III. Civil Procedure and Jurisdiction

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A. Introduction

This Survey Article is limited to a discussion of those cases and amendments to trial rules that proved the most significant in the survey period reviewed. During the survey period, the Indiana courts decided important cases concerning Indiana's long arm statute, service of process, and Trial Rules 59 and 60. In addition, several of the trial rules pertaining to discovery were amended to coincide with the federal trial rules. These amendments, however, did not substantially alter existing Indiana case law. The Indiana Supreme Court also amended Trial Rules 6, 41, 52, 60.5, 75, and 79. The amended rules became effective January 1, 1982 and are supported by explanatory committee notes.

B. Jurisdiction, Process, and Venue

1. Trial Rule 4.4: "Long Arm" Jurisdiction.—During the survey period, the Indiana Court of Appeals decided two Trial Rule 4.4 cases of importance. Additionally, the decision of the United States Supreme Court in *City of Milwaukee v. Illinois*[1] has a significant effect on Indiana's long arm jurisdiction. In *City of Milwaukee*, the Court sustained an assertion of jurisdiction[2] under the Illinois long arm statute.[3] The jurisdictional assertion occurred when Illinois alleged that sewage, containing disease-causing viruses and bacteria, was being transported by water currents from the city and county of Milwaukee into parts of Lake Michigan, and that the sewage disposal affected the shores of Illinois. At trial, the defendants argued that there was no "tortious act within" the State of Illinois as that phrase is used in the Illinois long arm statute.[4] The Court of Appeals for the Seventh Circuit held that the tort was committed in the place where the injury occurred, and that it seemed beyond dispute that injury to the plaintiff occurred in Illinois.[5] Therefore, the appellate court stated that it was fair and reasonable to require the defendants to defend in Illinois because each year the defendants placed millions of gallons of sewage in Lake

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[1]451 U.S. 304 (1981).

[2]*Id.* at 312 n.5 (agreeing with the court of appeals that contacts with Illinois were sufficient to give personal jurisdiction over the defendant).

[3]Civil Practice Act, ILL. REV. STAT. ch. 110, § 17 (1982).

[4]State of Illinois v. City of Milwaukee, 599 F.2d 151, 155 (7th Cir. 1979).

[5]*Id.* at 156.

Michigan.[6] The Supreme Court expressly affirmed this conclusion and held that under the circumstances it was fair and reasonable to require the defendants to defend their conduct in the federal forum in Illinois.[7]

The decision in *City of Milwaukee* is significant for Indiana law because Indiana's long arm statute, Trial Rule 4.4(A)(2), is similar to the Illinois statute. Under Trial Rule 4.4(A)(2), Indiana does not require that business be done or conducted in the state for jurisdiction to exist.[8] For that matter, *International Shoe Co. v. Washington*[9] does not make that requirement either, as taught by *City of Milwaukee* and the reference to *International Shoe* in that opinion by Mr. Justice Rehnquist.[10] Instead, the question becomes whether the conduct causing personal injury or property damage by an act or omission done in Indiana makes it reasonable to call the defendant to account in Indiana courts. In *City of Milwaukee*, there was no intent and no anticipated result on the part of the defendants to cause injury in Illinois. There was no planned activity in Illinois; the Wisconsin defendants did not make a formal entry into Illinois, and no business of any kind was done or performed there. Nevertheless, the *conduct* outside of the state that had a sustained impact in Illinois generated jurisdiction in Illinois.[11]

Understanding this important determination in *City of Milwaukee*, the two Indiana decisions concerning personal jurisdiction thus become even more significant. In *Griese-Traylor Corp. v. Lemmons*,[12] the defendant corporation, who had contracted with the plaintiff to purchase the plaintiff's business and entire capital stock, appealed a judgment awarding the plaintiff damages for breach of the contract. The defendant challenged the court's jurisdiction, based upon its interpretation of the term "doing business" in Indiana Trial Rule 4.4(A)(1), by asserting that the corporation did not do any business in Indiana. Evidence indicated that the defendant was incorporated in Florida and maintained its principal place of business there, that its resident agent was in Florida, that the defendant transacted no business in Indiana and was not qualified or registered to do so, and that the defendant did not hire or retain employees or solicit business in Indiana. The

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[6] *Id.*

[7] 451 U.S. at 312 n.5.

[8] IND. R. TR. P. 4.4(A)(2). Rule 4.4(A)(2) confers jurisdiction on the court when a person commits an act "causing personal injury or property damage by an act or omission done within this state." *Id.*

[9] 326 U.S. 310 (1945).

[10] *See* 451 U.S. at 312 n.5.

[11] *Id.*

[12] 424 N.E.2d 173 (Ind. Ct. App. 1981). *See* Townsend, *Secured Transactions, 1982 Survey of Recent Developments in Indiana Law*, 16 IND. L. REV. 315, 321 (1983).

defendant's only involvement in Indiana was the execution of the sale and purchase contract.

The issue on appeal was whether this "single transaction" would qualify under the Trial Rule 4.4 provision "doing business." In a lengthy opinion, the court of appeals canvassed United States Supreme Court decisions,[13] and the court in *Griese-Traylor* found that the single transaction fell within Trial Rule 4.4 and that there were no due process or statutory law violations.[14]

The court determined that the defendant corporation had availed itself of the privilege of doing business in Indiana through one of its corporate officers who had negotiated and facilitated the execution of the contract for the sale and purchase of an Indiana corporation from Indiana residents. Additionally, the contract provided that the stock transfer, payment, and consulting services would occur in Indiana, and that all contract provisions were governed by Indiana law. Given these facts, the court affirmed the trial court's exercise of in personam jurisdiction over the defendant corporation.[15]

A second case involving Trial Rule 4.4, and discussed by the court in *Griese-Traylor*,[16] is *Suyemasa v. Myers*.[17] Much like the *Griese-Traylor* facts, the latter action arose from a breach of contract for the sale of the capital stock of a foreign corporation to Indiana residents. In *Suyemasa*, however, the plaintiffs were appealing a dismissal on the grounds of lack of personal jurisdiction. The nonresident defendant seller argued that he was not "doing business" in the state within the meaning of Trial Rule 4.4(A)(1), because he had no office in Indiana nor was he in the business of selling or transferring stock or stock subscriptions within the state. The defendant, a Tennessee resident, further asserted that the making of the contract did not satisfy the minimum contacts requirement of *International Shoe Co. v. Washington*.[18] The court of appeals held that the defendant's acts of discussing the stock transfers with the plaintiffs and of ultimately negotiating the sales contract, all done in Indiana, were sufficient to satisfy any jurisdictional assertion.[19]

The *Suyemasa* court also discussed the burden of proof in a party's

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[13]World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); Hanson v. Denckla, 357 U.S. 235 (1958); McGee v. International Life Ins. Co., 355 U.S. 220 (1957); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); International Shoe Co. v. Washington, 326 U.S. 310 (1945).

[14]424 N.E.2d at 181.

[15]*Id.*

[16]*Id.* at 180.

[17]420 N.E.2d 1334 (Ind. Ct. App. 1981).

[18]326 U.S. 310 (1945) (allowing a court to exercise jurisdiction over a nonresident defendant if the party has such minimum contact with the state that maintenance of the suit complies with traditional notions of fair play).

[19]420 N.E.2d at 1342.

challenge to the jurisdiction of the trial court. Where a party raises a jurisdictional challenge in either a Trial Rule 8(C) pleading or in a Trial Rule 12(B)(2) Motion to Dismiss, the challenging party bears the burden of proof on the issue, unless the lack of jurisdiction is apparent on the face of the complaint.[20] The court noted that the challenging party might utilize discovery tools such as depositions, affidavits, and interrogatories in meeting this burden of proof.

2. Child Custody Jurisdiction.—The concepts of "home state" and "state of significant connection" as expressed in Indiana's Uniform Child Custody Jurisdiction Law (UCCJL)[21] were interpreted in *In re Marriage of Hudson.*[22] In *Hudson*, the court observed that, because the father had removed the children to Spain, no state qualified as a "home state" for determining the custody of the children. However, the court found that the alternative statutory provision regarding "significant connection"[23] was available for establishing jurisdiction when a child has been recently removed from his or her home state and the remaining spouse also has moved away.[24] Under the significant connection test, the state having maximum access to relevant evidence regarding the child's present and future care has jurisdiction.

