deemed to have continuously existed since the date"[115] of its termination or revocation, thus eliminating any questions about the validity of corporate acts during the hiatus. A conforming amendment was made to section 23-1-7-4 to eliminate the prior procedure of reinstating a corporation whose existence has terminated pursuant to its articles by amending its articles to extend its duration.

There is no quarrel with a procedure streamlining the process of reinstating corporations that have failed to file annual reports, since it is a common occurrence. The only question that this author has is that the Act does not indicate the duration of the reinstated corporation. There is no problem for a corporation with a perpetual duration whose articles were revoked, but there is for a corporation whose existence was limited to, for example, five years. Is its duration perpetual? The statute is silent and should be clarified. However, a strong argument can be made that by deleting the language in section 23-1-7-4 concerning amending the articles, the legislature has demonstrated an intent that the newly reinstated corporation would have perpetual duration. Those responsible for reinstating such a corporation could, of course, amend the articles pursuant to the regular amendment process[116] if they wished to limit its duration.

IV. Civil Procedure and Jurisdiction

*William F. Harvey**

A. Jurisdiction and Service of Process

1. Quasi in Rem Jurisdiction.—A fitting introduction to this section is the penetrating opinion of the United States Supreme

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[115]IND. CODE § 23-3-4-1.6(c) (Supp. 1977). The courts are divided as to whether a corporation with a revoked charter had de facto status during the period of revocation. *Compare* Spector v. Hart, 139 So. 2d 923 (Fla. Ct. App. 1962) *with* Moore v. Rommel, 233 Ark. 989, 350 S.W.2d 190 (1961). A statutory provision granting de facto status has been declared unconstitutional. *See* Gano v. Filter-Aid Co., 414 S.W.2d 480 (Tex. Ct. App. 1967). An interesting question is whether the new provision would make the penalty provision of IND. CODE § 23-1-10-5(a) (1976) inapplicable where the business was conducted "knowingly and willfully and with intent to defraud" during the period the articles were revoked.

[116]IND. CODE § 23-1-4-1 (1976).

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The author wishes to extend appreciation to Gary Price for his assistance in the preparation of this discussion.

Court in the case of *Shaffer v. Heitner.*[1] While a detailed analysis is beyond the scope of this article, it appears that the holding was aimed at extending the minimum contacts standard elucidated in *International Shoe Co. v. Washington*[2] to exercises of in rem jurisdiction and particularly to the exercise of quasi in rem jurisdiction. The Court announced, as a general proposition, that "all assertions of state court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny."[3] The appellants in this case were sued in Delaware by a nonresident plaintiff who filed for a sequestration of Delaware property of the nonresident defendants. The trial court sequestered a significant amount of the defendants' stock by placing a "stop transfer" order on the books of the Greyhound corporation. Apparently, none of the certificates representing the seized property were physically present in Delaware. The appellants argued that the *ex parte* sequestration did not afford them due process of law, and that the property was not subject to attachment in Delaware.

Although the Court relied on both the constitutional argument of appellants and the remedy afforded by the standard enunciated in *International Shoe*, it is apparent that pragmatic considerations had much influence on the decision not to permit quasi in rem jurisdiction in this instance. The Supreme Court noted that cases of this type present the clearest illustration of the need for a single standard for assessing allegations of jurisdiction. The Court pierced the quasi in rem fiction, stating that especially in the instance of a sequestration proceeding, the underlying purpose is to compel a personal appearance by the defendant. The Court said that "if a direct assertion of personal jurisdiction over the defendant would violate the Constitution, it would seem that an indirect assertion of that jurisdiction should be equally impermissible."[4] It is this author's opinion that the language of Indiana Trial Rules 4.4 and 64 is consistent with the holding expressed by the United States Supreme Court in this case.[5]

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[1]97 S. Ct. 2569 (1977).

[2]326 U.S. 310 (1945).

[3]97 S. Ct. at 2584-85.

[4]*Id.* at 2583.

[5]IND. R. TR. P. 4.4 outlines the requirements for service of process on nonresidents for acts done within this state; it is the so-called "long-arm" provision of the trial rules. IND. R. TR. P. 64 outlines procedures and requirements for seizure of persons or property, including attachment and garnishment.

For an application of this decision in Indiana law, *see In re* Marriage of Rinderknecht, 367 N.E.2d 1128 (Ind. Ct. App. 1977), in which the Indiana Court of Appeals stated that a dissolution of marriage, while traditionally characterized as an in rem proceeding, must now meet the "minimum contacts" test described in Shaffer v. Heitner. The court held that the minimum contacts test must be applied to two issues

2. Service of Process.—In *Roberts v. Watson*,[6] the Indiana Court of Appeals held that mere compliance with the procedures for service of process outlined by Trial Rule 4.1(A)(1) will not be sufficient where there is no actual service.[7] The summons issued in this case, naming Opal V. and Ronald G. Roberts as defendants, went to the residence of Ronald G. Roberts, then separated from his wife. Opal first learned of the action when judgment was executed against her. The court held that the service of process did not conform to Trial Rule 4.1(A)(1) since the agent selected by plaintiffs, the United States Postal Service, did not *in fact* send the summons and complaint to Opal's "residence, place of business, or place of employment." The court believed the risk of misfeasance should be born by the party utilizing a particular means of service rather than the party prejudiced by the lack of notice and opportunity to be heard.[8] The court also rejected plaintiffs' contentions that the service was sufficient under Trial Rule 4.6(A)(2), which provides for service on organizations, or that the service was "reasonably calculated to inform" according to Trial Rule 4.15(F), holding that Trial Rule 4.15 has no application where there has not been actual service on a party.[9]

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in a dissolution proceeding: (1) whether there are requisite minimum contacts present to allow the court to adjudicate the marital status of the parties, and (2) whether there are requisite minimum contacts present to allow the court to adjudicate the rights and obligations which are incidents to the marriage. Applying two different levels of minimum contacts, the court noted on the first issue that an Indiana residence of one of the parties satisfied the minimum contacts needed to adjudicate marital status (*i.e.*, enter a decree). However, as to property rights, etc., the court said that minimum contacts are satisfied if the nonresident can be categorized under Trial Rule 4.4(A)(7) or another constitutionally permissible standard, or, if the nonresident fails to make a timely objection to the exercise of in personam jurisdiction. The court of appeals found that in personam jurisdiction could not properly be asserted under either standard necessary as a prelude to adjudication of rights and obligations. Hence, the court of appeals affirmed as to the portion of the decree effecting the dissolution of marriage but reversed that part which dealt with adjudication of the rights and obligations. Note that the jurisdictional issues were resolved against the backdrop of the Supreme Court's discussion in Shaffer v. Heitner.

[6]359 N.E.2d 615 (Ind. Ct. App. 1977).

[7]IND. R. TR. P. 4.1(A)(1) provides in part:

> Service may be made upon an individual, or an individual acting in a representative capacity, by (1) sending a copy of the summons and complaint by registered or certified mail or other public means by which a written acknowledgment of receipt may be requested and obtained to his residence, place of business or employment with return receipt requested and returned showing receipt of the letter . . . .

[8]359 N.E.2d at 619-20.

[9]The court summarily rejected a claim that Opal and Robert became partners by estoppel when they entered into a commercial lease with plaintiffs, stating that defendants held themselves out as husband and wife, not partners. *Id.* at 620.

3. Coordinate Jurisdiction.—In *State ex rel. International Harvester Co. v. Allen Circuit Court*,[10] the facts disclosed that the City of Fort Wayne and the City of New Haven had been attempting to annex the same geographical area for a number of years. Remonstrances were filed in the Whitley Circuit Court, protesting the actions of New Haven (1972), and in the Allen Circuit Court, protesting the actions of Fort Wayne (1974). The general rule has been that where two courts of coordinate jurisdiction exert authority over cases where there is *identity* of subject matter and *identity* of parties, the jurisdiction of the court first acquiring jurisdiction is exclusive until final disposition of the case. In *International Harvester*, the Indiana Supreme Court discussed the extent to which the general rule would apply to cases where parties and subject matter are only *substantially* similar.

Justice DeBruler, writing for a unanimous court, said that, notwithstanding the lack of identity of parties, the similarity of issues was substantial enough to require a writ ordering the Allen Circuit Court to stay its proceedings pending final adjudication by the Whitley Circuit Court. While not establishing a litmus test for cases of this nature, the court relied on the "outcome determinative" nature of the proceedings sought to be stayed.[11] This indicates that the extent to which an exercise of jurisdiction would be outcome-determinative may be the focus of analysis in further battles over coordinate jurisdiction when there is only substantial similarity between subject matter and parties.

