judge's order for phone equipment, the building authority filed a petition for trial on the merits in the mandating judge's court to determine whether the equipment should be supplied. The building authority also filed a motion

---

[47]*Id.* at 278 n.1 (Sullivan, J., dissenting).

[48]333 N.E.2d 104 (Ind. Ct. App. 1975).

[49]Vesting of jurisdiction in another court is not complete until the transcript and necessary filings are received in the office of the clerk of the change of venue court. *See* IND. R. TR. P. 78.

[50]333 N.E.2d at 114.

[51]*Id.*

[52]338 N.E.2d 670 (Ind. Ct. App. 1975).

[53]226 Ind. 260, 79 N.E.2d 409 (1948).

[54]344 N.E.2d 61 (Ind. 1976).

for change of judge. The judge set a hearing date, declared section 34-5-1-1 unconstitutional, viewed the building authority's action as a common law petition to modify, and set aside the order. The building authority then brought the original action in the supreme court to compel change of judge. Justice DeBruler, author of the opinion, held that the change of judge provision contained in section 34-5-1-1 "cannot constitutionally be invoked as a matter of right in cases . . . [where] substantial interference with a trial court's operation presently exists, requests for assistance have proven fruitless, and immediate remedial action by the trial court is necessary."[55] Justice DeBruler, analogizing the procedure to direct criminal contempt actions, stated that courts have the inherent power to order in emergency situations the removal of obstacles to the due administration of justice in their courts. The opinion stated in dictum, however, that change of judge should be granted when substantial capital improvements or salary increases are needed but can await a delayed decision by a special judge. The dissent by Justice Arterburn, joined by Chief Justice Givan, disputed the finding of an emergency situation.[56]

B. Pleadings and Pretrial Motions

In *Brendanwood Neighborhood Association, Inc. v. Common Council,*[57] the issue was whether a plaintiff, after his complaint had been dismissed pursuant to Trial Rule 12(B)(6), could amend his complaint to add new plaintiffs as a matter of right. Trial Rule 12(B)(8) provides that when an action is dismissed under Trial Rule 12(B)(6) the plaintiff has a right to amend pursuant to Trial Rule 15(A) within ten days of the dismissal. The pleadings were amended within this time limit, but the trial court refused the amendment. The First District Court of Appeals, finding no relevant Indiana case law on the issue, relied on federal decisions[58] and the interrelationship of Trial Rules 12(B)(6), 15(A), and 17(A). The court concluded that since rule 17(A) requires the party of real interest to be named in order to avoid a dismissal under rule 12(B)(6), the liberal amendment pro-

---

[55] *Id.* at 66.

[56] *Id.*

[57] 338 N.E.2d 695 (Ind. Ct. App. 1975).

[58] Halladay v. Verschoor, 381 F.2d 100 (8th Cir. 1967); Goldenberg v. World Wide Shippers & Movers, 236 F.2d 198 (7th Cir. 1956); Wood v. Rex-Noreco, Inc., 61 F.R.D. 669 (S.D.N.Y. 1973); Joint School District No. One v. Brodd Constr. Co., 58 F.R.D. 213 (E.D. Wis. 1973); Kroger Co. v. Adkins Transfer Co., 284 F. Supp. 371 (M.D. Tenn. 1968); Kaminsky v. Abrams, 41 F.R.D. 168 (S.D.N.Y. 1966); *see also* 6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1474, at 378 (1969).

cedures of rule 15(A) should be applicable. Accordingly, the decision of the trial court was reversed and the case remanded with instructions to sustain the plaintiff's motion to add other plaintiffs.[59]

The Indiana Supreme Court, in a unanimous decision in *State ex rel. Young v. Noble Circuit Court,*[60] permitted amendment of pleadings to add defendants to the caption. The original petition for a vote recount was filed under the caption *"In Re"* without naming adversary parties. One adversary party filed a motion to dismiss, which was granted but reversed in effect when the plaintiff's motion to amend the caption was granted. The added defendant then filed a writ of prohibition in the supreme court to restrain the trial court from further action. The supreme court reasoned that the added defendant was on notice of the original action even though her name was not found in the caption. The particular rule applicable was Trial Rule 15(C) which makes the amendment proper and relates it back to the date of original filing, to overcome any statute of limitation issue.[61]

The trial court in *Chrysler Corp. v. Alumbaugh*[62] permitted amendment of the pleadings to substitute the proper defendant after the statutory period of limitations had passed. Chrysler Corp. was substituted for the original defendant, Chrysler Motor Corp., when the plaintiff learned from an answer to an interrogatory that the pickup truck involved in the strict liability action was manufactured by Chrysler Corp. The statute of limitations having expired, the amendment was permitted under Trial Rule 15(C) rather than under Trial Rule 25, "Substitution of Parties," because the proper defendant had prior notice, there was no prejudice to the defendant's defense on the merits, and the proper defendant knew or should have known that but for mistake he would have been summoned on time.[63]

Two cases during the survey period involved amendments to include affirmative defenses. On rehearing of *Huff v. Travelers Indemnity Co.*[64] the Third District Court of Appeals followed the general rule that amendments to pleadings should be freely made so as to bring all matters at issue before the court. At the trial

---

[59]338 N.E.2d at 697-98.

[60]332 N.E.2d 99 (Ind. 1975).

[61]*Id.* at 103.

[62]342 N.E.2d 908 (Ind. Ct. App. 1976), also discussed in Vargo, *Products Liability, infra.*

[63]342 N.E.2d at 911-12. All such factors would be present in limited circumstances, primarily when parties are corporate entities, persons assuming aliases or changing their names, or where there is a family relationship between the originally named defendant and the substitute defendant.

[64]333 N.E.2d 786 (Ind. Ct. App. 1975).

court level, the defendant had filed a motion for summary judgment alleging an affirmative defense not raised in the pleadings. The plaintiff then filed a motion to strike the defendant's motion on the ground that the defense was waived by his failure to raise it in the answer. The defendant then filed a motion to amend the answer, and the trial court heard argument upon the summary judgment and the motion to amend the answer, as well as the plaintiff's response to each. The trial court allowed the amendment and denied the summary judgment. The appellate court affirmed, stating that even if the plaintiff had filed an affidavit stating the amendment would prejudice him, there was no error in allowing the amendment to the answer.[65]

In *Theye v. Bates*[66] the plaintiff, claiming that *in pari delicto* is an affirmative defense, argued that the defendant's failure to raise the defense in a responsive pleading or in an amended pleading resulted in the waiver of the defense. However, when *in pari delicto* evidence, which was a decisive factor in providing a reasonable basis for the judgment, was introduced at trial, the plaintiff failed to object.[67] The Second District Court of Appeals stated that appellate review of the status of *in pari delicto* as an affirmative defense was precluded, since the appellant's failure to object at trial meant that the issue was not preserved on appeal.

Trial Rule 76(2) provides for change of venue in any noncriminal action but puts a time limit of ten days on its exercise. The ten-day limit begins to run when the issues are *first* closed on the merits.[68] In *Rayburn v. Eisen*,[69] the First District Court of Appeals used policy reasons to support its conclusion that the issues in a multidefendant lawsuit are first closed on the merits when the *first* answer is filed. Judge Robertson, writing for the majority, supported the *Rayburn* holding with reasoning from *State ex rel. Yockey v. Superior Court*,[70] in which the Indiana Supreme Court examined the function of Trial Rule 76 and stated: "First [Trial Rule 76] is intended to guarantee a fair and impartial trial by making the automatic change of venue available.

---

[65] *Id.* at 787.

[66] 337 N.E.2d 837 (Ind. Ct. App. 1975).

[67] *Id.* at 844 n.6, *citing* Ayr-Way Stores, Inc. v. Chitwood, 261 Ind. 86, 91, 300 N.E.2d 335, 338 (1973).

[68] IND. R. TR. P. 76(2) provides:

> In any action except criminal no change of judge or change of venue from the county shall be granted except within the time herein provided. Any such application for a change of judge or change of venue shall be filed not later than ten [10] days after the issues are first closed on the merits.

[69] 336 N.E.2d 392 (Ind. Ct. App. 1975).

[70] 307 N.E.2d 70 (Ind. 1974).

Second, the rule is designed to avoid protracted litigation by imposing a time limit after which a change of venue motion shall be denied."[71] Judge Robertson saw both functions preserved in making the first answer the "time marker" for the ten-day rule.