The *Hudson* court found that the judicial inquiry in an adjudication of a child's status in custody proceedings under the UCCJL is an exception to the minimum contacts standard applied to in rem proceedings.[25] The *Hudson* court noted that in *Shaffer v. Heitner* the Supreme Court "recognized the necessity of such specialized jurisdictional rules in *in rem* status proceedings."[26] Therefore, a court may adjudicate child custody under the UCCJL without acquiring personal jurisdiction over an absent parent, if reasonable attempts to give the parent notice of the proceedings have been made.[27]

Hudson is particularly significant because the court also construed Indiana Trial Rule 4.4(A)(7) and noted that the particular long arm jurisdictional provision applies only when a party maintains *continuous* residency in Indiana, which did not appear in the *Hudson* facts.[28] Thus, when a spouse leaves Indiana and then returns, Trial Rule 4.4(A)(7)

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[20]*Id.* at 1340.

[21]IND. CODE §§ 31-1-11.6-1 to -24 (1982).

[22]434 N.E.2d 107 (Ind. Ct. App. 1982).

[23]IND. CODE § 31-1-11.6-3(a)(2) (1982).

[24]434 N.E.2d at 115 (citing Uniform Child Custody Jurisdiction Act § 3 Commissioners' notes, 9 U.L.A. 123-25 (1979)). The *Hudson* court found the Commissioners' notes persuasive because the version adopted by Indiana is identical to the corresponding paragraph of the Uniform Act. 434 N.E.2d at 115 n.7.

[25]434 N.E.2d at 117 (distinguishing Shaffer v. Heitner, 433 U.S. 186 (1977)).

[26]434 N.E.2d at 119 (citing Shaffer v. Heitner, 433 U.S. 186, 208 n.30 (1977)).

[27]434 N.E.2d at 117.

[28]*Id.* at 113.

is not satisfied, and jurisdiction is not available under that particular provision.[29]

3. Service of Process on a Subsidiary Corporation.—General Finance Corp. v. Skinner[30] is an important interpretation of Trial Rules 4.1 and 4.15, but the court's decision rests on the particular facts of this case. In *General Finance*, the court held that service of process on the wholly owned resident subsidiary constituted service on the parent corporation, a nonresident.[31]

The plaintiff in *General Finance* filed suit against the Illinois parent corporation in an Indiana state court and effected service of process on the Indiana subsidiary corporation by serving a registered agent of the Indiana subsidiary. Ultimately, process was returned and a default judgment, which included punitive damages, was entered against the parent corporation. On appeal, the default judgment was sustained.[32]

General Finance turned on the fact that the subsidiary was totally owned and controlled in all aspects by the parent corporation. Thus, service of process was upheld, whereas normally a wholly owned subsidiary doing business in the forum state is not a process agent of the parent.[33]

The significance of *General Finance* is that service of process on the wholly owned subsidiary's agent was expressly authorized by the subsidiary corporation but not by the parent corporation, and service was effected on the registered agent of the Indiana subsidiary. Because service upon a registered agent of the Indiana subsidiary was deemed to be service upon the parent Illinois corporation, the decision in *General Finance* suggests that under factual circumstances similar to *General Finance*, an attorney may seek a hearing designed to "penetrate the corporate veil" for purposes of service of process, irrespective of the fact that the parent corporation has not authorized receipt of process by the registered agent.

This case also suggests that whenever a corporation or other organization, which has sufficient minimum contacts with Indiana, appoints a registered agent or an organization to receive process for it, then process served upon that duly appointed agent will sustain jurisdiction in an Indiana trial court regardless of whether the registered agent or organization is in Indiana. For example, *X* corporation, an Ohio business, has been appointed by *Y* corporation, a

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[29]*Id.*

[30]426 N.E.2d 77 (Ind. Ct. App. 1981). For a full discussion of the case, see Galanti, *Business Associations, 1982 Survey of Recent Developments in Indiana Law*, 16 IND. L. REV. 25, 37 (1983).

[31]426 N.E.2d at 86.

[32]*Id.*

[33]*Id.* at 82-85.

foreign corporation with subsidiaries in Indiana, to receive process. Plaintiff serves process on *X* corporation from an Indiana trial court. If service of process is duly effected on *X* corporation pursuant to the Indiana rule, then process has been validly served upon *Y* corporation, although *Y* corporation did not contemplate that *X* corporation would receive process from courts outside of Ohio when *Y* appointed *X* as its registered agent. The court in *General Finance* sustained that method of service of process by allowing process on the parent Illinois corporation to be effected by serving the subsidiary in Indiana, even though the parent corporation had not expressly authorized such service of process.

4. Timely Service of Process.—The court in *Geiger & Peters, Inc. v. American Fletcher National Bank*[34] decided important questions concerning timely service of process and Trial Rule 41(A). In *Geiger & Peters* a third party complaint was filed against Geiger & Peters, Inc. and American Fletcher National Bank (AFNB). Geiger & Peters, Inc. subsequently cross-claimed against AFNB but did not serve process. Thereafter, under Trial Rule 41(A), which allows an action to be dismissed without a court order, the parties stipulated to dismiss the initial plaintiff's suit. AFNB argued that the stipulation of dismissal also dismissed the cross-claim against it, and, regardless of the effect of the dismissal, AFNB argued that Geiger & Peters failed to serve the cross-claim on AFNB within the one-year statute of limitation for filing a mechanic's lien.[35] Thus, the issues were whether the word "action" in Trial Rule 41(A)[36] meant the entire controversy was dismissed and not merely a single claim or party, and whether process that was served two years after filing the cross-claim was effective.

Noting the disagreement between other jurisdictions concerning the term "action" in similar trial rules, the court of appeals adopted the better view and determined that the word "action" meant a particular claim for relief.[37] Thus, the parties' stipulation of dismissal dismissed only the plaintiff's complaint and not the cross-claim.[38]

The appellate court then determined that filing the cross-claim against AFNB had tolled the statute of limitations because *filing* commences an action, and commencement of a cause of action tolls the

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[34]428 N.E.2d 1279 (Ind. Ct. App. 1981).

[35]IND. CODE § 32-8-7-1 (1982).

[36]IND. R. TR. P. 41(A).

[37]428 N.E.2d at 1281. *See also* Oswalt v. Scripto, Inc., 616 F.2d 191, 194-95 (5th Cir. 1980) (rejecting argument that term "action" as used in Trial Rule 41(a) means the entire controversy). *Contra* Philip Carry Mfg. Co. v. Taylor, 286 F.2d 782 (6th Cir.), *cert. denied*, 366 U.S. 948 (1961); Harvey Aluminum, Inc. v. American Cyanamid Co., 203 F.2d 105 (2d Cir.), *cert. denied*, 345 U.S. 964 (1953) (holding that the term "action" as used in Trial Rule 41(a) means the entire controversy).

[38]428 N.E.2d at 1281.

statute of limitations.[39] Furthermore, finding the language unambiguous in Trial Rule 3, which specifies that filing a complaint commences an action, the court refused to hold that tolling the statute of limitations was "conditioned upon diligence in service."[40] However, the court noted that Trial Rule 41(E) allows dismissal for failure to diligently prosecute a claim and thus provides "adequate protection against unreasonable delay in serving process."[41] The court added that subsequent but untimely service would not be sufficient to resume prosecution and, therefore, would not preclude a 41(E) motion.[42]

5. Change of Venue.—In *State v. Marion County Superior Court*,[43] the trial court judge had set aside his order granting a change of venue and had resumed jurisdiction of the case. Before the Indiana Supreme Court, the respondent judge posited that because a local Marion County Superior Court rule provided ten days for perfecting a change of venue after a party had selected a county, and because the ten days had expired before the parties in this case filed a proposed order to perfect the change, the original court could resume jurisdiction and a previously granted change of venue could be denied.

The Indiana Supreme Court, considering this issue pursuant to Indiana Code section 34-1-13-2,[44] held that the only consideration in determining whether the court granting a change of venue may resume jurisdiction is whether the applicant paid the court costs within the stated time frame.[45] The supreme court further noted that this holding is consistent with Trial Rule 78 because the Trial Rule merely provides "a procedure for properly vesting jurisdiction in the court to which venue has been changed before that court's receipt of the transcript."[46] The court's decision indicates that local rules which conflict with Indiana statutes and Trial Rules may be held invalid.

