

III. Civil Procedure and Jurisdiction

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A. Jurisdiction, Process, Venue, and Standing

1. *Jurisdiction.*—In *Hexter v. Hexter*,¹ the Indiana Court of Appeals interpreted the United States Supreme Court decision in *Shaffer v. Heitner*.² Suit was brought to enforce three judgments rendered by an Ohio court of general jurisdiction for arrearages in child support payments and attorney fees. In the Indiana suit, the plaintiff obtained in rem authority over the defendant's property. The court of appeals sustained the jurisdiction of the Indiana trial court against motions to dismiss which had been filed in the trial court under Trial Rule 12(B)³ and Trial Rule 4.4(A),⁴ denied, and raised on appeal. The defendant argued that under *Shaffer* the exercise of

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¹386 N.E.2d 1006 (Ind. Ct. App. 1979). For discussion of another aspect of this case, see text accompanying notes 64-66 *infra*.

²433 U.S. 186 (1977), discussed in Harvey, *Civil Procedure and Jurisdiction, 1977 Survey of Recent Developments in Indiana Law*, 11 IND. L. REV. 51, 51-52 (1978) [hereinafter cited as Harvey, 1977 Survey].

³IND. R. TR. P. 12(B) provides in part:

Every defense, in law or fact, to a claim for relief in any pleading, . . . shall be asserted in the responsive pleading thereto if one is required; except that at the option of the pleader, the following defenses may be made by motion:

- (1) Lack of jurisdiction over the subject-matter,
- (2) Lack of jurisdiction over the person,

. . . .

- (6) Failure to state a claim upon which relief can be granted which shall include failure to name the real party in interest under Rule 17.

⁴IND. R. TR. P. 4.4 (A) sets out seven separate bases for the assertion of jurisdiction over a person or organization that is a nonresident of the state, or a resident of the state who has left the state, or a person whose residence is unknown, as to any action arising from the listed acts which were committed by that person or organization, or his agent. Among those listed acts are: "(1) doing any business in this state; (2) causing personal injury or property damage by an act or omission done within this state; . . . (5) owning, using, or possessing any real property or an interest in real property within this state"

In addition, IND. R. TR. P. 64(B)(2) provides for the attachment and garnishment, at the onset of an action, of any interest in tangible or intangible property owned by the defendant, if it is subject to execution, proceedings supplemental to execution, or any creditor process allowed by law, except wages or salaries.

The defendant's motion to dismiss maintained, of course, that the action against him did not fall among the jurisdictional bases under Indiana law.

in rem jurisdiction over this property was improper because he had had no contact with the State of Indiana which would support in personam jurisdiction.

The appellate court held that while the argument "might have had merit [if the Indiana trial court were] adjudicating some underlying controversy between the parties, it is of no moment where, as here, the suit is one to enforce an existing judgment."⁵ The court observed that this precise situation had been addressed in *Shaffer* by Justice Marshall⁶ who noted that there "would seem to be no unfairness in allowing an action to realize on [a judgment debt from the debtor to the plaintiff] in a State where the defendant has property, whether or not that State would have jurisdiction to determine the existence of the debt as an original matter."⁷

Another United States Supreme Court case, *Kulko v. Superior Court*,⁸ addressed the in personam jurisdiction requirements enunciated in *Shaffer*. In *Kulko*, a husband and wife had established their marital domicile in New York, but the wife had obtained a divorce in Haiti which included a separation agreement giving each parent certain rights of visitation concerning the children. The wife brought suit in California to establish the divorce and to modify the custody agreement and increase the child support obligations of the father. The father had no earlier relationship to California other than sending one of the children there to live with the mother.

The Supreme Court held that California could not assert jurisdiction over the father because the appellant had derived "no personal or commercial benefit from his child's presence in California."⁹ The court held further that California could not find as a basis for personal jurisdiction under the "minimum contacts" rule that the father had allowed one of the children to spend more time with the mother than was required by the separation agreement.¹⁰

The *Kulko* holding, among others, was reviewed in *Oddi v. Mariner-Denver, Inc.*¹¹ In *Oddi*, the plaintiff sued for injuries, claiming that she had been bitten by bed bugs while staying in the defendant's hotel in Denver, Colorado. Suit was brought in Indiana against Holiday Inn of America and the Holiday Inn (Mariner-Denver) in Denver.