4. Municipal Notice Statutes.—An apparent conflict has developed among the districts of the Indiana Court of Appeals as to interpretations of the statutes requiring notice of claim as a condition precedent to suit against municipal entities.[12] A recent decision of the Third District Court of Appeals in *City of Fort Wayne v. Cameron*[13] appears to conflict with a prior decision of the Second District in *Geyer v. City of Logansport*[14] on the issue of substantial compliance with statutory notice requirements. In *Cameron* and *Geyer*, no timely notice was given by the plaintiffs, but the respective municipal police agencies conducted investigations of the incidents; both plaintiffs were shot by police officers of the municipalities. The Second District Court of Appeals in *Geyer* held that actual knowledge of the accident, as well as an investigation of the accident conducted by the municipality, satisfied notice re-

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[10]352 N.E.2d 487 (Ind. 1976).

[11]*Id.* at 489.

[12]*See, e.g.*, IND. CODE § 34-4-16.5-7 to -12 (1976).

[13]349 N.E.2d 795 (3d Dist. Ind. Ct. App. 1976).

[14]346 N.E.2d 634 (2d Dist. Ind. Ct. App. 1976).

quirements of the applicable statute.[15] On the other hand, the *Cameron* court held that "mere actual knowledge" of the occurrence by municipal agents is insufficient[16] and stressed the necessity of the plaintiff actually giving the notice required by the relevant statute.[17]

The First District, in *City of Indianapolis v. Satz*,[18] described the disparity in the above-cited cases as drawing a "fine line between substantial compliance and non-compliance" with notice statutes.[19] The First District distinguished *Cameron* from *Geyer*, stating that the investigation in *Cameron* was a routine matter that was required whenever a police officer discharged a weapon on duty, while the *Geyer* investigation was conducted by the sheriff and the insurer of the defendant city. Yet, the distinction noted does not appear to be consistent with the conclusion of the First District that where "the purpose of the notice statute has been fulfilled there is substantial compliance with said statute."[20] The fact remains that there is no definitive ruling on what criteria fulfill the purpose of the municipal notice statutes, and the stage appears to be set for a final disposition by the supreme court.[21]

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[15]The statute here at issue, ch. 16, § 1, 1967 Ind. Acts 21, was repealed in 1974. For present law, see IND. CODE § 34-4-16.5-7 (1976), which substituted a 180-day notice period for the prior 60-day period.

The court relied on Aaron v. City of Tipton, 218 Ind. 227, 32 N.E.2d 88 (1941), which held that the purpose of statutes requiring notice to a municipality was to inform the city with reasonable certainty as to time, place, and cause of the accident.

[16]349 N.E.2d at 800 (citing Touhey v. City of Decatur, 175 Ind. 98, 93 N.E. 540 (1911)).

[17]*Id.* at 800 (citing Thompson v. City of Aurora, 263 Ind. 187, 325 N.E.2d 839 (1975)).

[18]361 N.E.2d 1227 (1st Dist. Ind. Ct. App. 1977).

[19]*Id.* at 1230.

[20]*Id.* at 1231 (citing Galbreath v. City of Indianapolis, 253 Ind. 472, 479, 255 N.E.2d 225, 229 (1970)).

[21]After the Survey went to press, the Indiana Supreme Court handed down two companion cases reversing the Third District Court of Appeals in City of Fort Wayne v. Cameron and reversing in part and affirming in part the Second District Court of Appeals decision in Geyer v. City of Logansport.

In Geyer v. City of Logansport, 370 N.E.2d 333 (Ind. 1977), the supreme court reversed the court of appeals determination that the notice requirements were fulfilled, thus barring recovery against the city, but affirmed that part of the decision permitting suit against the police officer in his individual capacity. The supreme court stated that the purpose of the notice statute is to inform the city officials with "reasonable certainty" of the accident and circumstances in order that the city may determine possible liability and prepare a defense to the claim. In addition, the court noted that the clear language of the statute in question placed an affirmative duty upon the plaintiff to *deliver a writing* to the city that described the claim.

In reversing City of Fort Wayne v. Cameron, 370 N.E.2d 338 (Ind. 1977), the supreme court simply held that if a party was mentally and physically incapacitated to the extent that he could not comply with the provisions of the notice statute, he will have a "reasonable time after his disability was removed within which to file the

5. Change of Venue.—In the case of *Gulf Oil Corp. v. McManus*,[22] the Indiana Court of Appeals construed the meaning of the term "trial" in the context of the waiver provisions of Trial Rule 76(7).[23] After the appellee had filed a purported class action, the trial court, pursuant to Trial Rule 23(C)(1), set a class action determination hearing for June 13, 1974. The trial court set this date by order book entry on May 14, 1974. On June 6, 1974, after the order setting the hearing, but before the hearing itself, appellee moved for a change of venue, which was granted by the trial court. After denial of a motion to vacate the change of venue, appellants perfected an interlocutory appeal.

In considering whether a Trial Rule 23(C)(1) hearing constitutes a trial, the court of appeals first considered the general notion of a "trial" as an adjudication upon the factual merits of a claim and a disposition of a "distinct and definite branch of the litigation."[24] The court then drew an analogy to the "collateral order doctrine" of *Eisen v. Carlisle & Jacquelin*.[25] *Eisen* held that the determination under the counterpart federal rule, at least where there are no viable individual plaintiffs, constitutes a final judgment. The court of appeals held that the hearing provided by Trial Rule 23(C)(1) resulted in a collateral order disposing of a distinct branch of the litigation, and the appellee had waived his right to a change of venue by failure to object or request a change for more than three weeks after the May 14, 1974, entry. However, Judge Staton, in concluding his dissenting opinion, wrote that "23(C)(1), by its own terms denies any finality on the merits."[26]

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notice to the city." To hold otherwise, said the court, would be to deprive a litigant of his constitutional right to a "remedy by due course of law."

The *Satz* decision is the subject of a petition to transfer filed with the supreme court June 1, 1977.

[22]363 N.E.2d 223 (Ind. Ct. App. 1977).

[23]IND. R. TR. P. 76(7) provides in part:

> [A] party shall be deemed to have waived a request for a change of judge or county if a cause is set for trial before the expiration of the date within which a party may ask for a change, evidenced by an order-book entry and no objection is made thereto by a party as soon as such party learns of the setting for trial. Such objection, however, must be made promptly and entered of record, accompanied with a motion for a change from the judge or county (as the case may be) and filed with the court.

[24]363 N.E.2d at 225.

[25]417 U.S. 156 (1974).

[26]363 N.E.2d at 227 (Staton, J., dissenting). IND. R. TR. P. 23(C)(1) provides:

> As soon as practicable after the commencement of an action brought as a class action, the court, upon hearing or waiver of hearing, shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

In the case of *State Travelers Insurance Co. v. Madison Superior Court*,[27] the Indiana Supreme Court clarified the availability of automatic change of venue to a third-party defendant. The plaintiff sued to recover for damages resulting from an automobile accident. Eventually, the plaintiff's complaint was dismissed and the defendant received a default judgment on a counterclaim. The defendant then filed a motion in a proceeding supplemental to enforce the default judgment, and the original plaintiff (now the judgment defendant) filed a summons and third-party complaint against Travelers Insurance Company. Travelers responded with a motion to dismiss and a motion for a change of venue, both of which were overruled by the trial court. Travelers subsequently petitioned the supreme court to vacate the trial court's order denying the motion for change of venue. The supreme court commented generally that proceedings supplemental are considered to be summary; no answer or affidavit is intended or required. Here, however, the dispute between Travelers and the judgment defendant presented a new issue, not summary in nature. The court held that the new issue required a responsive pleading and was therefore governed by Trial Rule 76(2).[28]

The supreme court carefully distinguished *State Travelers Insurance* from *State ex rel. Yockey v. Superior Court*,[29] which held that for purposes of Trial Rule 76 the issues shall be deemed *first* closed on the merits upon the filing of the defendant's *original* answer.[30] The court said the competing policies that were balanced in *Yockey*, considerations of a fair trial and the need to avoid protracted litigation, are presented in a different light when a third party defendant is impleaded subsequent to the original complaint. The court refused to extend the holding of *Yockey* and ruled that the issue between Travelers and the judgment defendant had not been closed at the time the motion was filed and that the trial court was required to grant the change of venue.

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[27]354 N.E.2d 188 (Ind. 1976).

[28]IND. R. TR. P. 76(2) provides in part:

> 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.

[29]261 Ind. 504, 307 N.E.2d 70 (1974), *discussed in* Harvey, *Civil Procedure and Jurisdiction, 1976 Survey of Recent Developments in Indiana Law*, 10 IND. L. REV. 88, 98 (1976) [hereinafter cited as Harvey, *1976 Survey*].

[30]Strictly construed, this "original" answer would have been the answer of the original defendant in the primary personal injury lawsuit.