C. Pleadings and Pre-Trial Motions

1. Trial Rule 8(C): Waiver of Affirmative Defense.—In *State v. Totty*,[47] an action against the State by various plaintiffs for personal injuries sustained in an auto collision, the court of appeals held that the State had not waived its right to raise an affirmative defense even

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[39]*Id.* at 1282.

[40]*Id.*

[41]*Id.*

[42]*Id.* at 1283 (distinguishing State v. McClaine, 261 Ind. 60, 300 N.E.2d 342 (1973)) (holding that defendant must file 41(E) motion before plaintiff resumes diligent prosecution).

[43]430 N.E.2d 1170 (Ind. 1982).

[44]IND. CODE § 34-1-13-2 (1982).

[45]430 N.E.2d at 1171.

[46]*Id.* at 1172. *See* IND. R. TR. P. 78.

[47]423 N.E.2d 637 (Ind. Ct. App. 1981).

though the State failed to plead the issue in its answer. The affirmative defense involved a release that had been signed by two intervening plaintiffs in a prior proceeding to settle against a different defendant. At trial, the State contended that the release of all parties liable for the collision acted as a release of the State because of the general rule regarding release of joint tort-feasors.[48]

The court of appeals held that the effect of the release was a properly triable issue and distinguished *Totty* from a prior appellate decision which had held that the failure to raise the release of the joint tort-feasor in the answer or in other pleadings, or to litigate the release at trial effected a waiver of the issue.[49] The court noted that in *Totty* the State had included the issue of the release in its pre-trial contentions, which superseded the answer.[50] Further, the issue of the release was litigated by the parties and was made the subject of the State's motion for judgment on the evidence.[51] Thus, the decision in *Totty* indicates that an affirmative defense is not required to be raised in the answer but may be raised for the first time at any stage of the pre-trial proceedings, or perhaps even at trial.

2. Motion in Limine.—In an eminent domain action, the condemnees in *Indiana & Michigan Electric Co. v. Pounds*[52] filed a motion in limine to prevent discovery, after the opposing party had moved to compel discovery. The trial court overruled the motion to compel and granted the motion in limine. The utility company appealed from an adverse judgment, alleging, inter alia, that the trial court abused its discretion in granting the motion in limine.

On appeal, the court noted the unusual and misplaced use of the motion in limine in this suit, and the court held that a motion in limine may not be used to frustrate discovery because the motion's sole function is "to protect the moving party from the possible prejudicial effect of *in-court statements before the jury*."[53] Because there was no discernible basis for denying discovery, the appellate court ruled that the grant of the motion in limine was reversible error.[54]

3. Trial Rule 16: Pre-Trial Orders.—Hundt v. LaCrosse Grain Co.,[55] presented an important discussion regarding the issues that are formulated during pre-trial procedures. In *Hundt*, the trial judge set

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[48]*Id.* at 640-41. The general rule is that a release of one joint tort-feasor is a release of all. Cooper v. Robert Hall Clothes, Inc., 390 N.E.2d 155 (Ind. 1979).

[49]423 N.E.2d at 642 (citing Weenig v. Wood, 169 Ind. App. 413, 349 N.E.2d 235 (1976)).

[50]423 N.E.2d at 642.

[51]*Id.*

[52]426 N.E.2d 45 (Ind. Ct. App. 1981).

[53]*Id.* at 47 (emphasis added).

[54]*Id.*

[55]425 N.E.2d 687 (Ind. Ct. App. 1981).

aside a jury verdict for the plaintiff because the judge determined that he had erred by allowing the testimony at trial to exceed the issues defined by the pre-trial order.

Citing Indiana Supreme Court precedent, the court of appeals in *Hundt* noted that " '[t]he expressed purpose of Trial Rule 16 . . . is to provide for a pre-trial conference in which to simplify the issues raised by the pleadings and to define these issues within a pre-trial order.' "[56] However, the appellate court in *Hundt* concluded that pre-trial orders should be liberally construed to include all legal and factual theories inherent in the issues.[57] Therefore, because the pre-trial order did not restrict Hundt to a particular legal theory to prove his allegations and because the evidence presented was not inapplicable to the facts, the court of appeals held that the admission of the testimony was not error.[58]

4. Trial Rule 56: Motion for Summary Judgment.—In *Associates Financial Services v. Knapp*,[59] the Indiana Court of Appeals concluded, as a matter of first impression, that a counterclaim which seeks damages in excess of the original claim does not act as an automatic bar to summary judgment on the original claim.[60] Reviewing decisions from other jurisdictions, the court in *Knapp* noted two situations where summary judgment has been held appropriate, despite an excess counterclaim. A court may grant summary judgment to the plaintiff if the defendant offers no real defense and relies solely on the counterclaim,[61] or if a counterclaim, although related to the plaintiff's claim, is really a separate and distinct claim involving damages of a completely different nature which might arise from different circumstances than the plaintiff's complaint.[62] The *Knapp* court indicated that a court may stay judgment on the original claim,[63] but the court declined to do so in this case because the defendant did not raise this as an issue. In addition, the court in *Knapp* found that the defendant had failed to challenge the court's severance of the counterclaim, thus waiving the issue of the claim's separate nature, and found that the defendant had failed to show a genuine issue of material fact.

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[56]*Id.* at 694 (quoting North Miami Consolidated School District v. State *ex rel.* Manchester Community Schools, 261 Ind. 17, 20, 300 N.E.2d 59, 62 (1973)).

[57]425 N.E.2d at 695.

[58]*Id.* at 696.

[59]422 N.E.2d 1261 (Ind. Ct. App. 1981).

[60]*Id.* at 1265.

[61]*Id.* (citing Graham Associates, Inc. v. Fell, 192 A.2d 129 (D.C. App. 1963)).

[62]422 N.E.2d at 1265 (citing Sunbeam Corp. v. Morris Distributing Co., 55 A.D.2d 722, 389 N.Y.S.2d 173 (N.Y. App. Div. 1976)).

[63]422 N.E.2d at 1265 (citing Graham Associates, Inc. v. Fell, 192 A.2d 129 (D.C. App. 1963); Sunbeam Corp. v. Morris Distributing Co., 55 A.D.2d 722, 389 N.Y.S.2d 173 (N.Y. App. Div. 1976)).

Therefore, the court held that summary judgment on the plaintiff's original claim was proper.[64]

In *Otte v. Tessman*,[65] the Indiana Supreme Court consolidated two cases to consider the question regarding the necessity for trial courts to comply strictly with Trial Rule 56, which requires the trial court to set a time for hearing the motion for summary judgment. In each case, the trial court had granted a motion for summary judgment without setting a hearing date for considering the motion, and the court of appeals had affirmed the trial court's ruling, because the appellant had failed to prove that he was prejudiced by the trial court's failure to follow the procedure set out in Trial Rule 56.[66] On petition to transfer, the Indiana Supreme Court overturned both rulings based on the trial courts' failure to entertain the summary judgment motions consistent with Trial Rule 56(C).[67]

The supreme court found that prejudice to the parties is presumed if a trial court fails to follow the mandated procedure in Trial Rule 56, because the language in Trial Rule 56 is explicit, and, therefore, the parties are justified in relying on those procedures.[68] The supreme court quoted Judge Staton's dissent in the court of appeals' decision:

> "If the failure to obey the clear explicit dictates of the Indiana Rules of Procedure can be simply dismissed as harmless error, then, the erosion of an orderly judicial system has begun. If the [Rules of Procedure] can be re-written by judicial opinion . . . the shroud of confusion will prevent any meaningful, just and predictable solution to those disputes which must be resolved in our courts."[69]

The supreme court's decision in *Otte* indicates that the practice of the trial courts cannot be inconsistent with the published trial rules

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[64]422 N.E.2d at 1265.