The dissent by Judge Lybrook[72] would distinguish single defendant lawsuits from multiple defendant lawsuits. Where there is more than one defendant, making the first answer the "marker" would allow the second function of change of venue—avoiding protracted litigation—to predominate over the first—the fair and impartial trial. The defendant who fortuitously answered first would start the ten-day limit running for all defendants. This would to a certain extent destroy one of the basic tenets of the judicial system, a fair and impartial trial for all.[73]

In *Cherokee Drilling Corp. v. Gibson County Bank*,[74] a default judgment was entered against Cherokee for failure to appear or plead. Later, a cross-claim against Cherokee to foreclose a second mortgage was filed, to which Cherokee filed an answer and a motion for change of venue within the requisite ten-day period. The trial court denied the motion and was affirmed on appeal. The First District Court of Appeals held that the issues were first closed on the merits when the trial judge defaulted Cherokee for failure to answer the original complaint, and therefore the ten-day period for filing a motion for automatic change of venue began on the date of the default judgment.[75] The court's decision in *Cherokee* demonstrates that any party against whom a default is entered should file a change of venue motion within ten days, since additional claims may be filed against him in the same action after the entry of judgment.

In the case of *City of Fort Wayne v. State ex rel. Hoagland*[76] the plaintiff brought a restraint of trade action against the city and sought a preliminary injunction, a permanent injunction, and damages. The suit was filed on January 11, 1973, a hearing on the preliminary injunction was set for January 15, 1973, and the city filed an answer to the complaint on February 6, 1973. On February 16, 1973, the city moved for a change of venue from the county pursuant to Trial Rule 76(1). In response, the plaintiff filed a motion to strike the city's motion. The trial court sustained the plaintiff's motion and an appeal was perfected on that issue.

---

[71] *Id.* at 71-72.
[72] 336 N.E.2d at 394 (Lybrook, J., dissenting).
[73] *Id.*
[74] 336 N.E.2d 685 (Ind. Ct. App. 1975).
[75] *Id.* at 687.
[76] 342 N.E.2d 865 (Ind. Ct. App. 1976).

The Third District Court of Appeals held that the case was first closed on the merits when the answer to the complaint was filed on February 6 and thus the city's motion, filed on February 16, was timely. In making this determination the court rejected two novel arguments advanced by the plaintiff. The plaintiff's first theory was based on Trial Rule 76(3) which provides that the motion for change of venue must be filed within thirty days if a responsive pleading is not required. The plaintiff argued that since Trial Rule 65(A)(4)[77] does not require an answer for a preliminary injunction, the city had only thirty days to file and therefore the motion on February 16 was untimely. The court ruled that this argument may have validity in cases in which only a preliminary injunction is sought, but when a permanent injunction and damages are also at issue, responsive pleadings are required and the thirty-day provision of Trial Rule 76(3) is not applicable.[78]

The plaintiff's second argument involved an interpretation of Trial Rule 76(7), which provides generally that a party shall be deemed to have waived a change of venue if the case is set for trial before expiration of the time within which a party may ask for a change. The plaintiff contended that the city waived its right to a change of venue when the hearing on the preliminary injunction was set before the motion was filed. The court held that the hearing did not constitute a "trial"[79] so as to result in a waiver within the meaning of Trial Rule 76(7). Accordingly, the court of appeals reversed the trial court and remanded the case with instructions to grant the city's motion for change of venue.

In *City of Elkhart v. Middleton*[80] the Third District Court of

---

[77]IND. R. TR. P. 65(A)(4) provides, in pertinent part: "Responsive pleadings shall not be required in response to any pleadings or motions relating to temporary restraining orders or preliminay injunctions."

[78]342 N.E.2d at 868, *citing* McAllister v. Henderson, 134 Ind. 453, 34 N.E. 221 (1893); 4 W. HARVEY & R. TOWNSEND, INDIANA PRACTICE 386 (1971).

[79]State *ex rel.* American Reclamation & Ref. Co. v. Klatte, 256 Ind. 566, 270 N.E.2d 872 (1971) (function of preliminary injunction is to keep the status quo); State *ex rel.* Hale v. Marion County Municipal Courts, 234 Ind. 467, 127 N.E.2d 897 (1955) (the term trial contemplates final adjudication on the merits); Public Serv. Comm'n v. Indianapolis Rys., Inc., 225 Ind. 30, 72 N.E.2d 434 (1947); Tuf-Tread Corp. v. Kilborn, 202 Ind. 154, 172 N.E. 353 (1930) (preliminary injunction does not determine the final merits); Pence v. Garrison, 93 Ind. 345 (1884) (hearings on application for temporary injunction are not trials).

In addition the appeal from a final judgment (trial) is under Trial Rule 59, filing a motion to correct errors, whereas appeal of a preliminary injunction is under Appellate Rule 4(B)(3), perfecting an interlocutory appeal.

[80]346 N.E.2d 274 (Ind. Ct. App. 1976).

Appeals considered third party practice under Trial Rule 14(A).[81] The suit was brought by a contractor against the city for payment on a contract for construction of a sewage treatment system and against an equipment supplier for misrepresentation. The city counterclaimed for damages allegedly caused by the defective system.

Two days after its answer, the city requested joinder of the estate of the city engineer who drew up the plans and specifications for the treatment facilities on the theory that, if the city should be required to pay the contractor on the contract, the engineer would be liable in tort for deficient plans and specifications. The estate objected because it had already filed suit against the city for compensation for furnishing the plans and specifications. The trial court denied the city's motion. The court of appeals, analogizing to federal court decisions[82] and relying on commentary by the Indiana Civil Code Study Commission,[83] determined that Trial Rule 14(A) was sufficiently broad to allow the joinder of the estate. However, since the trial court has discretion to refuse joinder, the court of appeals affirmed.

In what the court of appeals termed an "ingenious argument," the city then sought to apply Trial Rule 20(A)(2)[84] to force joinder of the estate. The court, stating that the city's argument "ignores the fundamental precept that our Rules of Civil Procedure are to be construed together and, if possible, harmoniously,"[85] held that joinder of parties pursuant to Trial Rule 20(A)(2) is within the discretion of the trial court.

C. Pretrial Procedures and Discovery

Farinelli v. Campagna[86] illustrates the types of dilatory actions which may result in dismissal of a lawsuit. In this medical malpractice action, the defendant moved to dismiss because of the plaintiff's lack of prosecution, failure to comply with discovery requests, and failure to comply with a court order entered at the close of an incomplete pretrial conference. The Third District

[81]Trial Rule 14(A) provides that a defending party may bring in a third party if the third party may be liable to the defending party for all or part of the original plaintiff's claim against the defending party.

[82]346 N.E.2d at 277, *citing* Jones v. Waterman S.S. Corp. 155 F.2d 992 (3d Cir. 1945); Aetna Cas. & Sur. Co. v. Kochenour, 45 F.R.D. 248 (D. Pa. 1968); Borden v. Bowles, 35 F.R.D. 13 (D.D.C. 1964).

[83]2 W. HARVEY, INDIANA PRACTICE 81 (1970).

[84]Trial Rule 20(A)(2) provides for permissive joinder of parties where the right to relief arises out of one transaction and there are common questions of law or fact.

[85]346 N.E.2d at 279.

[86]338 N.E.2d 299 (Ind. Ct. App. 1975).

Court of Appeals discussed the inherent authority of a court to exercise administrative control over the conduct of the trial court's judicial business. However, the court found it unnecessary to base the dismissal upon that inherent power, because the power to dismiss was properly exercised in this instance pursuant to appropriate rules of civil procedure.

The court of appeals held that the provisions of Trial Rule 41(E) concerning the failure to prosecute civil actions or otherwise to comply with the rules of procedure, permit dismissal for a plaintiff's failure to comply with the trial rules or any court order.[87] The court also held that pursuant to Trial Rule 37(B)(4)[88] a trial court may enter a default judgment or a dismissal with prejudice against a party who fails to make discovery if the court determines that the conduct of a party has delayed or threatens to delay or obstruct the rights of another party. The court carefully distinguished Trial Rule 37(B)(2)(c), which permits a trial court to find that a party who resists or obstructs the action of another party in attempted discovery acted "in bad faith and abusively," from Trial Rule 37(B)(1), which permits a court to punish by contempt the same acts after a court has ordered a response to discovery. Pursuant to Trial Rule 37(B)(1), a finding that the court's order was in fact violated and that the violation resulted from unexcused conduct is sufficient to allow a court to order a dismissal.