B. Pleadings and Pre-Trial Motions

1. Attacks on Jurisdiction.—The defendant in *Weenig v. Wood*[31] moved to dismiss the complaint pursuant to Trial Rule 12(B)(2), alleging that there was no showing made in the pleadings that the extraterritorial summons served on defendant was sufficient to satisfy the requirements of Trial Rule 4.4 and confer personal jurisdiction. The Indiana Court of Appeals stated that there is a presumption under our current rules of procedure, as well as under past practice,[32] that the court has jurisdiction over the parties as well as the subject matter. Therefore, the plaintiff need not make jurisdictional allegations in the complaint. Should the defendant choose to attack the presumption of jurisdiction, he bears the burden of proof upon that issue, unless the lack of jurisdiction is apparent on the face of the complaint. The court noted that a defendant may attack jurisdiction in one of two ways. He may plead it as an affirmative defense under Trial Rule 8(E), or he may simply move to dismiss under Trial Rule 12(B)(2) for lack of personal jurisdiction. The court held that the defendant in *Weenig* had not carried his burden in the 12(B)(2) motion presented; consequently, the trial court had properly denied the motion to dismiss.[33]

An important caveat to the presumption of subject matter jurisdiction noted in *Weenig* is found in the decision of the Seventh Circuit Court of Appeals in *Sparkman v. McFarlin*[34] in which the Seventh Circuit discussed the jurisdictional limits of an Indiana circuit court judge with general jurisdictional powers conferred by statute.[35] Despite the general grant of power, the court held that a

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[31]349 N.E.2d 235 (Ind. Ct. App. 1976).

[32]*Id.* at 240 (citing First Bank v. Crumpacher, 120 Ind. App. 317, 90 N.E.2d 912 (1950)).

[33]To the same effect as Weenig v. Wood, regarding the presumed jurisdiction of a court, is Cunningham v. Universal Battery Div., 352 N.E.2d 83 (Ind. Ct. App. 1976), holding that in a suit to enforce a foreign judgment it is not necessary to allege jurisdiction of the foreign court, an allegation of the judgment itself being sufficient to place the matter in issue.

[34]552 F.2d 172 (7th Cir. 1977).

[35]IND. CODE § 33-4-4-3 (1976) states:

> Said court shall have original exclusive jurisdiction in all cases at law and in equity whatsoever, and in criminal cases and actions for divorce, except where exclusive or concurrent jurisdiction is, or may be conferred by law upon justices of the peace. It shall also have exclusive jurisdiction of the settlement of decedents' estates and of guardianships: Provided, however, That in counties in which criminal or superior courts exist or may be organized, nothing in this section shall be construed to deprive such courts of the jurisdiction conferred upon them by laws, and it shall have such appellate jurisdiction as may be conferred by law, and it shall have jurisdiction of all other causes, matters and proceedings where exclusive jurisdiction thereof is not conferred by law upon some other court, board or officer.

judge may not "arbitrarily" order or approve anything presented to him. The court said that the action of the trial court must have a statutory or common law basis in order to qualify as a valid exercise of jurisdiction. Moreover, the court stated that an action of the trial court must have a rational relation to existing statutory or common law principles in order to qualify as a valid exercise of the court's inherent power to fashion new common law.[36]

2. Collateral Estoppel.—In *Ragnar Benson, Inc. v. William P. Jungclaus Co.*,[37] the same defendants were sued for damages arising from the same construction accident by two different plaintiffs in separate courts of general jurisdiction (Hancock Circuit Court and Marion Superior Court). One aspect of the litigation in both the Marion and Hancock courts was a cross-claim filed by the appellant (defendant #1) against the appellee (defendant #2) for indemnification. The Marion Superior Court granted the appellee's motion to dismiss with respect to the cross-claim and entered final judgment on the matter. Thereafter, the appellee made this dismissal in the Marion court the subject of a motion for summary judgment on the identical cross-claim filed in the Hancock court. The appellee asserted collateral estoppel, based on the prior dismissal in the Marion court. The trial court granted summary judgment and the court of appeals affirmed that decision.

The court of appeals held that a final judgment entered on a motion to dismiss under Trial Rule 12(B)(6) constitutes an adjudication on the merits, which will bar a subsequent assertion of the issues which were the subject of the motion. By way of limitation, the court said that not all Trial Rule 12(B) dismissals would bar later claims. For example, a 12(B)(6) motion would not bar a later claim, if based on the absence of a real party in interest.[38] The court rejected the appellant's argument that collateral estoppel applied only to actions initiated subsequent to a final determination, and it stated that it is the entry of *judgment* of dismissal which provides the foundation for estoppel, not a ruling denying the same.

3. Motion to Strike.—In the case of *Nihiser v. Sendak*,[39] the plaintiff sought injunctive relief to restrain the enforcement of a statute which labelled the display of obscene films a nuisance. One of the motions filed by the defendants was a motion to strike a paragraph of the plaintiff's complaint pursuant to Federal Rule of

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[36]The *Sparkman* case discussed the concept of subject matter jurisdiction in the context of judicial immunity.

[37]352 N.E.2d 817 (Ind. Ct. App. 1976), *vacating* 340 N.E.2d 361 (Ind. Ct. App. 1976). *See also* Harvey, *1976 Survey, supra* note 29, at 105.

[38]352 N.E.2d at 820 (citing State v. Rankin, 260 Ind. 228, 294 N.E.2d 604 (1973)).

[39]405 F. Supp. 482 (N.D. Ind. 1974).

Civil Procedure 12(F), which is identical to its counterpart in the Indiana Trial Rules. The paragraph stated generally that the defendants were "harassing" the plaintiff's business enterprise without providing notice and an opportunity to be heard.[40] The defendants alleged that the vagueness of the paragraph in question required that it be stricken. The district court denied the motion, stating first that motions to strike are viewed with disfavor and infrequently granted. In order to prevail, the court held that the movant must show that the challenged allegation is unrelated to the plaintiff's claims and so unworthy of defense that its presence will prejudice the defense. In the instant case, the court said that while the paragraph may be vague in content, it was consistent with the plaintiff's allegations and could not cause any prejudice to the defendants.

4. Pleadings Under the Trial Rules.—The case of *Nelson v. Butcher*[41] serves as a reminder to counsel to evaluate possible procedural defects in light of our modern trial rules. In an action for default on a land contract, the appellants filed a counterclaim for wrongful ejectment. The appellees claimed that this issue became moot when appellants neither posted bond nor remained in possession during trial, as required by a statutory provision.[42] The Indiana Court of Appeals held that the authority cited was not sufficient to establish a waiver of claim under the new rules of procedure. The court said that Trial Rules 12(A) and 13(B) distinguish between permissive and mandatory counterclaims, "but abrogate all restrictions on the right to plead a counterclaim."[43]

5. Third-Party Practice.—In *City of Elkhart v. Middleton*,[44] the Indiana Supreme Court, in a case of first impression, examined the relationship between Trial Rules 14 and 20, which generally describe procedures for third-party practice in Indiana. Plaintiff, a construction contractor, sued the City of Elkhart for damages incurred due to additional labor costs allegedly resulting from faulty plans supplied by the city. The city then attempted to file a third-party complaint against the estate of Middleton (the engineer on the project)

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[40]Specifically, the paragraph at issue stated: "And further, [the defendant should be enjoined] from otherwise harassing plaintiff in the conduct of its lawful business, without first securing and providing for, after due notice to the plaintiff, a judicially superintended prior adversary hearing on the issue of obscenity, in the constitutional sense." *Id.* at 497.

[41]352 N.E.2d 106 (Ind. Ct. App. 1976).

[42]Ch. 254, § 3, 1927 Ind. Acts 741 (repealed 1973). For present law, *see* IND. CODE § 32-6-1.5-1 to -12 (1976).

[43]352 N.E.2d at 114.

[44]356 N.E.2d 207 (Ind. 1976). Also discussed in Harvey, *1976 Survey*, *supra* note 29, at 100.

pursuant to Trial Rule 14(A).[45] The trial court denied this effort, and the court of appeals affirmed,[46] holding that the application of Trial Rule 14(A) is within the discretion of the trial court, subject to reversal only for abuse of discretion.

The supreme court, speaking through Justice Prentice, vacated the opinion of the court of appeals, with respect to its application of Trial Rule 14(A), and held that the review for abuse of discretion must "evaluate the action of the trial court upon the reasons specifically articulated."[47] Such review may not be based upon reasons postulated by the reviewing court merely to uphold the decision of the trial court. Quoting extensively from a treatise on the subject,[48] the court noted that the scope of discretion of the trial court vis-a-vis Trial Rule 14 centered on a just, speedy, and inexpensive determination of the cause, seeking to avoid inconsistent results and multiple litigation. Here, the findings of the trial court dealt with the merits of appellant's claim, rather than the procedural effects of its grant or denial; this substantive focus was incorrect, and therefore the trial court had abused its discretion.