[65]426 N.E.2d 660 (Ind. 1981). This suit is a consolidation of two cases both of which were petitioned for transfer to the supreme court. Indiana State Highway Dep't v. Collins, 413 N.E.2d 982 (Ind. Ct. App. 1980) (originating in the Marion County Superior Court, Judge Betty Barteau); Otte v. Tessman, 412 N.E.2d 1223 (Ind. Ct. App. 1980) (originating in the Lake Superior Court, Judge Cordell C. Pinkerton).

[66]426 N.E.2d at 661. In Indiana State Highway Dep't v. Collins, the trial court had granted the plaintiff's motion for summary judgment six days after the motion was filed. 413 N.E.2d 982 (Ind. Ct. App. 1980). In Otte v. Tessman, the trial court had granted the defendant's motion for summary judgment five months after the filing *but* without setting a hearing date or a deadline for filing all evidentiary materials in support of or in opposition to the motion. 412 N.E.2d 1223 (Ind. Ct. App. 1980).

[67]426 N.E.2d at 661-62. Trial Rule 56(C) provides, in part, as follows: "The motion shall be served at least ten [10] days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits." IND. R. TR. P. 56(C).

[68]426 N.E.2d at 661-62.

[69]*Id.* at 662 (quoting Otte v. Tessman, 412 N.E.2d 1223, 1232 (Ind. Ct. App. 1980) (Staton, J., dissenting)).

adopted by the Indiana Supreme Court, and that trial courts must strictly comply with those rules.

D. Parties and Discovery

1. Trial Rule 17(A)(2): Real Party in Interest in Class Action Suit.—In *Adams v. City of Fort Wayne*,[70] property owners appealed the trial court's dismissal of their challenge to the rezoning and the annexation of land by the city of Fort Wayne. The trial court had based its decision on the fact that the property owners lacked standing to challenge the annexation in an *individual capacity*.

Agreeing that the plaintiffs lacked standing as individuals, the court of appeals noted that the plaintiffs may have had standing as a class and held that the failure to designate a suit as a class action is not fatal to the complaint.[71] The appellate court stated that:

> "Cases often will be found where an individual seeks relief in his or another's name upon a cause of action available only to a class. Failure to designate the action as a class action should not be fatal under Rule 17(A) allowing a reasonable time for naming the proper party."[72]

Thus, although the trial court's dismissal was affirmed on other grounds, the court of appeals found that Trial Rule 17(A) requires parties be given a reasonable opportunity to amend their complaint and bring suit on behalf of all interested parties.[73]

2. Trial Rules 20 and 24: Joinder of Parties and Intervention.—In *Krieg v. Glassburn*,[74] the maternal grandparents sought to join in a custody proceeding to obtain visitation rights. The Kriegs had titled their petition as one for joinder under Trial Rule 20. In ruling that joinder was inapplicable, the *Krieg* court said that Trial Rule 20 pertains only to those persons who may be parties to the action from the outset and to those who may be brought into the suit by the original parties.[75] However, the court looked beyond the title of the petition to the substance of the motion. The court of appeals found that the petition was actually a motion to intervene under Trial Rule

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[70]423 N.E.2d 647 (Ind. Ct. App. 1981).

[71]*Id.* at 649.

[72]*Id.* (quoting W. HARVEY, 2 INDIANA PRACTICE 334 (1970)).

[73]423 N.E.2d at 649.

[74]419 N.E.2d 1015 (Ind. Ct. App. 1981). The Kriegs had also sought to intervene in the adoption proceeding. The court denied intervention in that proceeding because the adoption statute sets out who may be a party to an adoption and does not include grandparents. *Id.* at 1019-21. *See* IND. CODE § 31-3-1-3 to -6 (1982). For a full discussion of the case, see Rhine & Weinheimer, *Domestic Relations, 1981 Survey of Recent Developments in Indiana Law*, 15 IND. L. REV. 203, 212 (1982).

[75]419 N.E.2d at 1017.

24 and, because of the Kriegs' interest in their grandchildren, that Trial Rule 24 was broad enough to encompass the grandparents' action.[76] Although denial of a motion to intervene may only be challenged on appeal from a final judgment,[77] the appellate court found that the trial court's denial of the Kriegs' motion had the effect of determining the whole issue; therefore, the denial was a final judgment and subject to appeal.[78]

3. Discovery Rules.—a. Administrative agencies.—In *Josam Manufacturing Co. v. Ross*,[79] the court of appeals held that, pursuant to Trial Rule 28(F),[80] Trial Rules 26 through 37 apply to the Indiana Industrial Board. In *Josam*, the Indiana Industrial Board had ordered the Josam Manufacturing Co. (Josam) to answer interrogatories submitted by Ross as part of his workers' compensation claim. Josam had refused, and the trial court had ordered compliance, awarding attorney fees as a sanction.

On appeal, Josam argued that the Indiana Trial Rules did not apply to the Industrial Board. Relying on *State v. Frye*,[81] the *Josam* court said that Trial Rules 26 through 37 were an exception to the general rule that "the Indiana Trial Rules do not govern or bind the Industrial Board of Indiana."[82] The court rejected Josam's argument that *Frye* was inapplicable because *Frye* concerned an agency which was bound by the Administrative Adjudication Act (AAA). Instead, the court in *Josam* examined the similarity between the Industrial Board's powers and the powers of the agency in *Frye*, and reviewed the language of Trial Rule 28(F). Because Trial Rule 28(F) says "any" adjudicatory hearing before an administrative agency and an Industrial Board hearing is "trial-like," the court found that the discovery rules applied to the Industrial Board, even though the Industrial Board was not subject to the AAA.[83] Therefore, the court held that the Industrial Board had the authority to order Josam to answer the interrogatories.[84] The appellate court also concluded that the sanctions in Trial

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[76]*Id.* at 1017-18.

[77]*Id.* Trial Rule 24 provides: "The court's determination upon a motion to intervene may be challenged only by appeal from the final judgment . . . ." IND. R. TR. P. 24(C). Appeal may be effected by either Indiana Trial Rule 54 or Appellate Rule 4(B)(6). *See* IND. R. TR. P. 54; IND. R. APP. P. 4(B)(6).

[78]419 N.E.2d at 1017.

[79]428 N.E.2d 74 (Ind. Ct. App. 1981).

[80]IND. R. TR. P. 28(F).

[81]161 Ind. App. 247, 315 N.E.2d 399 (1974). In *Frye*, the court found that Trial Rule 28(F) provided an exception to the general rule that trial rules are inapplicable to administrative agencies. *Id.* at 251, 315 N.E.2d at 402. *Frye* involved an agency which was subject to the Administrative Adjudication Act. IND. CODE § 4-22-1-1 to -22 (1982).

[82]428 N.E.2d at 75.

[83]*Id.* at 76-77. *See* IND. R. TR. P. 28(F).

[84]428 N.E.2d at 77.

Rule 37(B) would apply; however, because Josam had disobeyed the Industrial Board's order, not the trial court order, the trial court could not order sanctions.[85]

b. Depositions.—In *Hales & Hunter Co. v. Norfolk & Western Railway*,[86] the parties had taken depositions and, prior to trial, had stipulated that the depositions may be published, may be included in the trial record, and may be considered by the court. However, the trial record did not indicate that the trial court had published the depositions or had considered the depositions in arriving at its verdict. Therefore, on appeal, the court of appeals issued a writ of certiorari to the trial court clerk, directing that the depositions be forwarded for appellate consideration.[87] The appellate court affirmed the trial court's decision, basing the affirmance on the evidence contained in the depositions.[88]

On review by the Indiana Supreme Court, the judgments of the lower court and the appellate court were vacated, and the case was remanded for further consideration by the trial court.[89] The supreme court held it was mandatory that the trial court publish and consider the depositions, regardless of the parties' stipulation that the depositions "may" be considered, because a trial court must consider all properly tendered evidence which is relevant and not repetitive.[90] In regard to the role of the appellate court, the supreme court noted that an appellate court's review is limited to those matters contained in the trial record. If depositions are not published by the trial court, then, in its review, the appellate court would "resort to speculation and conjecture" that the trial court's judgment was based on the evidence in the depositions.[91] Thus, if a deposition is to be used at trial, it must be published as a matter of the trial court's record, and only then is the deposition available to be reviewed on appeal.