Finally, the court discussed Trial Rule 16(K), which provides that if no appearance is made on behalf of a party at a pretrial conference without excuse or because of failure to give reasonable attention to the matter or if an attorney is grossly unprepared to participate in a pretrial conference, a trial court may "take such other action as may be appropriate" in addition to the remedies specifically allowed by the rule. Dismissal of the action is one of the "appropriate other actions."[89]

---

[87] 338 N.E.2d at 302. The court adopted the Civil Code Study Commission comment on Trial Rule 41(E): "Dismissal for failure of plaintiff to comply with these rules *or any order of court* will not change the existing Indiana law . . . ."

[88] IND. R. TR. P. 37(B)(4) provides:

> The court may enter total or partial judgment by default or dismissal with prejudice against a party who is responsible under subdivision (B)(2) of this rule if the court determines that the party's conduct has or threatens to so delay or obstruct the rights of the opposing party that any other relief would be inadequate.

[89] "Such other action may include dismissal of the action under Rule 41(E) if plaintiff is at fault or the entry of a default judgment against a defendant pursuant to Rule 55(A)." *Id.* at 303, *quoting from* 2 W. HARVEY, INDIANA PRACTICE § 16.6, at 180 (1970).

In the case of *Clark County State Bank v. Bennett*[90] the defendant bank appealed from a default judgment entered against it. The plaintiffs had filed with the trial court consolidated motions for a default judgment for failure to respond to a request for discovery, for an order compelling discovery, and for allowance of attorney's fees. A hearing was scheduled and notice was given. After notice and prior to the entry of judgment by default, the defendant answered the complaint and filed responses to the plaintiffs' interrogatories and requests for admissions. However, despite this proliferation of paper, the trial court entered judgment by default.

On appeal, the bank argued that because a pleading or answer had been filed, the default judgment was incorrectly entered since Trial Rule 55(B) allows three days for an answer before the entry of a default judgment. The First District Court of Appeals held that the plaintiffs' entitlement to judgment by default was not rendered moot by the filing of the delinquent answer. In doing so, the court limited the holding in *Hiatt v. Yergin*[91] that the question of default is moot when a motion for default and delayed pleadings are filed on the same day. The trial court is vested with power to entertain the plaintiffs' application as well as with the discretion to enter the default judgment, even though the answer has been filed within the three-day period between notice and entry of judgment. Otherwise, the court of appeals stated, the three-day notice to the defaulting party would be converted into an opportunity to expand, almost without limitation, the time in which to answer the complaint.[92]

In affirming the award of attorney's fees pursuant to Trial Rule 37(B), the court construed the words "bad faith" in Trial Rule 37(B)(2)(c) to mean "failure to comply with a duty imposed under the specific rule" and held that there was no reason for the evasive or incomplete answer.[93] Hence, the trial court correctly used its discretion granted by Trial Rule 37(B)(2) to award the attorney's fees as the result of the bank's defective response to the plaintiffs' interrogatories.

Dilatory action may not always result in default or dismissal. In *State v. Dwenger*[94] the Second District Court of Appeals affirmed the trial court's holding that each party had waived the right to complain of the other's delay because each side had failed

---

[90]336 N.E.2d 663 (Ind. Ct. App. 1975).

[91]152 Ind. App. 497, 284 N.E.2d 834 (1972).

[92]336 N.E.2d at 666-67.

[93]*Id.* at 668-69, *citing* 3 W. HARVEY, INDIANA PRACTICE § 37.1, at 125 (1970).

[94]341 N.E.2d 776 (Ind. Ct. App. 1976).

to file its complete witness list on time pursuant to a pretrial order. The witness lists in the negligence action were to be filed on Friday before the Monday trial, but both parties delivered only partial lists by the deadline. The state alleged that it had hand-delivered an additional list on Friday, but the plaintiff claimed to have received the list in Saturday's mail. The plaintiff mailed an additional list on Friday, which arrived at the state office on Monday and was delivered to the deputy attorney general after the first day of trial. The state contested the calling of an expert witness whose name first appeared on the delayed list. The trial court allowed the appearance after giving the defense thirty minutes to interview the witness.

In the case of *Shaw v. S. S. Kresge Co.*,[95] the plaintiff sued for wrongful discharge from employment. The trial court granted the defendant company's motion for summary judgment twenty days after the defendant had filed a request for admissions and before the plaintiff had responded. In rendering summary judgment, the trial court considered all questions in the unanswered request as admitted by the plaintiff. On appeal, the court looked to procedure rather than substance to decide whether the unanswered admissions could be deemed admitted in consideration of a motion for summary judgment. The Third District Court of Appeals held that when the party requesting admissions places no time limit for answering or objecting to the request, a reasonable time period should be allowed before the requests are deemed admissions. Because the thirty-day minimum time for response specifically provided in Trial Rule 36(A)[96] had not expired and a different time period was neither requested by the party nor granted by the judge, the court held that a reasonable time had not elapsed. Hence, the plaintiff's failure to respond to the request for admissions could not be deemed an admission of matters contained in the request.[97]

Vlatos v. Indiana Bonding & Surety Co.[98] involved the evidentiary effect of answers to interrogatories submitted by a litigant's attorney after insufficient consultation with his client. The litigant testified at trial that one answer was incorrect, and that his attorney in Philadelphia had been unable to confer with him at the time the answers were developed. He requested that his testimony concerning the accuracy of the answers to the interrogatories

---

[95]328 N.E.2d 775 (Ind. Ct. App. 1975).

[96]Trial Rule 36(A) provides that a request for admissions must be objected to or answered within 30 days unless the party requesting admissions designates or the court allows a different period.

[97]328 N.E.2d at 779-80.

[98]333 N.E.2d 835 (Ind. Ct. App. 1975).

be accepted as undisputed at trial and that the answer to the interrogatory be regarded as being without probative value. The Third District Court of Appeals held that the interrogatory and the answer could be used at trial to the extent permitted by the rules of evidence.[99] The court of appeals disapproved of counsel's making or developing answers to interrogatories, although the court recognized that on occasion the practice may be virtually unavoidable. The court concluded that when the practice did occur and there was no claim that the answer was procured by fraud and connivance of the opposing party, the answer constituted the answer of the party on whose behalf it was made, and was properly admissible as an admission of that party.

D. Trial and Judgment

In the case of *Ragnar Benson, Inc. v. William P. Jungclaus Co.*,[100] the plaintiff sued several defendants for injuries sustained in an accident at a construction site. Defendant Benson filed a cross-claim against defendant Jungclaus. Thereafter each party moved for summary judgment, which the trial court denied. Jungclaus then filed a defense against Benson which alleged that the cross-claim was barred as a result of the doctrine of collateral estoppel. Specifically, Jungclaus stated that Benson's cross-claim had been decided on the merits when the claim had been dismissed and entered as a final judgment pursuant to a Trial Rule 12(B)(6) motion for failure to state a claim.

On appeal, the First District Court of Appeals stated that not all judgments of dismissal pursuant to Trial Rule (12)(B) constitute an adjudication on the merits so as to bar a subsequent determination of the issues. Among these exceptions are dismissal for want of jurisdiction or dismissal for want of a real party in interest. However, when a case is dismissed for failure to state a claim upon which relief can be granted there has been an adjudication on the merits and thus a subsequent assertion of the same claim is barred by the doctrine of collateral estoppel.[101]

Brandon v. State[102] was actually a criminal case involving a belated motion to correct errors. However, in the course of the opinion, the Indiana Supreme Court took the opportunity to delineate the analysis a trial court should utilize in ruling on a motion

---

[99] *Id.* at 837.

[100] 340 N.E.2d 361 (Ind. Ct. App. 1976).

[101] Collateral estoppel is also known as "estoppel by verdict or finding." Town of Flora v. Indiana Service Corp. 222 Ind. 253, 257, 53 N.E.2d 161, 163 (1944).

[102] 340 N.E.2d 756 (Ind. 1976).

for summary judgment pursuant to Trial Rule 56.[103] The court stated that the trial judge should: (1) Identify the legal issues; (2) identify the nature of the material facts; (3) identify the material facts presented by the parties; (4) determine whether the material facts presented are in genuine issue, and if they are, deny summary judgment; (5) if the material facts presented are not in genuine issue, apply the law and grant or deny the summary judgment.[104]

In the case of *Sendak v. Allen*[105] two police officers brought an action for declaratory judgment[106] to test the validity of the Attorney General's Official Opinion No. 27, which interpreted Indiana Code section 18-1-11-9 to require that a policeman on active duty must resign his position before he may become a candidate for election to public office. The trial court entered summary judgment for the plaintiffs, and an appeal was perfected.