The lesson of the case is clear. When reviewing the propriety of Trial Rule 14 motions, the trial court does have discretion, but that discretion must be directed at the underlying purpose of the rule. If the right to implead is at issue, the trial court must rest its decision upon procedural factors, such as considerations of delay, complications of trial, and prejudice to the parties. The use of discretion over third-party practice to determine substantive or jurisdictional questions is improper and an abuse of discretion. It would seem that this decision has direct impact upon review of other discretionary acts of a trial court, at least when the discretion is directed at a procedural aspect which sets forth clearly articulated purposes as guideposts for the trial judge.

C. Pre-Trial Procedures and Discovery

1. Guardian for Minor.—In *Richardson v. Brown*,[49] the minor plaintiff filed suit in her name alone seeking recovery for personal injuries. On the first day of trial, the plaintiff moved to substitute a

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

[46]City of Elkhart v. Middleton, 346 N.E.2d 274 (Ind. Ct. App. 1976), *vacated*, 356 N.E.2d 207 (Ind. 1976).

[47]356 N.E.2d at 210.

[48]2 W. HARVEY, INDIANA PRACTICE 86 (1970).

[49]362 N.E.2d 197 (Ind. Ct. App. 1977).

court-appointed guardian as plaintiff. The trial court refused this request. On appeal from an adverse judgment, the Indiana Court of Appeals agreed with the plaintiff's contention that the language of Trial Rule 17(C)[50] is mandatory in nature and permits no discretion by the trial court in permitting representation of an incompetent by a guardian. However, the court went on to state that the error committed by the trial court must be considered in conjunction with Trial Rule 61.[51] On this standard, the appellant must show not only that error occurred, but that the error "was prejudicial and harmed her case."[52] Since the plaintiff had failed to demonstrate such prejudice, the court of appeals found no reversible error and affirmed.

2. Intervention by Insurer.—Trial Rule 24 was the focus of attention in *Vernon Fire & Casualty Ins. Co. v. Matney.*[53] Matney was injured in an accident caused by an uninsured motorist (Thoms) and subsequently filed an action against Thoms. Matney notified his insurer, Vernon, of the initiation of the suit. In addition, Matney gave Vernon detailed notice of every major step in the litigation between Matney and Thoms. Following a favorable judgment, Matney demanded payment under the uninsured motorist provisions of his policy and Vernon refused. Matney then filed an action against Vernon and received summary judgment therein. On appeal, Vernon challenged the effect of the Thoms judgment and claimed prejudice due to lack of intervention. The court reasoned that where the insured files suit against an uninsured motorist without joining the insurance carrier, the "interests of justice, the avoidance of multiple litigation and the conservation of judicial time"[54] compel a conclusion

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[50]IND. R. TR. P. 17(C) states in part:

The court, upon its own motion or upon the motion of any party, must notify and allow the representative named in subsection (3) of this subdivision, if he is known, to represent an infant or incompetent person, and be joined as an additional party in his representative capacity. If an infant or incompetent person is not represented, or is not adequately represented, the court shall appoint a guardian ad litem for him.

[51]IND. R. TR. P. 61 provides:

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

[52]362 N.E.2d at 199.

[53]351 N.E.2d 60 (Ind. Ct. App. 1976). The case represents the first explicit recognition of an insurer's right to intervene.

[54]*Id.* at 64.

that would require intervention by an insurer. The court concentrated on the language of Trial Rule 24(A)(2), which confers the right to intervene on a party when the litigation "may as a practical matter impair or impede his ability to protect his interest . . . ."[55]

Here, the court noted that if intervention were not allowed, a formidable barrier would be placed before the carrier in a subsequent suit due to the stare decisis effect of the decision.[56] Moreover, a decision not permitting intervention would allow the insured and insurer to continue litigation until a favorable judgment is received, ignoring adverse results of the initial litigation. Since Vernon had received ample notice of the original action, the court held that it was obligated to intervene if it desired to raise any of the defendant's defenses and would be bound by the judgment against Thoms absent such intervention.

3. Discovery.—The Indiana Court of Appeals in *Newton v. Yates*[57] directed considerable attention to Trial Rule 26(B). The attempted discovery in this case related to a claim against an insurer for punitive damages; this claim evolved from the primary suit seeking recovery from an uninsured motorist (Yates). Newton had filed a motion for discovery of an extensive amount of documentary material of the insurer, the greater portion of which was excluded by the trial court. The court of appeals grounded its review in the two-step approach enunicated in Trial Rule 26(B), namely, (1) that the matter requested must be relevant to the issues to be tried, and (2) if relevant, the matter must not be protected by a privilege or immunity. The court first held that the trial court's *in camera* inspection of the disputed documents, while a rare occurrence, is a valid exercise of discretion. The court then considered the question of privilege, citing a line of federal cases flowing from *Hickman v. Taylor*,[58] and expanding the scope of immunity to include: agents of attorneys,[59] information gathered in anticipation of litigation by the client,[60] privilege of a corporation as a client when consulting an attorney in a legal capacity,[61] and the extension of the attorney-client

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[55]IND. R. TR. P. 24(A)(2) provides:
Upon timely motion anyone shall be permitted to intervene in an action when the applicant claims an interest relating to a property fund or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect his interest in the property, fund or transaction, unless the applicant's interest is adequately represented by existing parties.

[56]351 N.E.2d at 64.

[57]353 N.E.2d 485 (Ind. Ct. App. 1976).

[58]329 U.S. 495 (1947) (establishing the "work product" rule).

[59]Alltmont v. United States, 177 F.2d 971 (3d Cir. 1949).

[60]Guilford Nat'l Bank v. Southern Ry. Co., 297 F.2d 921 (4th Cir. 1962).

[61]Radiant Burners, Inc. v. American Gas Assoc., 320 F.2d 314 (7th Cir. 1963).

privilege to attorneys who are exclusive employees of a corporation (*i.e.*, house counsel).[62]

The court endorsed these decisions and held that the documents at issue fell within their purview. In addition, the court held that a mere allegation of need and unavailability will not establish the "good cause" necessary to overcome a privilege.[63] Finally, the court recited and endorsed the "principle of judicial parsimony," which allows a court to delay or suspend discovery on one issue if the outcome of another issue will dispose of the entire case.[64]

The Indiana Supreme Court in *Chambers v. Public Service Co.*[65] vacated a decision of the court of appeals which had reversed a trial court ruling on certain interrogatories proffered by appellant. The supreme court held that although the term "relevance" has greater latitude in discovery than at trial, "the information sought must be admissible or reasonably calculated to lead to admissible evidence."[66] In examining the rejected interrogatories, the court held that none of the information sought was relevant to the issues at trial in the land condemnation proceeding. The decision obviously vitiates the use of discovery techniques as a means to engage in a "fishing expedition" and indicates that the question of relevance in a discovery dispute must be resolved with an eye to the ultimate issues to be tried in the particular case.

With respect to the use of depositions at trial in lieu of oral testimony,[67] the Indiana Court of Appeals in *Wells v. Gibson Coal Co.*[68] held that the application of Trial Rule 32(A)(3) is to be tempered with trial court discretion.[69] Thus, where the deposition in issue is replete with explicit statements emphasizing the witness' inability to attend the trial, it is not necessary that corroborating

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[62]Malco Mfg. Co. v. Elco Corp., 45 F.R.D. 24 (D. Minn. 1968).

[63]353 N.E.2d at 492 (citing 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2025 (1970) dealing with the analogous federal rule and the standards set forth therein).

[64]353 N.E.2d at 491. *See also* 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2040 (1970).

[65]355 N.E.2d 781 (Ind. 1976).

[66]*Id.* at 784.

[67]IND. R. TR. P. 32(A) states in part:

> The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (a) that the witness is dead; or (b) that the witness is outside the state, unless it appears that the absence of the witness was procured by the party offering the deposition; or (c) that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or (d) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena.

[68]352 N.E.2d 838 (Ind. Ct. App. 1976).

[69]*Id.* at 841.

evidence be presented to support the trial court's determination that the deposition falls within the guidelines of 32(A)(3)(c). Of course, this discretionary power also applies to other appropriate categories of Trial Rule 32(A)(3).[70]

Finally, the court of appeals in *Burger Man, Inc. v. Jordan Paper Products, Inc.*[71] held that although a Trial Rule 33 interrogatory is a proper method to discover the *existence* of documents, it is not a device to compel *production* of those documents. A Trial Rule 34 motion to produce documents is the proper procedure to compel production. To hold otherwise, said the court, would allow parties to use interrogatories to by-pass the strict requirements of Trial Rule 34 with respect to the particularity of inspection and the need to specify a reasonable time, place, and manner for inspection of documents produced.[72]

D. Trial and Judgment

1. Voir Dire.—Anderson v. State,[73] although a criminal case, has important implications for voir dire examination in civil cases. At issue was a local rule that limited voir dire to a total of 20 minutes, requiring counsel to reserve time for subsequent rounds. In its decision, the Indiana Court of Appeals noted that under Trial Rule 47 and Criminal Rule 12 the trial court has discretion on whether or not to allow attorneys to question prospective jurors directly or whether to conduct the examination itself. However, the court could find no rule or decision which abolished the right of attorneys to ask questions indirectly on voir dire. While recognizing the possibility of waste and abuse,[74] the court could find no support for an inflexible time limit as a proper restriction on voir dire. The court distinguished recent Indiana Supreme Court opinions which sanctioned remedial practices which either eliminate all direct voir dire interrogation[75] or permit only twenty minutes of direct examination, supplemented by questions submitted by the parties through the judge. The court held that the rule as applied in the instant case contravened the right to a trial by an impartial jury and the correlative right to participate in voir dire to the extent necessary for an intelligent exercise of peremptory challenges.[76]

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[70]*Cf.* Cooper v. Indiana Gas & Water Co., 362 N.E.2d 191 (Ind. Ct. App. 1977) (citing *Wells* and applying the discretionary standard to Trial Rule 32(A)(3)(e)).