c. Trial Rule 37: Sanctions.—On rehearing, the court of appeals in *State v. Kuespert*[92] upheld a discovery sanction that shifted the burden of proof to the State on a significant issue by requiring the State to submit evidence on the issue. The sanction was imposed pursuant to Trial Rule 37(B)(3), which explicitly allows such an order.[93]

The appellate court in *Kuespert* also reviewed this sanction and the trial court's order that the State pay attorney fees, to determine

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[85]*Id.* at 77-78.
[86]428 N.E.2d 1225 (Ind. 1981).
[87]*Id.* at 1226.
[88]*Id.*
[89]*Id.* at 1227.
[90]*Id.*
[91]*Id.*
[92]425 N.E.2d 229 (Ind. Ct. App. 1981).
[93]*See* IND. R. TR. P. 37(B)(3).

which discovery sanctions are appealable as a matter of right.[94] The court first noted that the sanction to shift the burden of proof was severable from the order to pay attorney fees for the purpose of interlocutory appeals. The court then stated that discovery orders are generally interlocutory and that interlocutory orders are allowed to be appealed only by express statutory authority.[95] However, the court added that discovery sanctions requiring the payment of money are interlocutory orders for money payments and, thus, are appealable as a matter of right under Appellate Rule 4(B)(1).[96] Other sanctions that accompany a money payment sanction, like the sanction to shift the burden of proof, are appealable only if certified by the trial court and accepted by the appellate court, pursuant to Appellate Rule 4(B)(6).[97]

In *Breedlove v. Breedlove*,[98] the former wife had sued to recover child support arrearages, and the trial court had entered a default judgment against the husband because he had failed to answer interrogatories after the court had ordered him twice to answer, pursuant to Trial Rule 37. The husband appealed the default judgment.

On appeal, the default judgment for arrearages and attorney fees was affirmed.[99] The appellate court noted that the discovery sanction of dismissal or default judgment is severe; however, such a sanction is within the trial court's discretion when a "party has in bad faith abusively resisted or obstructed discovery or violated a court order enforcing discovery," and the court finds that such actions prejudice the discovering party's rights.[100] The holding in this case, based on the defendant's repeated failure to obey court orders for discovery, continues to be good law, even though the 1982 amendments to Trial Rule 37 have eliminated the "bad faith" requirement and limited the sanction of default to defendants who fail to obey court orders for discovery.[101] Additionally, the court noted that Trial Rule 37(B)(4) does not require a court to make specific findings of fact when granting a party's motion for sanctions.[102]

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[94]425 N.E.2d at 232. For a discussion of the earlier appellate case, see Harvey, *Civil Procedure and Jurisdiction, 1981 Survey of Recent Developments in Indiana Law*, 15 IND. L. REV. 69, 93-94 (1982).

[95]425 N.E.2d at 231. For cases where interlocutory appeals were held to be authorized by statute, see Anthrop v. Tippecanoe School Corp., 257 Ind. 578, 277 N.E.2d 169 (1972); Estate of Newman v. Hadfield, 174 Ind. App. 537, 369 N.E.2d 427 (1977); Caster v. Caster, 165 Ind. App. 520, 333 N.E.2d 124 (1975).

[96]425 N.E.2d at 231. *See* IND. R. APP. P. 4(B)(1).

[97]425 N.E.2d at 232. *See* IND. R. APP. P. 4(B)(6).

[98]421 N.E.2d 739 (Ind. Ct. App. 1981).

[99]*Id.* at 740.

[100]*Id.* at 742.

[101]*See* IND. R. TR. P. 37(B)(2)(c). Amended Trial Rule 37(B)(2)(c) eliminates the requirement, alluded to in *Breedlove*, that the sanction of default may be ordered only when other sanctions would be inadequate.

[102]421 N.E.2d at 743.

E. Trials and Judgments

1. Trial Court's Function as the Thirteenth Juror.—In *Bossard v. McCue*,[103] a medical malpractice suit, the court of appeals held that the trial judge was not required to disqualify himself from ruling on post-trial motions, even though the judge had commented negatively on the evidence after the jury had retired to deliberate. The trial judge had found that the jury verdict for the physician was against the weight of the evidence and had ordered a new trial.

The court of appeals, in upholding the trial court order, determined that the trial judge's comments, which were made in his chambers, were a reaction to the evidence and were in accordance with the judge's role as the "thirteenth juror."[104] The court emphasized the importance of *when* the biased comments were made. Because the trial judge had not commented *before* the presentation of evidence,[105] but only commented after the presentation of all the evidence and after the jury had retired for deliberations, no disqualification was necessary.[106] However, the court of appeals did caution judges to refrain from making comments while the jury is deliberating.[107]

In *State v. Lewis*,[108] a criminal proceeding, the Indiana Supreme Court addressed the appropriate usage and standards of Trial Rules 50 and 59.[109] In *Lewis*, the State argued that the trial court erred in granting a motion for judgment on the evidence when the jury had failed to reach a verdict and had been discharged, and that the trial court had used an incorrect standard in applying the "thirteenth juror" rule to the defendant's post-trial motion for judgment on the evidence under Trial Rule 50.

In *Lewis*, the supreme court found that a trial court has authority under Trial Rule 50 to enter final judgment on the evidence either before or after a jury is discharged. Therefore, the court in *Lewis* held that the trial court in this case could grant judgment on the

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[103]425 N.E.2d 682 (Ind. Ct. App. 1981).

[104]*Id.* at 684. See Justice Hunter's discussion of the role of the trial judge as juror in Bailey v. Kain, 135 Ind. App. 657, 663-64, 192 N.E.2d 486, 488-89 (1963).

[105]*See* Brokus v. Brokus, 420 N.E.2d 1242 (Ind. Ct. App. 1981) (holding that reversal is required where the judge's remarks, made during opening arguments, indicated bias against the appellant).

[106]425 N.E.2d at 684.

[107]*Id.*

[108]429 N.E.2d 1110 (Ind. 1981).

[109]*See* IND. R. TR. P. 50, 59. The court began its discussion by noting the applicability of the civil rules to criminal cases: "[r]ules of civil procedure, whether statutory or court-made, are applicable to criminal cases where no criminal procedural rule or statute exists." 429 N.E.2d at 1113 (citing IND. CODE § 35-4.1-2-2 (1976)). For current law, see IND. CODE § 35-35-2-2 (1982); IND. R. CRIM. P. 21.

evidence for the defendant, even though no verdict was returned and the motion was granted after the declaration of a mistrial and the jury's discharge.[110]

The supreme court also determined that the "thirteenth juror" standard, which allows the judge to weigh the evidence, is properly applied when evaluating a Trial Rule 59 motion for a new trial, but that the "thirteenth juror" standard cannot be applied to a Trial Rule 50 motion for judgment on the evidence.[111] The court stated that, in both civil and criminal cases, a judgment on the evidence is proper only where there is a total absence of evidence on some essential issue, or where the evidence is without conflict and susceptible of only one inference in favor of the moving party.[112]

Essentially, the *Lewis* decision denies the trial court's ability, pursuant to Trial Rule 50, to enter a judgment on the evidence where there is *any* conflicting evidence, because if a conflict exists, there would not be "complete failure of proof."[113] Thus, the *Lewis* holding advocates a "scintilla rule" when a Trial Rule 50 motion is considered.

2. Trial Rule 63: Unavailability of Judge.—The Indiana Supreme Court in *State ex rel. Indiana-Kentucky Electric Corp. v. Knox Circuit Court*,[114] determined that Trial Rule 63 is an exception to the "law of the case" doctrine and allows a successor judge to grant a new trial after the original judge has ruled on the case.[115] In *Knox Circuit Court*, the judge presiding over the trial had died after determining the liability issue but before entering judgment on the damages issue. In accordance with Trial Rule 63(A) a successor judge was appointed, whereupon the defendant moved for a new trial on both the liability and damages issues. Over the plaintiff's objection, the successor judge ordered a new trial on both issues.

On appeal, the supreme court upheld the order for a new trial on both the liability issue and the damages issue, noting the trial court's power pursuant to Trial Rule 63.[116] In general, the rule permits a successor judge to grant a new trial after a verdict is returned

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[110]429 N.E.2d at 1114.