The First District Court of Appeals held that the suit was proper since the plaintiffs had established standing by demonstrating that their "rights, status and other legal relations would be directly affected by enforcement of the statutes in question."[107] The court then elaborated on the propriety of challenging a criminal statute by declaratory judgment, stating that such an attack is proper if the plaintiff's trade, business, or occupation is affected by statute. The court also noted that Trial Rule 57[108] expressly provides that a property right need not be involved to justify an action for declaratory judgment. However, the court did hold that such an action is not appropriate for a criminal defendant challenging the constitutionality of a statutory crime *malum in se*.

In the case of *Leinenbeck v. Dairymen, Inc.*,[109] the First District Court of Appeals considered the process by which a temporary restraining order may evolve into a permanent injunction pur-

---

[103]Trial Rule 56 provides, in pertinent part, that:
The judgment sought shall be rendered forthwith if the pleadings, depositions, answer 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.

[104]340 N.E.2d at 758.

[105]330 N.E.2d 333 (Ind. Ct. App. 1975).

[106]Declaratory Judgment Act, IND. CODE §§ 34-4-10-1 to -4 (Burns 1973).

[107]330 N.E.2d at 334, *citing* City of Mishawaka v. Mohney, 297 N.E.2d 858 (Ind. Ct. App. 1973).

[108]Trial Rule 57 generally provides for a declaratory judgment proceeding.

[109]333 N.E.2d 910 (Ind. Ct. App. 1975).

suant to Trial Rule 65(A)(2).[110] The plaintiff sought a temporary restraining order, a preliminary injunction, and a permanent injunction. The trial court granted the temporary restraining order and set a date for a hearing on the preliminary injunction. The hearing was held with both sides presenting evidence. Three days later the trial court entered judgment by making the temporary order a permanent injunction.

The issue presented at the appellate level was whether the trial court's action was proper under Trial Rule 65(A)(2). The court of appeals observed that although the trial rule provides for consolidation of the preliminary injunction hearing with a permanent injunction proceeding, the power to do so must be tempered with due process, fair notice, and an opportunity to be heard.[111] The court held that consolidation is not appropriate unless the parties receive clear and unambiguous notice at a time which will allow adequate opportunity to prepare for the pending litigation, and failure to give adequate notice is reversible error. Accordingly, the appellate court reversed the permanent injunction and remanded the case.

The Indiana Supreme Court in *In re Public Law No. 305 and Public Law No. 309*[112] resolved the issue of whether the new statute[113] requiring six-member juries in county court cases is constitutional. The court held the provision constitutional and overruled prior case law to the contrary.[114]

In *Van Horn v. City of Terre Haute,*[115] the First District Court of Appeals examined the scope of a trial court's de novo review of actions taken by a municipal board. The plaintiff Van Horn, a fireman, was dismissed after a hearing before the Board of Public Works and Safety of Terre Haute. Subsequently, he

---

[110]Trial Rule 65(A)(2) provides, in pertinent part: "Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application."

[111]333 N.E.2d at 912, *citing* Pughsley v. 3750 Lake Shore Drive Loop Bldg., 463 F.2d 1055 (7th Cir. 1975); Eli Lilly & Co. v. Generik Drug Sales, Inc., 460 F.2d 1096 (5th Cir. 1972).

[112]334 N.E.2d 659 (Ind. 1975), also discussed in Marsh, *Constitutional Law, infra.* Other issues raised on appeal in this case are discussed in text accompanying notes 1-5 *supra.*

[113]IND. CODE § 33-10.5-7-6 (Burns Supp. 1976).

[114]334 N.E.2d at 662-63. The court relied upon the decision in Williams v. Florida, 399 U.S. 78 (1970), that the fourteenth amendment of the United States Constitution does not require 12-member juries.

The court overruled Miller's Nat'l Ins. Co. v. American State Bank, 206 Ind. 511, 190 N.E. 433 (1934), which held that 6-member juries violate IND. CONST. art. 1, § 20.

[115]346 N.E.2d 628 (Ind. Ct. App. 1976).

appealed the board's decision to the trial court, contending the board had made numerous errors and that he was therefore entiled to de novo review pursuant to Trial Rule 52. The complaint was summarily dismissed by the trial court.

Pursuing the matter to the appellate level, Van Horn argued that the trial court had erred by failing to hold the required trial de novo on the issues raised by the complaint and by failing to make findings of fact and conclusions of law as required by Trial Rule 52(A).[116]

The court of appeals held that Indiana Code section 18-1-11-3[117] provides for an appeal to the trial court by de novo review; but the review is applicable only to new legal issues or factual disputes, not to those which were presented to the administrative board.[118] In this case, Van Horn's complaint presented new issues and factual determinations; therefore de novo review and judicial findings of fact and law were required by Trial Rule 52.

The First District Court of Appeals opinion in *Hendrickson & Sons Motor Co. v. Osha*[119] focused on the effect of concurrent motions for judgment on the evidence as provided by Trial Rule 50.[120] Both the plaintiff and the defendant moved for judgment on the evidence after the jury's verdict but prior to the entry of judgment. The trial court granted a partial judgment for Osha and overruled Hendrickson's motion *in toto*.

On appeal, Osha argued that when a motion for judgment on the evidence is made by both parties in a jury trial, the result is a mutual waiver of trial by jury and a joint submission of the case on the merits to the court. The case of *Estes v. Hancock County Bank*[121] was cited as authority and found to be on point. However, the court of appeals observed that the Civil Code Study Commission did not intend for the "automatic withdrawal" rule to apply to Trial Rule 50[122] and held that, despite *Estes*, Indiana courts have never strictly adhered to the position that concurrent motions absolutely result in withdrawal of the case from the jury. The preferable rule of law is found in *Michigan Central Railroad*

---

[116]Trial Rule 52 provides that the court shall make special findings of fact without request in any review of actions by an administrative agency.

[117]This section generally provides a discipline procedure for firemen and policemen.

[118]*See generally* City of Mishawaka v. Stewart, 261 Ind. 670, 310 N.E.2d 65 (1974).

[119]331 N.E.2d 743 (Ind. Ct. App. 1975).

[120]Trial Rule 50 provides that where the issues "are not supported by sufficient evidence or a verdict thereon is clearly erroneous . . . the court shall withdraw such issues from the jury and enter judgment thereon . . . ."

[121]259 Ind. 542, 289 N.E.2d 728 (1972).

[122]*See* 3 W. HARVEY, INDIANA PRACTICE 365 (1970).

Corp. v. Spindler[123] which declared that a case may be withdrawn from the jury after concurrent motions only where both parties acquiesce in the removal. However, where the parties do not contemplate withdrawal of the case from the jury, such action by the trial court is reversible error.

Trial Rule 50 was also discussed in *Geyer v. City of Logansport,*[124] in which the Second District Court of Appeals reviewed the standard for determining whether a motion for judgment on the evidence shall be granted. The case was a personal injury suit in which the trial court granted the defendant's motion for judgment at the close of all the evidence.

The court of appeals reversed, holding that the trial court can withdraw the issues from the jury and enter judgment pursuant to Trial Rule 50 only if there is no evidence, or no reasonable inferences to be drawn from the evidence, in favor of the party opposing the motion on any essential element of recovery. The evidence must be without conflict and susceptible of only one inference, which must be in favor of the moving party. The trial court must draw all rational inferences in favor of the party opposing the motion, and it may not substitute its judgment for that of the jury on questions of fact or grant the motion because the evidence preponderates in favor of the moving party.

In the case of *Burger v. National Brands, Inc.*[125] the Third District Court of Appeals discussed the distinction between the former Trial Rule 50 motion for a directed verdict and the current Trial Rule 50 motion for judgment on the evidence. The court stated that the former rule required the trial court to direct the jury to return a specific verdict, but the contemporary rule permits the judge to enter judgment without referral to the jury. Directing the jury to return a verdict is therefore now superfluous.