[71]352 N.E.2d 821 (Ind. Ct. App. 1976).

[72]*Id.* at 827.

[73]359 N.E.2d 594 (Ind. Ct. App. 1977).

[74]*Id.* at 598.

[75]*Id.* (citing White v. State, 330 N.E.2d 84 (Ind. 1975)).

[76]*Id.* (citing Owens v. State, 333 N.E.2d 745 (Ind. 1975); Hart v. State, 352 N.E.2d 712 (Ind. 1976)).

In the case of *Hunter v. State*,[77] another local court practice governing voir dire was at issue. The trial court had issued an order which required submission of questions twenty-four hours prior to trial. The state failed to comply with this order but was permitted to conduct oral voir dire after the court's examination. The defendant had complied with the order. The court of appeals rejected appellant's equal protection argument, stating that the conduct of voir dire is within the discretion of the trial court, subject to reversal only for abuse of discretion and prejudice resulting therefrom. Noting that the purpose of voir dire is to determine whether a prospective juror is able to deliberate fairly on the issue of guilt,[78] the court said that the appellant failed to show that the action of the trial court was detrimental to that purpose and therefore affirmed on that issue.

2. Judgment on the Evidence.—The Indiana Court of Appeals in *McKeown v. Calusa*[79] discussed the proper factors to be addressed in considering a Trial Rule 50 motion for judgment on the evidence. The court noted that the trial court is not allowed to weigh evidence or to resolve credibility questions in order to grant such a judgment. Yet, there must be some evidence of probative value[80] on each element of the claim asserted, and if absent, the motion is properly granted. While the ascertainment of the probative value of direct evidence is seldom problematic, circumstantial evidence does present difficulties. The court stated that if an ultimate fact in issue can exist as a reasonable inference from circumstantial evidence, the motion should be denied, but if the circumstantial evidence does not create a reasonable inference to an ultimate fact, the motion may be granted.

An example of the above reasoning is found in *Huff v. Travelers Indemnity Co.*[81] wherein the Indiana Supreme Court found a grant of judgment on the evidence to be clearly erroneous since the trial court had, in effect, weighed the evidence in order to grant the motion. The court held that where there is relevant evidence to support each essential element of the plaintiff's claim, but the trial court still believes that the weight of the evidence is contrary to the verdict, then the appropriate remedy is an order for a new trial pur-

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[77]360 N.E.2d 588 (Ind. Ct. App. 1977).

[78]*Id.* at 594 (citing Lamb v. State, 348 N.E.2d 1 (Ind. 1976)).

[79]359 N.E.2d 550 (Ind. Ct. App. 1977).

[80]The court defines evidence of probative value as evidence "carrying the quality of proof and having fitness to induce conviction upon each element of the claim . . . ." *Id.* at 553.

[81]363 N.E.2d 985 (Ind. 1977). *See also* Harvey, *1976 Survey*, *supra* note 29, at 97.

suant to Trial Rule 59(E), not a judgment on the evidence under Trial Rule 50.[82]

3. Declaratory Relief.—In *City of Evansville v. Grissom*,[83] the Indiana Court of Appeals stressed the basic requirement that a justiciable controversy exist between parties before a declaratory judgment is proper. In this case, every allegation found in appellant's complaint was admitted in appellee's answer. Moreover, each party prayed for the same relief, asking that certain statutes be declared unconstitutional. Holding that the appellant did not present the trial court with a "true adversary situation upon which every decision must rest,"[84] the court affirmed the dismissal of the complaint.

4. Summary Judgment.—The issue in *Equitable Life Assurance Society of the United States v. Crowe*[85] was whether the trial court had met the required two-prong test in granting a summary judgment, namely, (1) that the trial court make an affirmative finding that there is no genuine issue as to any material fact, and (2) that the court state with particularity its reasons for granting a summary judgment.[86] Appellant relied on the second prong of the test, as codified in Trial Rule 56(C), and argued that the trial court had erred by failing to designate the issues and claims which presented no genuine issue as to any material fact. The court of appeals found this contention meritless, quoting an author on the subject to the effect that the "purpose of the rule is to enable the case to proceed in an orderly manner if partial summary judgment is entered."[87] Therefore, when the trial court grants a summary judgment upon all the issues or claims in the case, the requirement of Trial Rule 56(C) requiring designation of claims and issues is rendered superfluous.

5. Default.—In *Henline, Inc. v. Martin*,[88] the court of appeals held that an *entry* of default,[89] as opposed to a default *judgment*,[90] is an appealable ruling as defined by Trial Rule 60(B)[91] and authorized by Trial Rule 60(C). This holding differs from federal practice in which the entry of default is treated as an interlocutory order and

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[82]*Id.* at 994.

[83]349 N.E.2d 207 (Ind. Ct. App. 1976).

[84]*Id.* at 209.

[85]354 N.E.2d 772 (Ind. Ct. App. 1976).

[86]This test was first enunciated in Singh v. Interstate Fin. Inc., 144 Ind. App. 444, 246 N.E.2d 776 (1969).

[87]354 N.E.2d at 776 (quoting 3 W. HARVEY, INDIANA PRACTICE 542, 547 (1970)).

[88]348 N.E.2d 416 (Ind. Ct. App. 1976).

[89]*See* IND. R. TR. P. 55(A).

[90]*See* IND. R. TR. P. 55(B).

[91]IND. R. TR. P. 60(B) states: "[T]he [trial] court may relieve a party . . . from a final judgment, order, default or proceeding . . . ."

not subject to immediate appeal.[92] However, even assuming that appellants had properly appealed the mere entry of default, the court held that the trial court had not abused its discretion by refusing to grant relief. The facts showed that a claims adjuster who had received service did not act promptly due to business pressures resulting from a tornado but that he had acted immediately when he noticed the service papers at a later date. The court said that the fact that another trial court might not have abused its discretion by *granting* relief in these circumstances does not permit the inference that the trial court here abused its discretion by *not granting relief.*[93]

6. Relief from Verdict.—Trial Rule 59(E) was the subject of considerable discussion during the survey period; the decisions in *Weenig v. Wood*[94] and *Nissen Trampoline Co. v. Terre Haute First National Bank*[95] reversed actions taken by the trial court under the auspices of this rule. In *Weenig*, the trial court reduced a jury verdict for compensatory and punitive damages and entered a judgment for the reduced amount. The plaintiff cross-appealed the reduction, claiming that his constitutional rights had been violated;[96] simultaneously, the defendant argued that the trial court sits as a "thirteenth juror," and, therefore, the decision was entitled to a strong presumption of correctness, subject to reversal only for abuse of discretion.[97]

In resolving the conflict, the court of appeals first recited those options available to the trial judge who has determined a jury's award to be improper because it is excessive or inadequate. The judge could (1) enter final judgment on the evidence for the amount of proper damages, (2) grant a new trial, or (3) grant a new trial subject to additur or remittitur.[98] After determining that the form of relief granted by the trial court was allowable under the first option, the court of appeals went on to reverse the trial court's use of the option in this particular case. Although there is authority permitting a trial court to vary a jury award without granting a new trial,[99] the court held that a trial court could properly exercise that

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[92]*See* 10 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2692, at 297; § 2693, at 306-07 n.65 (1973).

[93]348 N.E.2d at 420. *See also* Green v. Karol, 344 N.E.2d 106 (Ind. Ct. App. 1976), *discussed in* Harvey, *1976 Survey, supra* note 29, at 112.

[94]349 N.E.2d 235 (Ind. Ct. App. 1976).

[95]358 N.E.2d 974 (Ind. 1976).

[96]IND. CONST. art. 1, § 20 provides: "In all cases, the right of trial by jury shall remain inviolate."

[97]The defendant relied on Bailey v. Kain, 153 Ind. App. 657, 192 N.E.2d 486 (1963).

[98]*See* IND. R. TR. P. 59(E)(5).