[111]*Id.*

[112]*Id.* (citing, among others, Proctor v. State, 397 N.E.2d 980 (Ind. 1979); Williams v. State, 395 N.E.2d 239 (Ind. 1979)). The major case in Indiana which sets forth the standard to be applied in granting a motion for judgment on the evidence is Huff v. Travelers Indem. Co., 266 Ind. 414, 363 N.E.2d 985 (1977).

[113]*But see* 429 N.E.2d at 117-18 (DeBruler, J., dissenting).

[114]422 N.E.2d 1247 (Ind. 1981) (bifurcated trial).

[115]*Id.* at 1248. The doctrine of the law of the case was described by Justice Holmes as a policy expressing "the practice of courts generally to refuse to reopen what has been decided, not a limit to their power." Messenger v. Anderson, 225 U.S. 436, 444 (1912).

[116]422 N.E.2d at 1248.

or findings are entered by the trial court, if the successor judge is satisfied that he cannot perform the duties of the trial judge because he did not preside at the trial, or for *any reason.*[117] Thus the *Knox Circuit Court* decision imputes broad discretion to the successor judge in utilizing Trial Rule 63 by allowing the successor judge to order a new trial on issues previously decided.

3. Finalty of Judgment, Res Judicata.—The doctrine of res judicata was thoroughly discussed in *White v. Davis*,[118] a dissolution action involving mutiple claims. The court of appeals stated that "[t]he doctrine of res judicata acts as a bar when the same parties to an earlier final judgment on the merits attempt to relitigate the same issues,"[119] and that "[f]or res judicata purposes the earlier judgment is final when it disposes of the subject matter of the litigation to the furthest extent of the court's powers and reserves no further question for future determinaton."[120] However in a multiple claims case, a judgment, decision, or order on fewer than all of the claims does not result in a final judgment and, under Indiana procedural law, cannot be appealed unless the trial court, pursuant to Trial Rule 54(B), determines that there is no reason for delay and expressly directs the entry of a judgment.[121] Claims are, by definition, separate where each claim depends on a different legal theory and on different factual evidence.[122] The court in *White* recognized the general rule that every question within the issues litigated which could have been proven is presumed to be adjudicated; however, that presumption is premised upon the existence of a final judgment.[123] Therefore, the court found that where a judgment leaves issues open for modification and the issues are not ripe for appeal, the presumption of finality will not apply.[124]

Thus, according to the decision in *White*, when a trial court is presented with multiple claims and decides one of them, but does not certify that claim for appeal under Trial Rule 54(B) and does not settle other issues presented, an order on fewer than all of the claims is not a final order or judgment, and there is nothing upon which to base a res judicata defense.[125] The decision in *White* is important for

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[117]*See* IND. R. TR. P. 63.

[118]428 N.E.2d 803 (Ind. Ct. App. 1981).

[119]*Id.* at 804-05 (citing *In re* Terry, 394 N.E.2d 94 (Ind. 1979), *cert. denied*, 444 U.S. 1077 (1980); Gasaway v. State, 249 Ind. 241, 231 N.E.2d 513 (1967)).

[120]428 N.E.2d at 805 (citing Richards v. Franklin Bank & Trust Co., 381 N.E.2d 115 (Ind. Ct. App. 1978)).

[121]428 N.E.2d at 805. *See* IND. R. TR. P. 54(B).

[122]428 N.E.2d at 805.

[123]*Id.*

[124]*Id.* at 806.

[125]*Id.*

understanding the developing case law of collateral estoppel and in understanding the offensive and defensive use of issue preclusion in subsequent litigation between the same parties or between different parties to the prior litigation.

F. Appeals

1. The Relationship between Trial Rules 59 and 60.—The Indiana Court of Appeals explored the interrelationship between Trial Rules 59 and 60 in *Dawson v. St. Vincent's Health & Hospital Care Center.*[126] In *Dawson*, the trial court had entered a default judgment against the defendants and then had denied the defendants' motion for relief under Trial Rule 60. The defendants appealed the denial of their Trial Rule 60 motion, but they did not file a motion to correct errors pursuant to Trial Rule 59.

On appeal, the fourth district court of appeals considered whether the Trial Rule 60(B) motion seeking relief, which was filed within the sixty-day time limit stipulated in Trial Rule 59, was equivalent to a Trial Rule 59 motion to correct errors.[127] Although the court in *Dawson* recognized that the underlying purpose of Trial Rule 59 and Trial Rule 60 motions is to call the trial court's attention to appealable errors, the court determined that in this case a Trial Rule 59 motion was required prior to appeal.[128]

In reaching this determination, the appellate court distinguished *In re Marriage of Robbins*,[129] where the third district court of appeals had held that, because of the overlapping purposes of Trial Rules 59 and 60, if a Trial Rule 60(B) purpose is stated in a motion, then, regardless of the motion's denomination, it is treated as a Trial Rule 59 motion if filed within the sixty-day period after judgment. The *Dawson* court explained that a Trial Rule 60(B) motion may serve only as a Trial Rule 59 motion if it meets the purposes of the Trial Rule 59 motion,[130] but the court noted that often the Trial Rule 60(B) motion calls on the equity powers of the trial court for relief because no appealable error exists.[131] Thus, unlike the *Robbins* case where the

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[126]426 N.E.2d 1328 (Ind. Ct. App. 1981).

[127]*Id.* at 1332.

[128]*Id.* at 1333.

[129]171 Ind. App. 509, 358 N.E.2d 153 (1976).

[130]In *Dawson*, the court listed the purposes of a Trial Rule 59 motion as follows:

> "1) to present to the trial court an opportunity to correct errors which occur prior to filing of the motion, 2) to develop those points which will be raised on appeal by counsel and 3) to inform the opposing party concerning the points which will be raised on appeal so as to provide that party an opportunity to respond in the trial court and on appeal."

426 N.E.2d at 1333 (quoting P-M Gas & Wash Co. v. Smith, 268 Ind. 297, 301, 375 N.E.2d 592, 594 (1978)).

[131]426 N.E.2d at 1332-33.

questioned Trial Rule 60(B) motion was clearly adequate to serve as a motion to correct errors, the Trial Rule 60(B) motion in *Dawson* raised no error and developed no appealable issues.[132] Consequently, because no motion to correct errors was filed, in either form or substance, the appellate court in *Dawson* held that no error was presented on appeal, and, therefore, that the court was without authority to "fish for errors."[133]

In contrast, the court of appeals for the third district reaffirmed *Robbins* in *Sowers v. Sowers*,[134] without making the distinctions enunciated in *Dawson*. *Sowers* involved a default judgment against the husband in a dissolution action. He filed a timely Trial Rule 60(B) motion but failed to effect service of process on the wife, who was not advised of the motion. Thereafter, the wife filed a motion to reconsider, followed by the praecipe and then the appeal. The court of appeals concluded that, because the husband had filed a Trial Rule 60(B) motion for relief from judgment within sixty days of the original judgment, it should be treated as a Trial Rule 59 motion for purposes of perfecting the appeal, without determining whether the Trial Rule 60(B) motion met the purposes of a motion to correct errors.[135]

The court in *Sowers* added that because the wife was a party who was prejudiced or adversely affected by the ruling on the Trial Rule 60(B) motion, she would come within the ambit of Trial Rule 59(F), and no jurisdictional challenge could arise because of her failure to file an additional motion to correct errors.[136] Further, the wife's failure to receive notice and to be given an opportunity to present her case constituted reversible error because a hearing is required on a Trial Rule 60(B) motion.[137]

2. Timely Filing of Trial Rule 59 Motion.—In *Sekerez v. Gehring*,[138] the plaintiff failed to serve the motion to correct errors on the opposing counsel within the sixty-day time limit specified in Trial Rules 5(A) and 59(C).[139] Ruling on the plaintiff's motion, the trial court found that it was untimely served upon opposing counsel, as well as insufficient on its merits. However, the appellate court distinguished the *total* failure to serve from an *untimely* failure to serve. The court of appeals noted that the motion was timely mailed and was received one day late by the court. Because the nonmoving party was not pre-

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[132]*Id.*
[133]*Id.*
[134]428 N.E.2d 245 (Ind. Ct. App. 1981).
[135]*Id.* at 247.
[136]*Id.*
[137]*Id.* at 248. *See* IND. R. TR. P. 60(B).
[138]419 N.E.2d 1004 (Ind. Ct. App. 1981).
[139]*See* IND. R. TR. P. 5(A), 59(C).