In *Redmond v. United Airlines, Inc.,*[126] the plaintiff brought suit against the defendant on a contract of guaranty. The trial was to the court; at the close of the plaintiff's case and prior to the defendant's presentation of evidence, the defendant made an oral motion for a finding in his favor pursuant to Trial Rule 41(B).[127]

---

[123]211 Ind. 94, 5 N.E.2d 632 (1937); *see also* State Security Life Ins. Co. v. Rinter, 243 Ind. 331, 185 N.E.2d 527 (1962).

[124]346 N.E.2d 634 (Ind. Ct. App. 1976).

[125]342 N.E.2d 870 (Ind. Ct. App. 1976).

[126]332 N.E.2d 804 (Ind. Ct. App. 1975).

[127]Trial Rule 41(B) provides that:

> After the plaintiff or party with the burden of proof upon an issue, in an action tried by the court without a jury, has completed the presentation of his evidence thereon, the opposing party, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that considering

Briefs were submitted and the trial court ruled for the plaintiff, thereby giving him a final judgment and recovery.

On appeal, the defendant argued that the trial court had denied him the opportunity to present evidence. The Second District Court of Appeals observed that the defendant's oral motion for dismissal pursuant to Trial Rule 41(B) was the correct procedure,[128] since a motion for judgment on the evidence is improper in a trial to the court.[129] However, the court held that there is no authority in the Indiana Trial Rules for finding for a plaintiff prior to the defendant's case-in-chief[130] and that the defendant's failure to make a timely request to present evidence after his motion was denied did not constitute a waiver of the right to present evidence.

In the case of *Building Systems, Inc. v. Rochester Metal Products, Inc.*[131] the Third District Court of Appeals distinguished Indiana's Trial Rule 41(B)[132] from Federal Rule of Civil Procedure 41(b),[133] both of which provide for an involuntary dismissal in a court trial, comparable to a judgment on the evidence in a jury trial. The court found that the Indiana rule requires the court to look only to the evidence and inferences most favorable to the nonmoving party to determine whether there is substantial evidence of probative value, but the federal rule permits the trial court to determine whether or not the party with the burden of proof has established the right to recovery by a preponderance of the evidence.[134] Thus, federal courts have more discretion in the determination of whether an involuntary dismissal shall be granted.

In the case of *Moe v. Koe*[135] the Second District Court of Appeals discussed the procedure for a motion for relief from final

---

all the evidence and reasonable inferences therefrom in favor of the party to whom the motion is directed, to be true, there is no substantial evidence of probative value to sustain the material allegations of the party against whom the motion is directed.

[128]332 N.E.2d at 806 n.2.

[129]*Id.* at n.4.

[130]*Id.* at n.3.

[131]340 N.E.2d 791 (Ind. Ct. App. 1976).

[132]*See* note 130 *supra.*

[133]FED. R. CIV. P. 41(b) provides:

After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief.

[134]340 N.E.2d at 793, *citing* Emerson Elec. Co. v. Farmer, 427 F.2d 1082 (5th Cir. 1970); 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2371, at 224 (1971).

[135]330 N.E.2d 761 (Ind. Ct. App. 1975).

judgment as provided by Trial Rule 60. The case involved a paternity action in which the defendant, representing himself, eventually suffered an adverse judgment. Thereafter he retained an attorney to perfect an appeal, but no action was taken for almost one year. Subsequently the defendant moved for relief from the former judgment. The trial court denied the motion.

On appeal, the denial was affirmed. The court of appeals observed that Trial Rule 60(B)(1),[136] which states the law as it has been in Indiana since 1881, requires the moving party to demonstrate that the judgment entered against him was the result of mistake, surprise, or excusable neglect. In addition to the trial rule's requirements, case law applicable to the rule demands that a meritorious defense to a claim must be asserted before the judgment may be set aside.[137]

In *Fitzgerald v. Brown*,[138] a personal injury case, the First District Court of Appeals discussed Trial Rule 60(B)(8). In 1971 the trial court entered a default judgment against the defendant. In 1973, after a hearing to determine damages, the plaintiff was awarded $6,000 damages and costs. Later that year the defendant moved for relief from the 1971 judgment pursuant to Trial Rule 60(B)(8).[139] The motion was granted and the plaintiff appealed.

The court of appeals held that the motion for relief was proper since Trial Rule 60(B)(8) is not subject to the one-year limitation applicable to other provisions of Trial Rule 60 and that the sole requirement of the rule is that the motion be made within a reasonable time.

The appellate court explained that the motion is "a catch all provision allowing the court to vacate a judgment within the residual power of a court of equity to do justice."[140] The moving party in the court below testified that he did not receive service or have actual knowledge of the proceedings prior to entry of the default judgment. Although this would seem to be enough to qualify for the rule, case law indicates that the party seeking to avoid a judgment must also show that he has a meritorious de-

---

[136]Trial Rule 60(B)(1) provides: "On motion and upon such terms as are just the court may relieve a party or his legal representative from a final judgment, order, default or proceeding for the following reasons:

(1) mistake, surprise, or excusable neglect;"

[137]330 N.E.2d at 764, *citing* Cantwell v. Cantwell, 237 Ind. 168, 143 N.E.2d 275 (1957), *cert. denied*, 356 U.S. 225 (1958).

[138]344 N.E.2d 309 (Ind. Ct. App. 1976).

[139]IND. R. TR. P. 60(B)(8) provides that: "the motion shall be made within a reasonable time, and for reasons (1), (2), (3) and (4) not more than one [1] year after the judgment, order or proceeding was entered or taken."

[140]344 N.E.2d at 311, *citing* 4 W. HARVEY, INDIANA PRACTICE § 60.17, at 215 (1971).

fense to the claim against him.[141] The defendant in this case alleged that there was a failure of the car brake system, which the appellate court held to be sufficient for relief from the judgment. Accordingly, the court of appeals affirmed the trial court decision.[142]

In *Green v. Karol*[143] the issue was what constituted "excusable neglect" in conjunction with a motion for relief from a final default judgment as provided by Rule 60(B)(1).[144]

The case involved an action by a buyer against a seller of unregistered securities in which the defendant defaulted because of "the press of business" and "the inadvertent loss" of the case file. The trial court entered a default judgment but later set it aside pursuant to Rule 60, and the plaintiff appealed.

The First District Court of Appeals held that the defaulted party has the burden of showing why a default would result in an injustice and why the inaction should be excused.[145] However, a default judgment is not favored and any doubt of its propriety must be resolved in favor of the defaulted party.[146] The court then considered (1) the substantial amount of money involved; (2) the material issues of fact accompanying the allegations of common law fraud and securities law violations; (3) the existence of a meritorious defense; (4) the apparent inadvertence of the delay; (5) the short length of delay; and (6) the lack of prejudice to the plaintiff caused by the delay. The court of appeals concluded that the trial court did not abuse its discretion in allowing the case to be heard on the merits, rejecting the plaintiff's argument that the "press of business" and the loss of the case file were negligent and inexcusable. The court explained that the trial court must exercise its discretion in light of all the circumstances of the case.

During the past year the appellate courts were again confronted with a plethora of litigation alleging error in instructions to the jury. Most of these appeals were routinely handled, but several merit discussion.

Wickizer v. Medley[147] was a personal injury case in which the plaintiff appealed the jury's award, contending that the trial court had erred in instructing the jury of the income tax consequences of a damage recovery. The Third District Court of Appeals

[141] *See* Moe v. Koe, 330 N.E.2d 761 (Ind. Ct. App. 1975).

[142] *Compare id.*, discussed in text accompanying notes 138-140 *supra*.

[143] 344 N.E.2d 106 (Ind. Ct. App. 1976).

[144] *See* note 139 *supra* for the text of Trial Rule 60(B)(1).

[145] *See* Clark County State Bank v. Bennett, 336 N.E.2d 663 (Ind. Ct. App. 1975).

[146] *See* Indiana Travelers' Accident Ass'n v. Doherty, 70 Ind. App. 214, 123 N.E. 242 (1919).

[147] 348 N.E.2d 96 (Ind. Ct. App. 1976).

held that the instruction was improper[148] but did not amount to reversible error since it could not be concluded that the jurors had been misled as to the law of the case.[149] The court observed that the challenged instruction served to warn the jury to base its award on the evidence rather than on speculation about tax consequences.

In the case of *Chrysler Corp. v. Alumbaugh*[150] the appellate court again addressed the issue of jury instructions. The trial court gave an instruction which generally stated that failure of a party to call a witness presumably favorable to that party gives rise to an inference that the witness's testimony would actually be unfavorable to that party. The court of appeals stated that such an instruction may be appropriate when the facts in evidence uniquely require the instruction, but casual acceptance of such instructions is not approved. After further examination of the record and the total circumstances of the case, the the court concluded that the improper instruction did not constitute harmful error.