The federal district court held, on a motion to dismiss, that jurisdiction was not available under any of the provisions of Trial

⁵386 N.E.2d at 1007.

⁶*Id.*

⁷433 U.S. at 210-11 n.36.

⁸436 U.S. 84 (1978).

⁹ *Id.* at 100.

¹⁰*Id.* at 94.

¹¹461 F. Supp. 306 (S.D. Ind. 1978).

Rule 4.4.¹² The court had no jurisdiction under Trial Rule 4.4(A)(3),¹³ because the out-of-state harm did not cause a tortious injury in the State of Indiana, or under Trial Rule 4.4(A)(1), because the defendant was not doing any business in this state.¹⁴ Citing both *Shaffer* and *Kulko*, the court concluded that Mariner-Denver's contacts with Indiana did not form the basis for the cause of action, and that there were, at best, only the barest minimal contacts with Indiana.¹⁵

The court also held that there was no jurisdiction over Holiday Inn of America, a Tennessee corporation with its principal place of business in Tennessee:

The mere fact that it may have subsidiaries, franchisees or licensees in this state does not subject it to the jurisdiction of this state. The general rule is that a foreign parent corporation will not be subjected to a state's jurisdiction merely because of its ownership of a subsidiary corporation doing business within the state.¹⁶

The pleading of subject matter jurisdiction was also discussed during the survey period in *Campbell v. Campbell*,¹⁷ wherein the Indiana court held that in a suit brought under a special statutory proceeding, the plaintiff must plead sufficient jurisdictional facts and set out the statutory provision under which the plaintiff is proceeding.¹⁸

2. *Standing ("Ripeness") in the Form of Access to Courts when Subject Matter and Personal Jurisdiction is Established or Alleged.*— In *Hines v. Elkhart General Hospital*,¹⁹ the plaintiff challenged the constitutionality of the Indiana Medical Malpractice Act of 1975,²⁰ claiming, *inter alia*, that the statute violated article 1, section 12 of the Indiana Constitution, which guarantees the right of access to the

¹²*Id.* at 308-10.

¹³IND. R. TR. P. 4.4(A)(3) provides for jurisdiction over nonresidents causing personal injury or property damage in this state by an occurrence, act, or omission done outside this state if he regularly does or solicits business or engages in any other persistent course of conduct, or derives substantial revenue or benefit from goods, materials, or services used, consumed, or rendered in this state

¹⁴See note 4 *supra*.

¹⁵461 F. Supp. at 308-09.

¹⁶*Id.* at 310.

¹⁷388 N.E.2d 607 (Ind. Ct. App. 1979) (child custody dispute). See notes 75-79 *infra* and accompanying text.

¹⁸*Id.* at 609 n.3. Compare this requirement with the required plea of jurisdiction in FED. R. CIV. P. 8(a).

¹⁹465 F. Supp. 421 (N.D. Ind. 1979). For a discussion of another aspect of this case, see text accompanying notes 159-62 *infra*.

²⁰IND. CODE §§ 16-9.5-1-1 to -10-5 (1976 & Supp. 1979).

courts of Indiana and remedy for injury to person, property, or reputation. The plaintiff claimed that the "costs and delays resulting from the medical review panel procedure established by the Act, and the Act's limitation upon damages recoverable against health care providers for medical malpractice clearly violate [the constitutional] proscriptions."²¹ The federal district court rejected this claim, stating that the claimant's right to pursue his claim is not a fundamental right, and that the administrative remedy required in medical malpractice statutes and the added expenses that result do not constitute a violation of due process.²²

The Indiana Supreme Court held, in *Wilson v. Review Board of Indiana Employment Security Division*,²³ that under certain circumstances a trial court could entertain an action even though the plaintiff had failed to exhaust her administrative remedies.²⁴ The plaintiff challenged the procedures employed by the defendant on constitutional grounds, contending that under the Indiana Employment Security Act,²⁵ the court of appeals has the exclusive right to review decisions by the board, and that the trial court was without jurisdiction in this case.²⁶