judiced by the untimely filing, the court of appeals reversed the lower court's decision and ruled to decide the case on its merits.[140]

3. Second Motion to Correct Errors.—In *Breeze v. Breeze*,[141] a consolidation of two cases, the fundamental questions were whether a second motion to correct errors is permitted, and if so, whether an appeal effected from the ruling on the second motion was timely. In each case, the trial court's entry on a motion to correct errors had been challenged by the parties as error. Accordingly, the parties had filed a second motion to correct errors which the trial court ruled on, initiating the appeals procedure. On appeal, the Indiana Supreme Court held that the filing of a second motion to correct errors was consistent with Trial Rule 59.[142] In addition, the court in *Breeze* clearly held that if a second motion to correct errors is filed, the time for filing an appeal begins running from the decision on the second motion to correct errors.[143]

In discussing a second motion to correct errors, the court noted that "after one motion to correct error has been filed and the trial court has subsequently altered, amended, or supplemented its findings and/or judgment, the parties have the discretion to appeal immediately or to file a new motion to correct error directed to the changed findings and/or judgment."[144] The court observed that this interpretation of Trial Rule 59 provides the needed flexibility in the trial rule and gives all parties equitable opportunity for an appeal. After *Breeze*, however, it is still the law that a second motion to correct errors is not *necessary* to effect an appeal.[145]

The result of the supreme court's decision in *Breeze* provides an attorney with the opportunity to delay the appeals process by the unnecessay filing of a second motion to correct errors. If this occurs, both the trial and appellate courts may utilize Indiana Trial Rule 11(A) to impose penalties on the attorney.[146] Consequently, it certainly is not in the attorney's best interest to file a conspicuously unnecessary second motion to correct errors.

4. Trial Court's Jurisdiction to Entertain Trial Rule 60 Motion after Filing of Appeal.—In *Crumpacker v. Crumpacker*,[147] the issue raised on appeal was whether the federal district courts have jurisdiction to entertain a Federal Rule 60(b) motion after an appeal has been

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[140]419 N.E.2d at 1008.

[141]421 N.E.2d 647 (Ind. 1981). *See* Falender, *Trusts and Decedents' Estates, 1982 Survey of Recent Developments in Indiana Law*, 16 IND. L. REV. 415, 424 (1983).

[142]421 N.E.2d at 648.

[143]*Id.* at 650.

[144]*Id.*

[145]*Id.* at 649. *See* P-M Gas & Wash Co. v. Smith, 268 Ind. 292, 375 N.E.2d 592 (1978).

[146]*See* IND. R. TR. P. 11(A).

[147]516 F. Supp. 292 (N.D. Ind. 1981).

filed. The district court decided that during the pendency of an appeal, a district court may entertain a Rule 60(b) motion and deny the motion if it is without merit, or seek leave to remand from the federal court of appeals if it appears the motion should be granted.[148]

Crumpacker conforms to the trend that a federal district court generally will not lack jurisdiction to entertain Rule 60 motions after an appeal has been filed.[149] This interpretation is inconsistent with the procedure in Indiana state courts. In the Indiana courts, once an appeal has been filed, relief pursuant to Indiana Trial Rule 60 must be sought first in the appellate court where the appeal is pending, not in the trial court.[150]

5. Appellate Jurisdiction.—The landowners in *In re Little Walnut Creek Conservancy District*[151] appealed from the trial court order affirming an appraiser's report which was unfavorable to the appellants' properties. The issue on appeal concerned a conflict between Indiana Code section 19-3-2-65 and the Appellate Rules. The appellants filed their appeal pursuant to the statute which allowed an appeal of the court's order to be made to the Indiana Supreme Court within thirty days.[152] The court first noted that the provision of the statute that allowed the parties to appeal to the supreme court was superseded by Appellate Rule 4(B), which provided that appeals were to be taken to the court of appeals.[153] This result occurred because, when a statute conflicts with the trial or appellate rules, "the rules will take precedence and the conflicting phrases within the statute will be deemed without force and effect."[154]

In determining the timeliness of filing the appeal, the court looked to Appellate Rule 3(B), which mandates the time for filing the record of proceedings in both interlocutory and final appeals, to determine if its provisions superseded the statutory time limit of thirty days. Appellate Rule 3(B) states that if a statute, pursuant to which an appellate review is filed, fixes a shorter time, the statutory time limit prevails.[155] The court of appeals observed that the statute, fixing a thirty-day period for filing an appeal, did not conflict with the Appellate Rule 3(B).[156] Rather, the court found that the statute controlled

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[148]*Id.* at 296.

[149]*Id.* at 295-96 (citing United States v. Ellison, 557 F.2d 128, 132 (7th Cir.), *cert. denied*, 434 U.S. 965 (1977)).

[150]*See, e.g.*, Donahue v. Watson, 413 N.E.2d 974 (Ind. Ct. App. 1980); Logal v. Cruse, 167 Ind. App. 160, 338 N.E.2d 305 (1975).

[151]419 N.E.2d 170 (Ind. Ct. App. 1981).

[152]IND. CODE § 19-3-2-65 (1976) (now codified at IND. CODE § 13-3-3-62(f) (1982)).

[153]419 N.E.2d at 171; *see* IND. R. APP. P. 4(B).

[154]419 N.E.2d at 171 (construing IND. R. APP. P. 4(B)(5)(c)). *See also* State *ex rel.* Western Parks, Inc. v. Bartholomew County Court, 270 Ind. 41, 383 N.E.2d 290 (1978).

[155]*See* IND. R. APP. P. 3(B).

[156]419 N.E.2d at 171.

in this case; therefore, the court held that the appeal was dismissed because it was untimely.[157] The practitioner is advised to be alert to statutory time limits for effecting appeals in Indiana.

G. 1982 Indiana Trial Rule Amendments

1. Trial Rule 26: General Provisions Governing Discovery.— Effective January 1, 1982, Indiana Trial Rule 26 was amended to conform with the Federal Rules of Civil Procedure, Rule 26. Indiana Trial Rule 26 was altered in sections (A), (B), (C), and (E). Federal Rule 26(f), which allows a discovery conference, was not recommended for adoption by the Rules Committee.[158] Although the Rule Committee did not contemplate that decisional law in Indiana would be affected significantly by the Trial Rule 26 amendments, there are several important changes which should be noted.[159]

In addition to relocating some sections of Trial Rule 26,[160] the 1982 amendments changed the previous requirement that trial preparation materials could be discovered upon a showing of "good cause" to a two-part requirement. A party seeking discovery must now show substantial need and must show that he is unable, without undue hardship, to obtain the substantial equivalent of the materials by other means.[161] With these changes, the Trial Rule more specifically spells out what is now required because these requirements were two elements of "good cause" under prior law.[162] A new sentence was added to the section on trial preparation materials that protects "the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party" from disclosure.[163] Thus, any previous Indiana decisions that did not protect an attorney's mental impressions are modified to that extent, and Indiana decisions will now follow recent federal cases construing this limitation.[164]

The section on discovery of experts is now renumbered as Trial Rule 26(B)(4). Its contents were changed substantially so that several recent Indiana decisions are affected. Amended Trial Rule 26(B)(4)(a)

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[157]*Id.*

[158]IND. CODE ANN., IND. R. TR. P. 26 Supreme Court Committee note (West Supp. 1982).

[159]*Id.*

[160]Section 26(B)(4) is now 26(B)(2) and the section on discovery of trial preparation material is now 26(B)(3). IND. R. TR. P. 26(B)(2), (3).

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

[162]*See* Newton v. Yates, 170 Ind. App. 486, 497, 353 N.E.2d 485, 492 (1976).