During the past year, there were a number of developments in the area of assessment of attorney fees and court costs in both federal and state courts. In *Satoskar v. Indiana Real Estate Commission*[151] the Seventh Circuit Court of Appeals affirmed the district court's denial of attorney's fees to the plaintiff. The suit for injunctive relief successfully challenged the Indiana statute precluding aliens from applying for or obtaining a real estate license.[152] On appeal the plaintiff conceded that a prevailing party is not ordinarily entitled to a recovery of attorney's fees but contended that the case came within any one of four judicially recognized exceptions to that rule. Specifically, the plaintiff asserted that attorney's fees should be granted because: (1) By securing injunctive and declaratory relief he has conferred a common benefit on a group of people whose constitutional rights had been violated; (2) he has acted as a private attorney general in effectuating a strong congressional policy; (3) the court has inherent power to shift the attorney's fees to defeated defendants in section 1983[153]

---

[148]*See also* Highshew v. Kushto, 235 Ind. 505, 134 N.E.2d 555 (1956).

[149]This is the test to determine whether an erroneous instruction constitutes reversible error. *See* Drolet v. Pennsylvania R.R. Co., 130 Ind. App. 544, 555, 164 N.E.2d 555, 558 (1960).

[150]342 N.E.2d 908 (Ind. Ct. App. 1976).

[151]517 F.2d 696 (7th Cir. 1975). This case and others discussed in this section are discussed in Note, *The Taxation of Costs in Indiana Courts*, 9 IND. L. REV. 679 (1976).

[152]IND. CODE § 25-34-1-12(2) (Burns 1974).

[153]42 U.S.C. § 1983 (1970).

actions; and (4) the defendants had acted in bad faith by pursuing frivolous appeals.

The court of appeals rejected the plaintiff's argument for all four exceptions. The court observed that the United States Supreme Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society*[154] was largely controlling. In that case, the Court held that in the absence of statutory authority the federal courts have no authority to grant attorney's fees based on the private attorney general approach or on the courts' views of the social importance of the issues involved in the case. The court of appeals concluded that the *Alyeska* case was fatal to the plaintiff's second and third arguments.

The court went on to note that the "common fund and benefit" theory of the first exception urged by the plaintiff was not applicable in this case, since that exception to the general rule is recognized only where there is an identifiable class of persons to whom the benefits of the litigation may be traced and to whom the costs of the litigation may be assessed. The court found that there was no such class involved in this case. The court also rejected the plaintiff's argument that the appeals had been taken in bad faith.

In *Palace Pharmacy, Inc. v. Gardner & Guidone, Inc.*,[155] the plaintiff was granted a preliminary injunction against the defendant after posting bond. The trial court's subsequent granting of a permanent injunction was reversed, however, and the injunction was dissolved. Thereafter the defendant filed a motion with the trial court to assess damages on the plaintiff's bond, including attorney's fees incurred in resisting the injunction.

The First District Court of Appeals agreed with the plaintiff that attorney's fees are not recoverable in the absence of statutory authority. However, the court ruled that in a successful action for dissolution of an injunction attorney's fees are a proper element of recovery under the authority of Trial Rule 65(C).[156]

In the case of *Popeil Brothers, Inc. v. Schick Electric, Inc.*,[157] the Seventh Circuit Court of Appeals discussed the question of whether a prevailing party is entitled to costs pursuant to Federal Rule 54(d).[158] The action was a patent infringement case in which

---

[154]421 U.S. 240 (1975).

[155]329 N.E.2d 642 (Ind. Ct. App. 1975).

[156]Trial Rule 65(C) provides for damages and costs incurred for a wrongfully enjoined party.

[157]516 F.2d 772 (7th Cir. 1975).

[158]FED. R. CIV. P. 54(d) provides, in pertinent part: "Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs . . . ."

an appeal was originally taken to the Seventh Circuit. Upon remand the clerk of the trial court assessed costs against the plaintiff in excess of $13,000. Thereafter the defendants moved for an order pursuant to Federal Rule 37(c) to charge to the plaintiff additional expenses, including attorney fees, amounting to more than $16,000, incurred in the taking of a deposition in Japan. The defendants claimed the deposition expenses were caused by the plaintiff's failure to admit.[159] The plaintiff moved the court to set aside the taxed costs and also to deny the deposition expenses. The district court granted the plaintiff's motion and an appeal followed.

In discussing Federal Rule 54(d), the court of appeals held that even in situations where the parties in good faith bring and defend a lawsuit, the prevailing party is prima facie entitled to costs and it is incumbent on the losing party to overcome that presumption. Therefore unless the losing party can show some degree of fault on the part of the prevailing party which would merit a penalty, costs will be taxed against the loser, even if the judgment is silent as to costs. Federal Rule 54 provides that "costs shall be allowed as of course to the prevailing party unless the court otherwise directs." The court noted that although the language of the rule vests some discretion in the trial court, that discretion "is not unfettered, however, or the earlier language [of the rule] would be rendered meaningless."[160] The court of appeals held that in this case the district court's denial of costs was an abuse of discretion and reversed.

However, the court of appeals reached a different conclusion regarding the $16,000 expenses for the Japan deposition. The court observed that the Supreme Court has held that whether or not to apply the old "100 mile rule," denying expenses incurred beyond a 100-mile zone, is a question for the trial court's discretion.[161] Furthermore, Rule 37(c) lacks the "shall be allowed as of course" language and the presumption of taxation of costs provided by Federal Rule 54. Accordingly, the court refused to reverse the lower court's denial of the deposition expenses.

In the case of *Calhoun v. Hammond*,[162] the trial court permitted the successful party to recover an expert witness fee of $200, three individual witness fees of $20 each, a filing fee of $26, and compensation of $25 for the transcription of a deposition. The issue on appeal was whether the expenses other than the filing fee

---

[159]FED. R. CIV. P. 37(c) permits the court to order the payment of "reasonable" expenses, including "reasonable" attorney's fees, incurred in making proof of matters the opposing party has failed to admit.

[160]516 F.2d at 774.

[161]Farmer v. Arabian American Oil Co., 379 U.S. 227 (1964).

[162]345 N.E.2d 859 (Ind. Ct. App. 1976).

could be taxed as costs. The relevant rule, Trial Rule 54(D), provides that "costs shall be allowed as of course to the prevailing party unless the court otherwise directs . . . ."[163]

The Third District Court of Appeals held that witness fees should be included in costs assessed, but not in excess of the amounts allowed by two statutes which prescribe the same per diem and mileage allowance for both lay and expert witnesses.[164] The court also stated without discussion that there is no Indiana authority permitting the taxation as costs of expenses incurred in the transcription of depositions.[165]

E. Appeals

In the case of *Citizens National Bank v. Harvey*[166] the Second District Court of Appeals took the opportunity to describe the anatomy of an appeal. The court stated that the essential elements of an appeal are the judgment,[167] the motion to correct errors,[168] the brief,[169] and the record.[170] The appeal is taken from the judgment. The motion to correct errors serves as a complaint for the appellate action. The brief, which must contain a verbatim copy of the judgment, raises the issues of the alleged errors. The record provides an alternative source of information to cover the brief's deficiencies.

In the case of *Logal v. Cruse*[171] the Indiana Supreme Court examined the relationship between trial court jurisdiction and appellate review. The trial court dismissed the suit for failure to comply with orders, and an appeal was perfected on the dismissal. Subsequently, new counsel filed a petition to reinstate the action pursuant to Trial Rule 60(B). The petition was denied and another appeal was perfected on that issue.

The supreme court held that when the appeal was filed on the original judgment of dismissal, the trial court lost its general jurisdiction over the case. Therefore, the purported proceeding

---

[163]IND. R. TR. P. 54(D) provides, in pertinent part: "Except when express provision therefor is made either in a statute or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs in accordance with any provision of law."

[164]IND. CODE § 5-7-9-4 (Burns Supp. 1976) (lay witnesses); *id.* § 34-1-14-12 (Burns 1973).

[165]345 N.E.2d at 863. *But see* Note, *The Taxation of Costs in Indiana Courts*, 9 IND. L. REV. 679, 687-88 (1976).

[166]334 N.E.2d 719 (Ind. Ct. App. 1975).