The court observed that the rule requiring exhaustion of administrative remedies "should not be applied mechanistically."²⁷ Instead, the court should consider the following pertinent factors: "[T]he character of the question presented, i.e., whether the question is one of law or fact; the adequacy or competence of the available administrative channels to answer the question presented; the extent or imminence of harm to the plaintiff if required to pursue administrative remedies, and; the potential disruptive effect which judicial intervention might have on the administrative process."²⁸

The supreme court concluded that in the present case the question presented was of a "constitutional character, [involving] a purely legal issue . . . beyond the expertise of the Division's administrative channels and . . . thus a subject more appropriate for judicial consideration."²⁹

3. *Standing in the Form of Determining Whether a Party Can Invoke the Court's Jurisdiction.*—In *Board of Trustees v. City of*

²¹465 F. Supp. at 431-32.

²²*Id.* at 433. The court also observed that if suit is filed and the case goes to trial, "the judge or jury remain the final arbiter of factual questions concerning the liability and quantum." *Id.* (quoting *Everett v. Goldman*, 359 So. 2d. 1256, 1269 (La. 1978)).

²³385 N.E.2d 438 (Ind. 1979).

²⁴*Id.* at 441.

²⁵IND. CODE §§ 22-4-1-1 to -8-3 (1976 & Supp. 1979).

²⁶*See id.* § 22-4-32-13 (1976).

²⁷385 N.E.2d at 441.

²⁸*Id.*

²⁹*Id.*

Fort Wayne,³⁰ the Indiana Supreme Court held that, because standing determines whether the complaining party is a proper party to invoke a trial court's jurisdiction, lack of standing is a restraint upon the court's exercise of jurisdiction. If there is no demonstrable injury to the complaining party or person, the trial court cannot proceed.³¹ Thus, standing is used here to define a jurisdictional element of a case or controversy, without which the court has no authority or power to render a decision on a dispute before it.³²

A similar case³³ developed when the Indiana Medical Licensing Board adopted certain resolutions which defined the practice of chiropractic in such a way that chiropractic analysis did not include the performance and interpretation of cardiograms, blood tests, urinalysis, or other analyses.³⁴ The Indiana State Chiropractic Association and the Indiana Society of Chiropractic Physicians filed suit for declaratory and injunctive relief, alleging that the proposed rules would emasculate the practice of chiropractic in Indiana.

The court of appeals held that in the absence of a showing of injury to the associations, they did not have standing to bring the action.³⁵ Because the individual chiropractors, and not the associations, would be subject to malpractice claims, there was no showing of infringement of the associations' legal interest.³⁶ Citing *City of Indianapolis v. Indiana State Board of Tax Commissioners*,³⁷ which held that the absence of standing was a restraint upon the trial court's *jurisdiction*, the court concluded that the trial court could not proceed.³⁸

4. *Service of Process*.—In *Green v. Carlson*,³⁹ the plaintiff was the administratrix of the estate of a deceased prisoner who had been in a federal prison in Terre Haute, Indiana. Suit was brought against certain prison administration officials and other employees, alleging, generally, that the defendants were responsible for the death of the deceased. Process was effected upon the Assistant Surgeon General of the United States, Mr. Brutshe, and upon the

³⁰375 N.E.2d 1112 (Ind. 1978).

³¹*Id.* at 1117.

³²*Id.* The case was remanded to the trial court for a determination of the issue of standing of the City of Fort Wayne. This litigation, brought to decide questions of annexation of territory in Allen County, has proceeded for 27 years. *Id.* at 1114.

³³*Medical Licensing Bd. v. Indiana State Chiropractic Ass'n*, 373 N.E.2d 1114 (Ind. Ct. App. 1978).

³⁴*Id.* at 1114-15.

³⁵*Id.* at 1116.

³⁶*Id.*

³⁷261 Ind. 635, 308 N.E.2d 868 (1974).

³⁸373 N.E.2d at 1116.