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

[164]*See, e.g.*, Upjohn Co. v. United States, 449 U.S. 383 (1981); Duplan Corp. v. Moulinage Et Retorderie DeChavanoz, 509 F.2d 730 (4th Cir.), *cert. denied*, 420 U.S. 997 (1975).

allows a party to seek through interrogatories not only the names of experts and the subject matter of their testimony, but also the facts and opinions to which the expert is expected to testify, thus modifying Indiana case law which limited discovery of facts and opinions of expert witnesses.[165]

2. Discovery Rules.—a. Trial Rule 33: Interrogatories to parties.—Trial Rule 33(C) was amended to conform with Federal Rule 33(c) by adding a sentence at the end. Trial Rule 33(C) provided that when a party is served interrogatories that can be answered by examining business records, and the burden of obtaining the answer is the same for the party requesting the information as for the party served, it is permissible to answer by providing the requesting party access to the records and time to examine them. This option had been abused by answering parties who directed the requesting party to a large mass of business records without specifying where the information sought might be found.[166] The amendment now requires that the answering party specify by category and location, the records from which answers to interrogatories can be derived.[167]

b. Trial Rule 34: Production of documents.—Trial Rule 34(B) was also amended by the addition of one sentence which conforms it to Federal Rule 34(b). The amendment requires that a party who produces documents in response to a request by the opposing party "produce them as they are kept in the usual course of business or . . . organize and label them to correspond with the categories in the request."[168] This amendment, similar to the amendment to Trial Rule 33(C),[169] attempts to prevent abusive practices that make it difficult for the requesting party to find the information sought in the requested documents.[170]

c. Trial Rule 37: Sanctions.—The amendment to Indiana Trial Rule 37, which was quite substantial, conformed the Indiana Rule to Federal Rule 37. The purpose of the amendment, according to the Rules Committee, was to "reinforce Indiana decisions in the area, and to clearly identify the enforcement power . . . of the Indiana trial court."[171]

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[165]*See, e.g., Costanzi v. Ryan*, 370 N.E.2d 1333 (Ind. Ct. App. 1978); State Highway Commission v. Jones, 173 Ind. App. 243, 363 N.E.2d 1018 (1977).

[166]IND. CODE ANN., IND. R. TR. P. 32(C) Supreme Court Committee note (West Supp. 1982).

[167]IND. R. TR. P. 33(C).

[168]IND. R. TR. P. 34(B).

[169]*See supra* notes 166-67 and accompanying text.

[170]IND. CODE ANN., IND. R. TR. P. 34(B) Supreme Court Committee note (West Supp. 1982).

[171]IND. CODE ANN., IND. R. TR. P. 37 Supreme Court Committee note (West Supp. 1982).

3. Trial Rule 41: Provisions Governing Dismissal of Actions.— Prior to the 1982 amendment, Indiana courts had consistently interpreted Trial Rule 41(B) to mean that the trial court, in determining whether to grant an involuntary dismissal, could consider only the evidence and inference most favorable to the nonmoving party, and that the trial court was not permitted to weigh the evidence.[172] Under the standard adopted by the Indiana courts, a trial judge, when trial is to the court, could not disbelieve a prima facie case and find for the moving party who does not have the burden of proof. However, such a prohibition is inconsistent with the power of a jury to find against a party who has made a prima facie case.[173] In addition, this standard is inconsistent with Rule 41(b) of the Federal Rules of Civil Procedure, which permits the trial court to weigh the evidence and determine for whom the evidence preponderates.[174]

The 1982 amendment to Trial Rule 41(B) corrected these inconsistencies. As amended, the rule now provides that the standard to be applied by the trial court is whether, "upon the weight of the evidence and the law there has been shown no right to relief."[175] The amendment makes clear that the trial court may weigh the evidence, may determine the credibility of witnesses, and may decide whether the plaintiff, or party with the burden of proof, has established a right to relief or defense during the case-in-chief.[176] The Rules Committee noted that all cases holding contrary to the new Trial Rule 41(B) standard were effectively overruled by the amendment.[177]

4. Trial Rule 75: Venue Requirements.—As amended, Trial Rule 75 now allows interlocutory appeal of an order transferring or refusing to transfer a case under the venue provisions.[178] This amendment represents a complete change from the previous rule. It should be noted that the new provision expressly provides that an interlocutory appeal will not stay the trial court proceedings unless the trial or ap-

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[172]*See, e.g.*, Fielitz v. Allred, 173 Ind. App. 540, 541-43, 364 N.E.2d 786, 787 (1977); Building Systems, Inc. v. Rochester Metal Prods., Inc., 168 Ind. App. 12, 14, 340 N.E.2d 791, 793 (1976).

[173]*See* State *ex rel.* Peters v. Bedwell, 267 Ind. 522, 527, 371 N.E.2d 709, 712 (1978) (jury may find against party with burden of proof who has established a prima facie case).

[174]*E.g.*, Emerson Electric Co. v. Farmer, 427 F.2d 1082 (5th Cir. 1970); Ellis v. Carter, 328 F.2d 573 (9th Cir. 1964).

[175]IND. R. TR. P. 41(B). The amendment adopted the holding in Ferdinand Furniture Co. v. Anderson, 399 N.E.2d 799 (Ind. Ct. App. 1980).

[176]IND. CODE ANN., IND. R. TR. P. 41 Supreme Court Committee note (West Supp. 1982).

[177]*Id.* The committee note lists several cases which were overruled by the amendment, including Fielitz v. Allred, 173 Ind. App. 540, 364 N.E.2d 786 (1977) and Building Systems, Inc. v. Rochester Metal Prods., Inc., 168 Ind. App. 12, 340 N.E.2d 791 (1976).

[178]IND. R. TR. P. 75(E).

pellate court so orders. This provision conforms to the general rule on interlocutory appeals.[179]

5. Trial Rule 79: Special Judge Selection.—The 1982 amendment modified subsections (4), (8), and (10) of Trial Rule 79. As amended, subsection (4) provides that each party in an adversary proceeding "shall" strike or move from the list of three prospective special judges submitted by the presiding judge.[180] The rule was amended in order to make clear that the parties are obligated to strike.[181]

Subsections (1), (6), and (7) provide for the appointment of a special judge by the Indiana Supreme Court under certain circumstances. As amended, subsection (8) no longer specifically designates particular courts to which subsections (1), (6), and (7) are inapplicable, but makes the supreme court's appointment power inapplicable to any court from which an appeal is allowed to a circuit court or a court of coordinate jurisdiction.[182] The amendment has the effect of making the supreme court's power to appoint a special judge applicable to any court where orders or judgments may be appealed directly to the Indiana Supreme Court or the Indiana Court of Appeals.[183] As pointed out in the Committee note, statutes that permit direct appeal to the court of appeals from the Marion County Municipal Court[184] will have, as a result of the amendment to Trial Rule 79, the further effect of extending supreme court appointment of special judges to municipal and other lower courts.

Subsection (10) sets forth the time limits within which a presiding judge must take action to nominate a list of prospective special judges, and within which the parties must strike from that list.[185] The amendment to this subsection decreased the time within which the presiding judge is required to nominate the list and to submit it to the parties, after his attention has been called to the necessity for nomination, from three days to two days. The amendment also increased the time within which the parties must strike from two days to not less than seven nor more than fourteen days thereafter, as the judge may allow. These changes are in conformity with the time limits applicable to change of venue from the county.[186]

This subsection also was amended to provide for contingencies in

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[179]*See* IND. R. APP. P. 4(B)(5)(c).

[180]IND. R. TR. P. 79(4). The prior rule had read "may" strike.

[181]IND. CODE ANN., IND. R. TR. P. 79 Supreme Court Committee note (West Supp. 1982).

[182]IND. R. TR. P. 79(8).

[183]IND. CODE ANN., IND. R. TR. P. 79 Supreme Court Committee note (West Supp. 1982).

[184]*See, e.g.*, IND. CODE § 33-6-1-8 (1982).

[185]IND. R. TR. P. 79(10).

[186]*See* IND. R. TR. P. 76(9); IND. R. CRIM. P. 12.

the event either party fails to strike within the time allowed. If the moving party fails to strike, he is not entitled to a change of venue from judge, and the presiding judge reassumes jurisdiction in the case.[187] If the nonmoving party fails to strike, the clerk strikes for him.[188] The addition of these provisions is consistent with the amendment of subsection (4) and essentially states the result of failure to strike under prior case law.[189]

[187]IND. R. TR. P. 79(10).

[188]*Id.*

[189]*See* State *ex rel.* Goins v. Sommer, 239 Ind. 296, 299-300, 156 N.E.2d 885, 887 (1959).