[99]IND. R. APP. P. 15(N). *See generally* 4 W. HARVEY & R. TOWNSEND, INDIANA PRACTICE 111 (1971).

authority only when the jury verdict was erroneous as a matter of law. Hence, a trial court is not empowered under Trial Rules 50 or 59 to weigh conflicting evidence and enter a definitive and different judgment.[100] The role of the trial court as a "thirteenth juror" extends only to the ability to weigh evidence in order to prevent an abuse of the jury system, *not* to abrogate it. This permits the trial court to grant a new trial or grant a new trial subject to additur or remittitur, where appropriate, while preserving the constitutional right to a jury trial.

In *Nissen Trampoline*, a sharply divided Indiana Supreme Court shed new light on the ability of a trial court to grant a new trial when the jury's verdict is against the weight of the evidence. In this case, the plaintiff sued Nissen and others to recover for injuries resulting from the use of an "aqua diver" device. Subsequent to a verdict for the defendant, the trial court ordered a new trial pursuant to Trial Rule 59(E)(7)[101] and entered findings on the evidence presented. These findings were based upon *undisputed* evidence which showed that the warnings and instructions accompanying the aqua diver were not adequate and that Nissen had knowledge from prior testing that injuries of the type plaintiff sustained could occur, due to the present design of the device. The supreme court reversed,[102] stating that the trial court had failed to set out the "supporting and opposing evidence"[103] relating to those elements which plaintiff was required to prove under his theory of the case. Apparently, because the trial court was unable to disclose from the evidence presented what kind of warning was required or what design was proper, the decision to grant the new trial was not the

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[100]Essentially the standards for granting a judgment on the evidence under Trial Rule 50 and a final judgment under Trial Rule 59(E)(5) are equivalent. Judgment on the evidence is appropriate under both rules where there is a total absence of evidence or legitimate inferences therefrom upon an essential issue in plaintiff's case or where the evidence is unconflicting and susceptible of only one inference, and that inference is in favor of the movant. *See* Huff v. Travelers Indem. Co., 363 N.E.2d 985 (Ind. 1977).

[101]IND. R. TR. P. 59(E)(7) states in part:

> In reviewing the evidence, the court shall grant a new trial if it determines that the verdict of a nonadvisory jury is against the weight of the evidence; and shall enter judgment, subject to the provisions herein, if the court determines that the verdict of a nonadvisory jury is clearly erroneous as contrary to or not supported by the evidence, or if the court determines that the findings and judgment upon issues tried without a jury or with an advisory jury are against the weight of the evidence.

[102]358 N.E.2d 974 (Ind. 1977) (Givan, C.J., DeBruler & Prentice, JJ., concurring; Arterburn & Hunter, JJ., dissenting with separate opinions).

[103]*Id.* at 977. IND. R. TR. P. 59(E)(7) states: "[I]f the decision is found to be against the weight of the evidence, the finding shall relate the supporting and opposing evidence to each issue upon which a new trial is granted . . . ."

result of a rational judicial process but an exercise in speculation and hypothesis.

The need to revise Trial Rule 59(E)(7) in light of *Nissen Trampoline* requires some comment. First, it seems logical to conclude that when Trial Rule 59(E)(7) speaks about a decision against the weight of the evidence, it presupposes a conflict in the evidence and does not address cases where the evidence is undisputed. Second, the language of the section should be revised to preclude a requirement that the trial court must formulate an instruction or speculate on the design of a product. Otherwise, the trial court itself must take an adversary role, a position which is abhorrent to a rational judicial process. Finally, the findings requirement of Trial Rule 59(E)(7) should be applied only to insure fulfillment of its underlying purpose: to prevent arbitrary and capricious awards of new trials and to prevent its use as a technical harpoon to control trial court decisions.

8. Relief from Judgment.—The Second District Court of Appeals in *Kelly v. Bank of Reynolds*[104] and the Third District in *In re Marriage of Robbins*[105] severely limited *Yerkes v. Washington Manufacturing Co.*,[106] which had held that the only method for setting aside a default judgment is through the use of a Trial Rule 60 motion. In *Kelly*, suit was filed and the defendant entered an appearance through counsel. Subsequently, the defendant's attorney was granted leave to withdraw. The trial court ruled that the effect of the withdrawal was as if the attorney had never appeared, even though an answer and counterclaim had been filed. The bank asked for and received a default judgment.

Following judgment, the defendant retained new counsel who filed a timely Trial Rule 59(A)(2) motion, claiming accident and surprise. The trial court overruled this motion, stating in part that it was "not the best remedy to attack the question."[107] Counsel then filed a Trial Rule 60 motion which was overruled, but he did not file a second motion to correct errors addressed to the Trial Rule 60 motion. The court of appeals held that where an alleged error of law forms the basis of a default judgment, the allegations may be presented in a motion to correct errors. Hence, the effect of counsel's withdrawal on the status of the pleadings he filed is distinctly a legal issue and is therefore susceptible to question in a

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[104]358 N.E.2d 146 (2d Dist. Ind. Ct. App. 1976).

[105]358 N.E.2d 153 (3d Dist. Ind. Ct. App. 1976).

[106]326 N.E.2d 629 (1st Dist. Ind. Ct. App. 1975), *discussed in* Harvey, *Civil Procedure and Jurisdiction, 1975 Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 83 (1975).

[107]358 N.E.2d at 148.

motion to correct errors. The ruling on the motion to correct errors is a final judgment and an appeal may be taken therefrom, notwithstanding the subsequent Trial Rule 60 motion.

The Third District Court of Appeals in *Robbins* painted with a much broader brush, reasoning that the expansive language of Trial Rule 59(A)(9)[108] as to the sixty-day time period allowed for filing of a motion to correct errors includes the additional equitable purposes stated in Trial Rule 60(B). The court held that a motion stating a Trial Rule 60 purpose, regardless of its denomination, should be treated as a Trial Rule 59 motion if filed within the sixty-day time period.[109] Conversely, after the sixty-day period a motion which states a Trial Rule 60 purpose, regardless of its denomination, must be treated as a Trial Rule 60 motion. If the trial court renders a judgment by granting or denying this Trial Rule 60 motion, a motion to correct errors is a prerequisite to appeal.

In relatively short order, the First District, which had originally authored the *Yerkes* opinion, extended the reasoning of the above-cited cases to the issue presented in *Roberts v. Watson.*[110] The court in *Roberts* held that although relief from a void judgment may be sought under Trial Rule 60(B)(6), the appellant's motion to correct errors was a permissible vehicle for allegations of error. The cases, when viewed in seriatim, appear to extend the interplay of Trial Rules 59 and 60 far beyond the default grounds before the court in *Yerkes* so as to include all Trial Rule 60 grounds, at least insofar as the sixty-day period after entry of judgment is concerned.[111]

This line of cases has hopelessly obscured the already murky requirements for post-judgment relief in Indiana practice. By whittling at the *Yerkes* decision, these cases create potential problems for the trial counsel who files what he *thinks* is a Trial Rule 60 motion within the sixty-day time limit controlling Trial Rule 59 motions. Relying on *In re Robbins*, the trial judge could, within his discretion, treat that motion as a Trial Rule 59 motion. The overruling of the motion would open the door for a direct appeal by counsel. However, if the same judge retained the same pleading until the

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[108]IND. R. TR. P. 59(A)(9) allows for correction of errors "[f]or any reason allowed by these rules, statute or other law."

[109]Subject, of course, to the "second motion" requirements of IND. R. TR. P. 59. *See* Grove, *The Requirement of a Second Motion to Correct Errors as a Prerequisite to Appeal*, 10 IND. L. REV. 462 (1977).

[110]359 N.E.2d 615 (1st Dist. Ind. Ct. App. 1977).

[111]*See In re* Marriage of Robbins, 358 N.E.2d 153, 156 (Ind. Ct. App. 1976) (concurring opinion); *cf.* Covalt v. Covalt, 354 N.E.2d 766, 768 n.3 (Ind. Ct. App. 1976) (wherein Judge Buchanan states he would place the burden upon the party invoking Trial Rule 60 to show why the issues involved could not have been litigated through a Trial Rule 59 motion).

sixty-first day after judgment, he could rule upon it as a legitimate Trial Rule 60 motion, which would require a motion to correct errors as a prerequisite to appeal.

Furthermore, *Kelly*, which allows a motion to set aside a judgment to be filed as a Trial Rule 59 motion when alleging "purely legal" errors, raises additional questions for the appellate courts. The question of which allegations are "purely legal" and which allegations are "purely factual" creates an abysmal quandary for an appellate court which must determine whether the motion before the court is a timely filed Trial Rule 59 motion or an independent Trial Rule 60 motion which requires a Trial Rule 59 motion as a prerequisite to appeal. The scope of this Article precludes a detailed consideration of all possible ramifications of these decisions, but counsel should be aware of the volatile nature of the subject and the strong possibility that future decisions will be forthcoming.