³⁹581 F.2d 669 (7th Cir. 1978), *cert. granted*, 47 U.S.L.W. 3813 (U.S. June 18, 1979) (No. 78-1261).

Director of the Federal Bureau of Prisons, Mr. Carlson, by certified mail pursuant to Federal Rule of Civil Procedure 4(e),⁴⁰ which allows the use of Indiana's service of process rules, and Indiana's bases of jurisdiction under Trial Rule 4.4.⁴¹ The district court dismissed the nonresident defendants, and the federal court of appeals reversed, holding that "Indiana Trial Rule 4.4 . . . provides for service by certified mail. Both defendants had contacts with Indiana sufficient to permit use of this provision and to meet the requirements of due process."⁴²

The court's reasoning in *Green* on the jurisdictional and process questions was very general. Apparently the court considered that the out-of-state defendants, the named federal officials, had control over the federal prison at Terre Haute, Indiana, or that the officials there were subject to their control. Thus, the allegations made by the plaintiff's administratrix would bring those federal officials under Trial Rule 4.4(A)(2), or perhaps (A)(3). If that is so, then Trial Rule 4.4 does allow service of process as provided elsewhere in Trial Rule 4. Trial Rule 4.1(A)(1), which provides for certified mail, was apparently used in this case.⁴³

In *Grecco v. Campbell*,⁴⁴ the defendant attempted to obtain relief from a default judgment entered because he did not respond to service of process which was served on him at his "place of abode." The court held that service was proper and that the definition of "a party's 'dwelling house' or usual place of abode within the context of [Trial

⁴⁰FED. R. CIV. P. 4(e) provides in part that "whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons . . . upon a party not . . . found within the state," the federal district court may effect service according to that state statute or rule of court.

⁴¹IND. R. TR. P. 4.4(B) provides in part: "A person subject to the jurisdiction of the courts of this state under this rule may be served with summons: (1) as provided by Rules 4.1 (service on individuals) . . ."

⁴²581 F.2d at 676.

⁴³IND. R. TR. P. 4.1(A) provides:

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 acknowledgement 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; or

(2) delivering a copy of the summons and complaint to him personally; or

(3) leaving a copy of the summons and complaint at his dwelling house or usual place of abode with some person of suitable age and discretion residing therein; or

(4) serving his agent as provided by rule, statute or valid agreement.

⁴⁴386 N.E.2d 960 (Ind. Ct. App. 1979).

Rule] 4.1 is a question that must turn on the particular facts of each case."⁴⁵

The significance of service and failure to appear is great, not only because a default judgment may be entered, but also because the three-day notice rule under Trial Rule 55(B),⁴⁶ to which a party is entitled who is to be defaulted, is not applicable when the defaulted party has not made an appearance.⁴⁷ Additionally, insufficient or defective service of process is remedied when a party makes an entry of appearance to defend the action,⁴⁸ and a defendant who enters the court and seeks some form of relief or disposition from the trial court, such as a change of venue, has voluntarily submitted to the trial court's jurisdiction, and the absence of personal jurisdiction is waived.⁴⁹

An unusual interpretation of the service of process provisions appeared in *Eicher v. Walter A. Doerflein Insurance Agency*.⁵⁰ Service was attempted by certified mail with return receipt requested pursuant to Small Claims Rule 3.⁵¹ The notice of the claim was returned by the United States Postal Service bearing the notation "unclaimed." The plaintiff attempted no other method of service. It would appear here that "unclaimed" meant that the notice of claim was refused by the defendants. The court of appeals held that this process did not "establish a reasonable probability that defendant received such notice."⁵² As a result, a default judgment which had been entered against the defendants was ordered vacated.

⁴⁵*Id.* at 962.

⁴⁶IND. R. TR. P. 55(B) provides in part: "If the party against whom judgment by default is sought has appeared in the action, he . . . shall be served with written notice of the application for judgment at least three (3) days prior to the hearing on such application."

⁴⁷386 N.E.2d at 962.

⁴⁸*Hexter v. Hexter*, 386 N.E.2d 1006, 1009 (Ind. Ct. App. 1979).