[167]IND. R. TR. P. 54.

[168]IND. R. TR. P. 59.

[169]IND. R. APP. P. 8.1, 8.2, 8.3, 8.4.

[170]IND. R. APP. P. 7.1, 7.2, 7.3.

[171]338 N.E.2d 309 (Ind. 1976).

pursuant to Rule 60(B) was a nullity and the appeal from that proceeding was dismissed.

During the past year the appellate courts were again confronted with a number of appeals involving defective filing. In the case of *Indianapolis Machinery Co. v. Bollman*,[172] cross-claimant Letzer filed a motion to correct errors by ordinary mail. The motion was mailed on the last day of the sixty-day limit provided by Trial Rule 59.[173] However, the motion was not received or entered into the record until after the statutory time limit had elapsed. The First District Court of Appeals ruled that Trial Rule 5(E)[174] was controlling. The rule provides that a motion will be deemed filed on the day it is mailed if it is sent by registered or certified mail. Unfortunately, in this case the motion was sent by ordinary mail and was therefore not considered to be filed until it was actually received. Accordingly, the court held that the lower court had erred in granting a motion for an entry nunc pro tunc and as a result the appellate court had no jurisdiction.[175]

In *State ex rel. Dillon v. Shepp*,[176] the plaintiff appealed from a judgment entered for the defendant. Thereafter the plaintiff, in the course of the appeal, neglected to serve certain defendants with a copy of a petition to extend the time to file a transcript or a petition for extension of time to file the appellate brief or the brief itself, as required by Appellate Rules 2(B)[177] and 12(B).[178]

The First District Court of Appeals observed that the unserved defendants were parties in the trial court complaint and therefore of record on appeal.[179] Thus, they were entitled to service of all copies of all papers filed on the appeal. The court concluded that the law in Indiana is clear that a failure to comply with the requirements for service of all parties will result in the dismissal of the appeal. Consequently, the appeal was dismissed.

---

[172]339 N.E.2d 612 (Ind. Ct. App. 1976).

[173]Trial Rule 59 provides that a "motion to correct errors shall be filed not later than sixty [60] days after the entry of judgment."

[174]Trial Rule 5(E) provides, in part, that "[f]iling by registered or certified mail shall be complete upon mailing."

[175]IND. R. TR. P. 59(G) provides that an appellate court may consider issues which could be raised in a motion to correct errors only when the issues have actually been included in the motion to correct errors.

[176]332 N.E.2d 815 (Ind. Ct. App. 1975).

[177]Appellate Rule 2(B) provides that all parties of record in trial are parties on appeal.

[178]Appellate Rule 12(B) provides in part:

> Copies of all papers filed by any party shall, at or before the time of filing, be served by a party or a person acting for him on all other parties to the appeal or review. Service on a party represented by counsel shall be made on counsel.

[179]IND. R. APP. P. 2(B).

The determination of when an order is appealable is often a crucial issue in appellate litigation. Several decisions in the last year have given new insight into the area. *Swanson v. American Consumer Industries, Inc.*[180] was a federal derivative class action suit brought by the minority shareholders. On the second appeal, the trial court was again reversed and the case remanded with a mandate to the trial court to enter judgment for the plaintiff and to assess costs and attorney's fees against the defendant. Final judgment was entered in September 1973. In April 1974, the district court awarded attorney's fees in excess of $21,000 to the plaintiff. Thereafter the plaintiff appealed, challenging both the 1973 judgment and the amount of attorney's fees allowed in the 1974 proceeding.

At the appellate level again, the defendant argued that the plaintiff's appeal from the 1973 judgment should be dismissed because the appeal was not filed within thirty days of the 1973 entry.[181] The court of appeals held that the 1973 judgment was final and that the reservation of the issue of attorney's fees until 1974 had no effect on the appealability of that judgment. The court noted that the issue of attorney's fees is collateral or incidental to the merits of the case and therefore directly appealable under 28 U.S.C. § 1291.[182] Accordingly, the court dismissed the plaintiff's untimely appeal from the 1973 judgment but reviewed the district court's 1974 award.[183]

In *Stanray Corp. v. Horizon Construction, Inc.*,[184] the Second District Court of Appeals dealt with the issue of when a summary judgment pursuant to Trial Rule 56(C)[185] becomes a final appealable judgment as provided by Trial Rule 54(B).[186]

---

[180]517 F.2d 555 (7th Cir. 1975).

[181]Appellate Rule 4(A) provides in part that notice of appeal shall be filed within "30 days of the date of the entry of the judgment or order appealed from."

[182]28 U.S.C. § 1291 (1970) provides, in part: "The court of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States."

[183]517 F.2d at 561, *citing* 6 J. MOORE, FEDERAL PRACTICE § 54.31, at 471-72 (2d ed. 1974).

[184]342 N.E.2d 645 (Ind. Ct. App. 1976).

[185]IND. R. TR. P. 56(C) provides in part:

> A summary judgment upon less than all the issues involved in a claim or with respect to less than all the claims or parties shall be interlocutory unless the court in writing expressly determines that there is no just reason for delay and in writing expressly directs entry of judgment as to less than all the issues, claims or parties. The court shall designate the issues or claims upon which it finds no genuine issue as to any material facts.

[186]IND. R. TR. P. 54(B) provides, in part:

> [T]he court may direct the entry of a final judgment as to one or

The plaintiff Stanray was one of several parties seeking foreclosure upon the defendant's property. In April 1973, the trial court granted summary judgment for the plaintiffs against the defendant. In November 1974, the trial court determined that another creditor's mortgage lien took priority over all of the original plaintiffs' claims and that Stanray's lien was not timely filed.

On appeal, Stanray contended that the 1974 entry was contrary to the 1973 judgment, which was a final determination of the plaintiffs' interest under the lien. The court of appeals rejected Stanray's argument and gave an in-depth explanation of Trial Rules 54(B) and 56(C). The court held that these rules provide that a summary judgment made upon less than all the issues involved in a claim shall be regarded as interlocutory unless the trial court expressly determines in writing that there is no just reason for delay and thereafter directs the judgment to be entered. The court ruled that since no such express determination was made in this case the 1973 judgment was only tentative and therefore subject to a subsequent final revision.

State v. Collier[187] was a 1968 personal injury suit brought against the State of Indiana. The trial court sustained the defendant's demurrer to the plaintiff's original complaint, but no appeal was taken at that time. In 1970 the trial court granted the plaintiff's motion to reconsider the matter.

The question raised on the defendant's appeal was whether the 1968 entry was a final judgment from which an appeal could have been taken. The record indicated that the ruling on the demurrer was entered on the docket sheet but not in the order book. The First District Court of Appeals found that the docket sheet entry was merely a finding and not a final judgment. Citing numerous Indiana statutes, cases and trial rules, the court held that a finding cannot be a final judgment until the trial judge intentionally declares it to be so. Since there was no evidence of this intention, the court of appeals affirmed the lower court's decision.

The past year also brought the usual large number of appeals dealing with Trial Rule 59. The rule generally prescribes the procedure for filing a motion to correct errors, which is a prerequisite to any appeal.

In *Hendrickson & Sons Motor Co. v. Osha*[188] the appeal was attacked on the grounds that the motion to correct errors and the

---

more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

[187]331 N.E.2d 784 (Ind. Ct. App. 1975).

[188]331 N.E.2d 743 (Ind. Ct. App. 1975).

memorandum in support thereof lacked the requisite specificity[189] to preserve any of the issues for the appellate court. The First District Court of Appeals held that the alleged error must be stated in specific terms and must be accompanied by a statement of the facts and grounds upon which the error is based. However, in determining the requisite specificity, the motion will be read together with its supporting memorandum. The court noted that although the motion at issue in *Hendrickson* was cast in general terms, the supporting memorandum contained a statement of the facts and grounds sufficient to comply with the specificity requirements of Trial Rule 59(B).

In *City of Indianapolis v. Nickel,*[190] a group of property owners filed a complaint for review in superior court after the Board of Sanitary Commissioners had assessed sewer construction costs against them. The trial court reduced the assessment and the city filed a motion to correct errors and perfected an appeal.

One of the issues raised on appeal was whether or not the city was required to file a petition for rehearing within fifteen days after the trial court's decision as provided by Indiana Code section 18-5-15-6. The Second District Court of Appeals held that Trial Rule 59 supersedes those unrepealed statutes which provide other procedures for taking an appeal from a final judgment. Hence, Trial Rule 59 is the only mechanism by which an appeal can be taken to a higher court.