8. Correction of Clerical Errors.—The court of appeals held in *Auto-Teria, Inc. v. Ahern*[112] that the trial court had abused its discretion under Trial Rule 60(A)[113] in denying a petition for correction of error where the only evidence before the trial court indicated that a clerical error had been committed and that such refusal would deprive the movant of the right to appeal. The uncontroverted facts disclosed that appellant's motion to correct errors was filed on June 4 , 1973, the last day in which appellant could make a timely filing. However, the court clerk had moved the file stamp to June 5, 1973, in anticipation of the next day's business. The court said that under these circumstances the error was clerical,[114] and a nunc pro tunc entry was the appropriate remedy. The court also stated that a writing in the record, such as the motion to correct errors, could be used as the basis of the amended nunc pro tunc entry.

9. Injunctions.—In *Cement-Masonry Workers Local 101 v. Ralph M. Williams Enterprises,*[115] the trial court granted the plaintiff's request for a temporary restraining order; after an evidentiary hearing the court entered findings of fact and granted a temporary injunction. Thereafter, in a pre-trial order issued prior to the consideration of the plaintiff's request for a permanent injunction, the trial court stated that it would not consider evidence presented in the previous hearing for the temporary injunction because the initial burden and question of proof differed from that considered in the final hearing on the merits. The trial court then granted a permanent injunction and awarded damages.

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[112]352 N.E.2d 774 (Ind. Ct. App. 1976).

[113]IND. R. TR. P. 60(A) permits the court to correct clerical mistakes sua sponte or upon motion by a party.

[114]*See* 4 W. HARVEY & R. TOWNSEND, INDIANA PRACTICE 205 (1971).

[115]350 N.E.2d 656 (Ind. Ct. App. 1976).

The Indiana Court of Appeals reversed, stating that although the trial court was not bound by the findings entered in the previous hearing, Trial Rule 65(A)(2) clearly requires that any admissible evidence received in an application for a preliminary injunction "becomes part of the record" at trial.[116] Hence, the trial court must *consider* evidence entered in a prior hearing, as well as newly entered evidence, in reaching a decision granting or denying a permanent injunction. The action of the trial court in the instant case, which explicitly precluded consideration of the prior evidence, constituted reversible error.

Trial Rule 65(C) requires that an applicant for a restraining order or preliminary injunction give security in an amount the court "deems proper" for damages actually incurred by a party found wrongfully enjoined. In *Howard D. Johnson Co. v. Parkside Development Corp.*,[117] the applicant did post a bond pursuant to Trial Rule 65(C), but following the hearing on the preliminary injunction, one of the defendants argued that the bond was insufficient and requested the trial court to increase the amount of the bond. The trial court refused this request, and eventually the application for a permanent injunction was denied. In the course of the appeal, the defendant alleged that the trial court had erred in not increasing the bond. The court of appeals disagreed, stating first that the time for posting bond had passed when the defendant had made the request; therefore, a subsequent increase would have been more in the nature of a forfeiture than a bond. Second, the fixing of security is a discretionary function of the trial court, and a showing that actual damages exceeded the amount of the bond is not conclusive of an earlier abuse of discretion. However, the court of appeals went on to make an important interpretation of the recovery provision of Trial Rule 65(C). The court stated that the security provision merely serves as a manifestation of the financial responsibility of the plaintiff. Because of the unavoidably speculative factors by which it is fixed, only the surety should be bound by its amount. The court held, therefore, that the recovery of costs and damages by a defendant wrongfully enjoined need not be limited to the amount of the bond posted; the defendant may recover any damages in excess of the bond directly from the plaintiff.[118]

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[116]IND. R. TR. P. 65(A)(2) states: "[A]ny evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial."

[117]348 N.E.2d 656 (Ind. Ct. App. 1976).

[118]This decision overrules Harless v. Consumers' Gas Trust Co., 14 Ind. App. 545, 43 N.E. 456 (1896) (holding that absent a showing of malice or lack of probable cause in seeking injunction, defendant's recovery would be limited to the amount of security given).

10. Special Judges.—The respondent in *In re May*[119] alleged that the trial court judge lacked jurisdiction under Trial Rule 79(11)[120] to issue a contempt citation because the respondent had named the judge as a defendant in an action for declaratory relief. The court of appeals rejected this contention on two grounds. First, the contempt conviction was based on statements made in a motion to correct errors in an *independent* civil action, rendering Trial Rule 79(11) inapplicable. Second, the court held that a judge may still cite a party for contemptuous statements directed toward the bench, even though the judge will not ultimately hear the merits of the case.[121]

E. Appeals

Filing a praecipe for a record of the proceedings is required to initiate an appeal.[122] The question in *Seco Chemicals, Inc. v. Stewart*[123] was whether a cross-appellant must make a separate filing of a praecipe in order to preserve his question for appeal. The court of appeals noted initially that a party must assign and preserve a cross-error by means of a separate motion to correct errors filed fifteen days after the service of the opposing party's motion to correct errors.[124] Further, the cross-appellant must, within thirty days of the filing of the appellant's brief, file a brief on the issues involved in the cross-error, as well as an answer to the appellant's brief.[125] The court found that the cross-appellant complied with the above requirements and held that once the appellant invoked appellate jurisdiction by filing its praecipe, the purpose of Appellate Rule 2(A) was fulfilled, and the cross-appellant would be excused from compliance. The court did, however, limit its holding to the facts of the case, wherein the appellant had praeciped the *entire record.*[126]

In *Indiana State Board of Tax Commissioners v. Lyon & Greenleaf Co.*,[127] the appellee contended that the appellant had waived the asserted errors based on the appellant's failure to set forth

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[119]358 N.E.2d 138 (Ind. Ct. App. 1976).

[120]IND. R. TR. P. 79(11) provides in part: "Any regular judge . . . shall be eligible for appointment in any of such courts as a special judge in any case pending in which he has not sat as judge or been named on a previous panel, unless he is disqualified by interest or relationship . . . ."

[121]358 N.E.2d at 139 (citing Allison v. State, 243 Ind. 489, 187 N.E.2d 565 (1963)).

[122]*See* IND. R. APP. P. 2(A).

[123]349 N.E.2d 733 (Ind. Ct. App. 1976).

[124]IND. R. TR. P. 59(D).

[125]*See* IND. R. TR. P. 8.1(A); 8.3(D).

[126]349 N.E.2d at 739 n.1.

[127]359 N.E.2d 931 (Ind. Ct. App. 1977).

specifically in its brief, with the arguments applicable thereto, the errors raised in the appellant's motion to correct errors.[128] The court of appeals rejected this contention, noting that although the appellants had grouped several specifications of error together, the issues raised were sufficiently articulated. Moreover, each grouping was prefaced with a numerical reference to the appropriate specification in the motion to correct errors. The court said that "where there has been substantial compliance with the rules, a failure to include all that is technically required will not result in a waiver."[129]

Compare, however, the court of appeals ruling in *Brady v. Eastern Indiana Production Credit Association*[130] wherein the court held that Appellate Rule 11(B)(7)[131] mandates the clerk to collect the $100 docketing fee before he accepts any appeal as "filed."[132] In this case, the appellant's time limit for filing an appeal expired on November 18, 1975. The appellant mailed the record to the court clerk on November 17, 1975, but failed to enclose the filing fee. On November 19, 1975, the clerk notified the appellant of his omission, the appellant made arrangements to pay, and the clerk filed the record. Under the facts given, the court ruled that the appellant had not "filed" the appeal until the ninety-first day after the ruling on the motion to correct errors; the appeal, therefore, was properly dismissed.[133]

Another case construing the requirements of cross-appeal is *P-M Gas & Wash Co. v. Smith*.[134] The appellees did not file cross-errors within fifteen days after service of the appellant's motion to correct errors but instead included alleged cross-errors and cross-appeals as

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[128]IND. R. APP. P. 8.3(A)(7) states that: "Each error assigned in the motion to correct errors that appellant intends to raise on appeal shall be set forth specifically and followed by the argument applicable thereto."

[129]359 N.E.2d at 933 (citing Yerkes v. Washington Mfg. Co., 326 N.E.2d 629 (Ind. Ct. App. 1975)).

[130]360 N.E.2d 1267 (Ind. Ct. App. 1977).

[131]IND. R. APP. P. 11(B)(7) states that appellant must pay a filing fee of $100 to the clerk "upon the filing of a petition to transfer or an appeal."

[132]The court distinguished between the "submission" of an appeal and the "acceptance" of the appeal by the clerk. The appeal is not "filed" until the clerk has signified acceptance by endorsing it as filed and recording the same. *See* 360 N.E.2d at 1269 n.1.

[133]*But see* Peters v. Poor Sisters of Saint Francis Seraph Inc., 257 Ind. 360, 274 N.E.2d 530 (1971), in which the supreme court, construing the deposit requirement of the former statute, stated:

> We find nothing either in the statutes or in the case law to indicate that the deposit is jurisdictional and required to be filed within the twenty-day period allowed for the filing of petition to transfer. The fact that the deposit was in fact made prior to this Court's determination of the petition was sufficient.