⁴⁹*Killearn Properties, Inc. v. Lambright*, 377 N.E.2d 417, 419 (Ind. Ct. App. 1978). For a discussion of the court's holding on sufficient minimum contacts for establishing personal jurisdiction, see *In re Marriage of Rinderknecht*, 367 N.E.2d 1128, 1136 n.11 (Ind. Ct. App. 1977); *Harvey*, 1977 *Survey*, *supra* note 2, at 52 n.5. *Rinderknecht* contains an excellent discussion of the law on raising the issue of lack of personal jurisdiction. If the claim is not raised at the first opportunity, that is, one's first pleading or motion, it is lost or waived. It is important that the question be properly raised in the trial court, in order that the jurisdictional question will be preserved on appeal.

⁵⁰384 N.E.2d 1126 (Ind. Ct. App. 1979).

⁵¹IND. R. SM. CL. 3 provides in part: "For the purpose of service the notice of claim shall also be considered to be the summons. A copy of the notice of claim shall be served upon each defendant by registered or certified mail with return receipt requested."

⁵²384 N.E.2d at 1126 (quoting IND. R. SM. CL. 10(B)). IND. R. SM. CL. 10(B) provides in part:

Before default judgment is entered, the court shall examine the notice of claim and return thereof and make inquiry, under oath, of those present so

It is suggested that if the return was refused by the defendants, service of process was more than adequate, and the default judgment should have been sustained. The opinion should be limited to the specific facts of the case and should not be used as precedent elsewhere.

In a major case, the Supreme Court in *Memphis Light, Gas & Water Division v. Craft*⁵³ held that the due process clause⁵⁴ is applicable to a termination of service by a municipal utility.⁵⁵ The plaintiffs had received notification of the termination of utility services to their newly purchased home because of nonpayment of monthly bills. The plaintiffs had been receiving "double billing" due to an error on the part of the utility.

The Supreme Court considered the adequacy of notice and the adequacy of a hearing before an identifiable property right or interest can be disturbed by a municipal utility. The Court held that although the notification procedure which the utility used was adequate to inform the plaintiffs of the threat of termination of service, it was not reasonably calculated to inform them of the availability of an opportunity to present their objections to their bills or an opportunity for a hearing of the question. Accordingly, notice in this case did not comply with constitutional requirements.⁵⁶

It now seems clear that if an administrative remedy or proceeding is available to the user of a municipal utility, notification of that remedy is constitutionally required, along with the usual notification of termination of the utility's service. The property interest of the user cannot be disturbed without that type of "extra" notification.⁵⁷

5. *Forum Non Conveniens and Comity*.—In *Killearn Properties, Inc. v. Lambright*,⁵⁸ a suit arose from an alleged conspiracy to sell Florida real estate in violation of both state and federal law. Suit was brought in Indiana. The defendants' motion to have the

as to assure the court that:

(a) Service of notice of claim was had under such circumstances as to establish a reasonable probability that the defendant received such notice.

⁵³436 U.S. 1 (1978).

⁵⁴U.S. CONST. amend. XIV, § 1.

⁵⁵436 U.S. at 22.

⁵⁶*Id.* at 14-15.

⁵⁷The Court said: "Many of the Court's decisions in this area have required additional procedures to further due process, notwithstanding the apparent availability of [other forms of relief]." *Id.* at 20 n.26 (citing *North Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Goss v. Lopez*, 419 U.S. 565 (1975); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Bell v. Burson*, 402 U.S. 535 (1972); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969)).

⁵⁸377 N.E.2d 417 (Ind. Ct. App. 1978).

case transferred to Florida pursuant to Trial Rule 4.4(C)⁵⁹ was denied by the trial court.⁶⁰

The defendants argued that Florida was the more convenient forum because the land was located there, the contract of sale was executed there, and all of the defendants were either residents of Florida, or corporations whose principal place of business was in Florida. The Indiana appellate court sustained the trial court's ruling.⁶¹ Because several defendants who were not parties to the appeal, along with the plaintiffs and several prospective witnesses, were residents of Indiana, there was no abuse of the trial court's discretion in refusing to transfer the case to a Florida court.⁶² The court of appeals stated that the review standard under Trial Rule 4.4(C) was whether the trial court had abused its discretion in ruling on a motion made pursuant to that provision.⁶³