During the past year the appellate courts again handed down a number of opinions holding that an appeal cannot be perfected unless a separate additional motion to correct errors is filed for every change in the original judgment.[191]

In the case of *Lake County Title Co. v. Root Enterprises, Inc.*[192] the trial court in determining the defendant's motion to correct errors, reduced a judgment of approximately $20,000 to $15,000. The defendant filed a second motion to correct errors addressed to the judgment on the prior motion. On appeal, the question was whether the second motion to correct errors was necessary. The Third District Court of Appeals observed that "any amendment of a judgment creates a new judgment which requires a motion to

---

[189]IND. R. TR. P. 59(B) provides, in part, that: "The statement of claimed errors shall be specific rather than general, and shall be accompanied by a statement of the facts and grounds upon which the errors are based."

[190]331 N.E.2d 760 (Ind. Ct. App. 1975). For a discussion of the other issues in this case, see Shaffer, *Administrative Law, supra.*

[191]The leading case on this matter appears to be State v. Deprez, 260 Ind. 413, 296 N.E.2d 120 (1973); *see also* Davis v. Davis, 306 N.E.2d 377 (Ind. Ct. App. 1974). *See generally,* Harvey, *1975 Survey, supra* note 18, at 94.

[192]339 N.E.2d 103 (Ind. Ct. App. 1976).

correct errors."[193] In the instant case the original judgment had been altered and therefore the second motion was necessary and proper.

In *Minnette v. Lloyd*,[194] the plaintiff sought injunctive relief against the Board of Public Safety of the City of Evansville and the defendant counterclaimed for declaratory judgment. The trial court entered an original judgment against both parties on their respective claims, and each party filed a motion to correct errors. Three months later the trial court corrected the judgment and found for the plaintiff. Without filing another motion to correct errors, the plaintiff initiated an appeal. The court of appeals held that without the second motion there could be no appellate jurisdiction to entertain the plaintiff's appeal. Consequently, the appeal was dismissed.

In *Miller v. Mansfield*[195] the plaintiff filed a motion to correct errors which was granted in part and denied in part. Specifically, a new trial was granted and the verdict of the jury was set aside. The defendant took an appeal. The issue on appeal was whether the defendant was required to file a motion to correct errors to bring the appellate action. The Third District Court of Appeals ruled that the motion was necessary under the Indiana Supreme Court's interpretation[196] of Appellate Rule 4(A).[197] Accordingly, the appeal was dismissed over Judge Garrard's dissent that the order for a new trial was a final judgment and that the purpose for the motion to correct errors did not exist.[198]

The defendant in *State ex rel. Murray v. Estate of Heithecker*[199] attacked the plaintiff's appeal on the grounds that the personal representative, who was a party at trial, was not named as a party in the motion to correct errors. In support of the argument for dismissal the defendant cited several cases[200] which were decided under the former Supreme Court Rule 2-6.[201]

---

[193] *Id.* at 108.

[194] 333 N.E.2d 791 (Ind. Ct. App. 1975).

[195] 330 N.E.2d 113 (Ind. Ct. App. 1975).

[196] *See* case cited at note 173 *supra*.

[197] IND. R. APP. P. 4(A) provides:

> Appeals may be taken by either party from all final judgments of Circuit, Superior, Probate, Criminal, Juvenile, County, and where provided by statute for Municipal Courts. A ruling or order by the trial court granting or denying a motion to correct errors shall be deemed a final judgment, and an appeal may be taken therefrom.

[198] 330 N.E.2d at 115 (Garrard, J., dissenting).

[199] 333 N.E.2d 308 (Ind. Ct. App. 1975).

[200] *Id.* at 309 & nn.1 & 2.

[201] "In the title to the assignment of errors all parties to the judgment seeking relief by the appeal shall be named as appellants, and all parties to the judgment whose interests are adverse to the interests of the appellants

The First District Court of Appeals held that the Supreme Court Rules are no longer the law in Indiana. The present state of the law is contained in Appellate Rule 2(B)[202] which provides that all parties of record at trial are parties to the appeal, regardless of whether the motion to correct errors names them as such.

In the case of *Haverstick v. Banat*[203] a jury verdict was entered as final judgment on June 25, 1973 and a praecipe for the record of the proceedings was filed on June 28, 1973. Five days later a motion to correct errors was filed and subsequently overruled.

The issue before the First District Court of Appeals was whether the procedural irregularity of filing the praecipe before the motion to correct errors was fatal to the court's appellate jurisdiction. The court held that Appellate Rule 2(A)[204] provides that the motion should precede the praecipe. However, the court noted that the essential purpose of Rule 2(A) is to hasten the submission of appeals. The court therefore concluded that the procedural defect in this case should not preclude appellate jurisdiction unless the substantial rights of a party had been adversely affected. Finding that the parties were not prejudiced the court denied the motion to dismiss.

In *Scott Paper Co. v. Public Service Commission*[205] an appeal was taken to the Second District Court of Appeals from a final ruling by the Public Service Commission. A petition for rehearing was filed with the Commission and a record of the proceedings was filed with the court. The record of the proceedings did not contain an assignment of error.

The court of appeals, considering the Commission's motion to dismiss, observed that Indiana Code section 8-1-3-1[206] requires the appealing party to file an assignment of error and Appellate Rule 7.2[207] further requires that the assignment be contained in

---

shall be named as appellees . . . ." IND. S. Ct. R. 2-6, *reprinted in* 3 D. FLANAGAN, F. WILTROUT, & F. HAMILTON, INDIANA TRIAL AND APPELLATE PRACTICE § 2402, at 169 (1952).

[202]*See* note 179 *supra*.

[203]331 N.E.2d 791 (Ind. Ct. App. 1975).

[204]IND. R. APP. P. provides:

> An appeal is initiated by filing with the clerk of the trial court a praecipe designating what is to be included in the record of the proceedings, and that said praecipe shall be filed within thirty [30] days after the court's ruling on the Motion to Correct Errors or the right to appeal will be forfeited. A copy of such praecipe shall be served promptly on the opposing parties.

[205]330 N.E.2d 137 (Ind. Ct. App. 1975).

[206]IND. CODE § 8-1-3-1 (Burns 1973) authorizes the appeal from the Commission.

[207]Appellate Rule 7.2 provides that the record of the proceedings shall consist of a certified copy of the motion to correct errors or an assignment

the record of the proceeding. Hence a separate, belated assignment of error would not be permissible. With much regret the court was forced to conclude that there was no jurisdiction to entertain the appeal.

The Indiana Supreme Court in *In re Estate of Fanning*[208] accepted a petition for transfer even though the court was aware that the petition for transfer failed to raise any of the grounds required by Appellate Rule 11(B)(2).[209] The court found that the issue presented in the case, in view of the conflicting case law, was of such public concern that the requirements of the rule should not be strictly applied.

In *Skendzel v. Marshall*[210] the plaintiff filed a petition for writ of mandate in the supreme court seeking an order to force compliance with the court's previous order on remand. In the petition the plaintiff alleged that the entry of the trial court on remand was inadequate and inconsistent with the supreme court's original remand order.

In examining the plaintiff's argument, the supreme court stated that when an appellate court remands with instructions for further proceedings the appellate court retains jurisdiction to see that the instructions are followed. Therefore, if the trial court fails to comply with the instructions the aggrieved party may promptly seek a writ of mandate to enforce compliance. The court observed that when such a procedure is taken, the function of the appellate court is to compare the action ordered on remand with the action taken by the trial court and thereby ascertain whether compliance has been achieved.

In this particular case, the supreme court found that the action ordered and the action taken were consistent and therefore denied the petition for writ of mandate.

---

of errors. The leading case interpreting this rule is Moore v. Spann, 298 N.E.2d 490 (Ind. Ct. App. 1973).

[208]333 N.E.2d 80 (Ind. 1975). For a discussion of this case, see *Property, 1975 Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 294 (1975).

[209]IND. R. APP. P. 11(B)(2) provides a lengthy description of the procedure for transfer of a case from the court of appeals to the supreme court.

[210]330 N.E.2d 747 (Ind. 1975). For a discussion of prior proceedings in this case, see Bepko, *Contracts and Commercial Law, 1974 Survey of Recent Developments in Indiana Law*, 8 IND. L. REV. 116, 117-19 (1974).