Id. at 361, 274 N.E.2d at 531.

[134]352 N.E.2d 91 (Ind. Ct. App. 1976).

a part of the appellee's brief on the merits filed in the court of appeals. The appellees argued that the fifteen-day time limitation was applicable only in those cases where the motion to correct errors is based upon evidence outside of the record.[135] Although the court acknowledged the plausibility of appellee's theory, it said that the clear and separate statement within Trial Rule 59(D) as to time limits dictated a different result. The court quoted authors on the subject[136] and held that an assignment of cross-errors must be filed within fifteen days after service of the opposing party's motion to correct errors, regardless of whether the motion is, or is not, based on evidence outside of the record. This ruling is consistent with the underlying rationale of Trial Rule 59, which allows the trial court to act upon alleged error without necessitating an appeal.

The question of what constitutes a "judgment" was the subject of several cases in the court of appeals. For example, in *Guido v. Baldwin*,[137] the trial court in a partition proceeding had vested title to the property in the respective parties. The appellants filed a timely motion to correct errors, and the trial court responded by "amending" its judgment to order a formal survey of the property awarded to appellants. The trial court overruled the motion in all other respects. The appellants' second motion to correct errors was filed and overruled. On appeal, the appellee alleged lack of jurisdiction, apparently on the basis that the amended judgment flowing from the first motion to correct errors would not become "final" until the survey was completed. The court of appeals rejected this argument, stating that the trial court had not disturbed the *substantive* aspect of its judgment. In this case, the court exercised its discretion under Appellate Rule 4(E) to pass on adjudicated issues which were severable without prejudice to the parties and heard the merits of the disputed ownership claims.

In contrast, the court of appeals found the appellant's reliance on the discretionary features of Appellate Rule 4(E) to be misplaced in *Minor v. Condict*.[138] The appellant had received a final judgment in the trial court but had failed to include a statement of the judgment in the record. The court of appeals, in granting appellees' motion to dismiss, stated that "a judgment is an essential element of any appeal."[139] Furthermore, the court said that the discretionary

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[135] IND. R. TR. P. 59(D) requires that a party file cross-errors within 15 days after the service of the opposition's motion to correct errors.

[136] 352 N.E.2d at 92 (citing 1 A. BOBBITT, INDIANA APPELLATE PRACTICE AND PROCEDURE 519 (1972); 4 W. HARVEY & R. TOWNSEND, INDIANA PRACTICE 116 (1971)).

[137] 360 N.E.2d 842 (Ind. Ct. App. 1977).

[138] 360 N.E.2d 857 (Ind. Ct. App. 1977).

[139] *Id.* at 858 (citing Citizen's Nat'l Bank v. Harvey, 334 N.E.2d 719 (Ind. Ct. App. 1975)). *See also* Harvey, *1976 Survey*, *supra* note 29, at 116.

features of Appellate Rule 4(E) apply only where there is an attempted appeal from partial judgment which does not dispose of all the issues. In this case, there was a final judgment disposing of all the issues, but it was being appealed upon an insufficient record. The court tempered this apparently harsh result by pointing out that the appropriate procedure in such a case as this is provided in Appellate Rule 15(D), which allows an application for certiorari to supplement the record with an omitted portion of the transcript. Since appellants had ignored this procedure, the appeal was properly dismissed.

Successful trial counsel should heed the warning given in *Colley v. Carpenter.*[140] The appellee had received a favorable judgment in the trial court and thereafter failed to file an appellee's brief when the cause was brought before the court of appeals. The court of appeals held that the appellant's brief would be deemed to be "accurate and sufficient for the disposition of this appeal."[141] Furthermore, the court stated that the appellant must only show prima facie error to win reversal.[142] The appellant had presented such a case and, unchallenged by the appellee, was granted a reversal by the court of appeals.

The court of appeals presented a primer to the aspiring appellate attorney in the case of *Anderson v. Indiana State Employees' Appeals Commission.*[143] The case involves much discussion of the detailed requirements of the Appellate Rules, but the general principles merit attention. In chronological order as they appear in the appellate process, those principles are: First, the allegations in the motion to correct errors must be discussed with sufficient particularity to inform the trial court and subsequently the appellate court of the exact legal issue involved;[144] second, the appellant must bring a record which supports his allegations and will permit an intelligent decision of the issues;[145] third, the brief must be prepared in such a manner as to allow each judge, independently of the record, to consider each question presented;[146] fourth, the appellant must present authority to support his allegations of error or face waiver;[147] and fifth, the appellant must demonstrate actual pre-

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[140]362 N.E.2d 163 (Ind. Ct. App. 1977).

[141]*Id.* at 166.

[142]*Id.* (citing *In re* Sheeks, 344 N.E.2d 872 (Ind. Ct. App. 1976)).

[143]360 N.E.2d 1040 (Ind. Ct. App. 1977).

[144]*Id.* at 1042 (citing Johnson v. State, 338 N.E.2d 680 (Ind. Ct. App. 1975)).

[145]*Id.* (citing Johnson v. State, 258 Ind. 648, 283 N.E.2d 532 (1972); Burns v. State, 255 Ind. 1, 260 N.E.2d 559 (1970)).

[146]*Id.* at 1043 (citing Thonert v. Daenell, 148 Ind. App. 70, 263 N.E.2d 749 (1970)).

[147]*Id.* (citing City of Indianapolis v. Heeter, 355 N.E.2d 429 (Ind. Ct. App. 1976); Schmidt Enterprises, Inc. v. State, 354 N.E.2d 247 (Ind. Ct. App. 1976); Weenig v. Wood, 349 N.E.2d 235 (Ind. Ct. App. 1976)).

judice by the trial court's decision and do so under the appropriate standard of review in the given case.[148]

V. Constitutional Law

*Jeffrey W. Grove**

A. Indiana Guest Statute Cases

In what one commentator has characterized as the "second wave"[1] of equal protection attacks on automobile guest statutes, which typically provide that an automobile guest cannot recover damages against the host driver for injury caused by the host's ordinary negligence, the statutes of eight states have been declared unconstitutional[2] while those of eleven states have been upheld.[3] Indiana's guest statute is the most recent survivor. It provides:

> The owner, operator, or person responsible for the operation of a motor vehicle shall not be liable for loss or damage arising from injuries to or death of a guest, while being transported without payment therefor, in or upon such motor vehicle, resulting from the operation thereof, unless

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[148]*Id.* (citing Wells v. Gibson Coal Co., 352 N.E.2d 838 (Ind. Ct. App. 1976)).

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The author wishes to express appreciation to Edwin B. Wainscott and William Dazy, both third-year students at the Indiana University School of Law—Indianapolis, for their assistance.

[1]Comment, *The Common Law Basis of Automobile Guest Statutes*, 43 U.CHI.L. REV. 798, 799 (1976). "In the first set of challenges, arising soon after the first statutes were enacted, acts with typical provisions were uniformly upheld. The leading case of the series was *Silver v. Silver* [280 U.S. 117 (1929)] in which the Supreme Court upheld the Connecticut guest statute . . . ." *Id.* at 799 (footnotes omitted).

[2]Brown v. Merlo, 8 Cal. 3d 855, 506 P.2d 212 (1973); Thompson v. Hagan, 96 Idaho 19, 523 P.2d 1365 (1974); Henry v. Bauder, 213 Kan. 751, 518 P.2d 362 (1974); Manistee Bank & Trust Co. v. McGowan, 394 Mich. 655, 232 N.W.2d 636 (1975); McGeehan v. Bunch, 88 N.M. 308, 540 P.2d 238 (1975); Laakonen v. Eighth Judicial Dist. Court, 91 Nev. 506, 538 P.2d 574 (1975); Johnson v. Hassett, 217 N.W.2d 771 (N.D. 1974); Primes v. Tyler, 43 Ohio St. 2d 195, 331 N.E.2d 723 (1975).

[3]Sidle v. Majors, 536 F.2d 1156 (7th Cir. 1976) (upholding Indiana's statute); Beasley v. Bozeman, 294 Ala. 288, 315 So. 2d 570 (1975); White v. Hughes, 257 Ark. 627, 519 S.W.2d 70 (1975); Richardson v. Hansen, 186 Colo. 346, 527 P.2d 536 (1974); Justice v. Gatchell, 325 A.2d 97 (Del. 1974); Keasling v. Thompson, 217 N.W.2d 687 (Iowa 1974); Botsch v. Reisdorff, 193 Neb. 165, 226 N.W.2d 121 (1975); Behrns v. Burke, 229 N.W.2d 86 (S.D. 1975); Duerst v. Limbocker, 269 Ore. 252, 525 P.2d 99 (1974); Cannon v. Oviatt, 520 P.2d 883 (Utah), *appeal dismissed*, 419 U.S. 810 (1974); Tisko v. Harrison, 500 S.W.2d 565 (Tex. Ct. App. 1973).