The provisions of Trial Rule 4.4(C) were also explored in *Hexter v. Hexter*.⁶⁴ The appellant argued that, because the same action had been brought in Virginia in 1975, the principle of "comity" should require dismissal of the action by the Indiana court. The court rejected this argument on the ground that comity was not a mandatory law, but a rule "of practice, convenience, and courtesy."⁶⁵ Because the Virginia suit had not proceeded further since 1975, there was little danger that the defendant would be subjected to inconsistent judgments.⁶⁶

6. *Change of Venue*.—It is a general rule that a timely motion for change of venue divests the court of jurisdiction to take any action except to grant the motion.⁶⁷ The policies of Trial Rule 76 are

⁵⁹IND. R. TR. P. 4.4(C) provides:

Jurisdiction under this rule is subject to the power of the court to order the litigation to be held elsewhere under such reasonable conditions as the court in its discretion may determine to be just.

In the exercise of that discretion the court may appropriately consider such factors as:

. . . .

(2) Convenience to the parties and witnesses of the trial in this state in any alternative forum;

(3) Differences in conflict of law rules applicable in this state and in the alternative forum; or

(4) Any other factors having substantial bearing upon the selection of a convenient, reasonable and fair place of trial.

⁶⁰377 N.E.2d at 418.

⁶¹*Id.*

⁶²*Id.* at 419.

⁶³*Id.*

⁶⁴386 N.E.2d 1006 (Ind. Ct. App. 1979). For discussion of another aspect of this case, see text accompanying notes 1-7 *supra*.

⁶⁵*Id.* at 1008.

⁶⁶*Id.*

⁶⁷*City of Fort Wayne v. State ex rel. Hoagland*, 342 N.E.2d 865 (Ind. Ct. App. 1976).

"to guarantee a fair and impartial trial by making the automatic change of venue available, . . . [and] to avoid protracted litigation by imposing a time limit after which a change of venue motion shall be denied."⁶⁸ Trial Rule 76(3) provides that "in those cases where no pleading or answer may be required to be filed by the defending party to close issues . . . each party shall have thirty (30) days after the filing of such case within which to request a change from the judge or the county."⁶⁹

*In re Marriage of Brown*⁷⁰ was a case involving an action for the dissolution of a marriage. The petition was filed on May 25, 1977, and the counter-petition and answer on June 3, 1977. A motion for change of venue from the county was filed on June 14, 1977. The trial court denied the motion because it was filed later than ten days after the close of issues, and the case proceeded to trial.

On appeal the court held that denial of the motion was error because the thirty-day time limit for a request for change of venue under Trial Rule 76(3) applies to every case in which no pleading or answer is required to be filed, even if the defending party actually files a pleading or answer.⁷¹ In this case, the defendant filed an answer, although none is required for the dissolution of a marriage.⁷²

If the suit is a proceeding supplemental, however, or in the nature of a proceeding supplemental, then no change of venue is allowed. The supreme court so held in a case⁷³ interpreting the Uniform Reciprocal Enforcement of Support Act of 1961.⁷⁴ The court reasoned that the enforcement of a foreign support decree, in which the parties were the same as in the original proceeding, was in the nature of a continuing proceeding. Although it was necessary for the judgment or foreign order to first be confirmed in Indiana, the nature of the suit, enforcement of a prior support order, remained the same. Thus no change of venue was permitted.⁷⁵

B. Pleadings and Pre-Trial Motions

1. *Pleadings to Conform to the Evidence Under Trial Rule 15(B).*—Trial Rule 7(A)⁷⁶ requires, of course, an answer to a com-

⁶⁸State *ex rel.* Yockey v. Superior Court, 261 Ind. 504, 506, 307 N.E.2d 70, 71-72 (1974), discussed in Harvey, *Civil Procedure & Jurisdiction, 1976 Survey of Recent Developments in Indiana Law*, 10 IND. L. REV. 88, 98 (1976).

⁶⁹IND. R. TR. P. 76(3).

⁷⁰387 N.E.2d 72 (Ind. Ct. App. 1979). The pleadings aspect of this case is discussed in text accompanying notes 82-84 *infra*.

⁷¹*Id.* at 73-74.

⁷²IND. CODE § 31-1-11.5-4(c) (1976).

⁷³State *ex rel.* Greebel v. Endsley, 379 N.E.2d 440. (Ind. 1978).

⁷⁴IND. CODE §§ 31-2-1-1 to -39 (1976) (amended 1979).

⁷⁵379 N.E.2d at 441.

⁷⁶IND. R. TR. P. 7(A) provides in part that "[t]he pleadings shall consist of (1) a complaint and an answer . . ." See also IND. R. TR. P. 8(B), 8(D).

plaint. Some cases arise, however, in which none is required.

In *In re Estate of Swank*,⁷⁷ the trial court's dismissal of a petition for the removal of a representative and the appointment of a special administrator was sustained on appeal.⁷⁸ The appellant argued that the trial court should not have considered the motion to dismiss because it was filed pursuant to Trial Rule 12(B)(6) after the twenty-day time limit imposed by Trial Rule 6(C).⁷⁹ The appellate court held that a responsive pleading to the petition for removal was not required because the controlling statute and provisions for removal do not demand adherence to the formal rules of pleading.⁸⁰ The petition was regarded as merely ancillary to the probate of a will, and thus neither Trial Rule 7 nor Trial Rule 6(C) controlled the question of the time when a motion to dismiss could have been considered.⁸¹

A similar observation was made in *In re Marriage of Brown*,⁸² a suit for the dissolution of marriage. The court pointed out that the statute⁸³ required no responsive pleading.⁸⁴ Such a statute is a qualification, obviously, of Trial Rule 7(A).

An important qualification of Trial Rule 8(A)⁸⁵ is found in *Campbell v. Campbell*,⁸⁶ although the case does not actually discuss the rule. *Campbell* was a statutory proceeding under the Uniform Child Custody Jurisdiction Act⁸⁷ for a change of child custody. There was no allegation in the complaint concerning the jurisdiction of the trial court. Generally, no such allegation is required in a state court when the court is one of general jurisdiction. In this case, however, the court held that a plea of jurisdiction was required:

⁷⁷375 N.E.2d 238 (Ind. Ct. App. 1978).

⁷⁸*Id.* at 241.

⁷⁹IND. R. TR. P. 6(C) determines the time for filing a responsive pleading when one is required and the time for filing a responsive pleading if a motion under Trial Rule 12(B) has been filed. But Trial Rule 6(C) *does not control* the time when a Trial Rule 12(B) motion must be filed; it speaks to the effect of filing such a motion on a responsive pleading, or the effect such a motion has after the trial court has ruled on it. Thus, the attorney's argument in this case was considerably wide of the mark, but it shows the confusion which may be present in the bench and bar. *DeHart v. Anderson*, 383 N.E.2d 431 (Ind. Ct. App. 1978), makes this very important distinction. See note 104 *infra* and accompanying text.

⁸⁰375 N.E.2d at 240.

⁸¹*Id.* See generally IND. R. TR. P. 1.

⁸²387 N.E.2d 72 (Ind. Ct. App. 1979).

⁸³IND. CODE § 31-1-11.5-4(c) (1976).

⁸⁴387 N.E.2d at 73. A responsive pleading was in fact filed.

⁸⁵IND. R. TR. P. 8(A) states in part that "a pleading must contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief . . ." There is no provision for the allegation of jurisdiction under Trial Rule 8(A).

⁸⁶388 N.E.2d 607 (Ind. Ct. App. 1979).

⁸⁷IND. CODE §§ 31-1-11.6-1 to -24 (Supp. 1979).

While it is generally not necessary to plead jurisdictional facts, such averments must be made in a special statutory proceeding. Such averments go to the subject matter jurisdiction of the court. In this respect, the Act is analogous because subject matter jurisdiction cannot be established without the ascertainment of jurisdictional facts.⁸⁸

The court also held that a clause in the complaint factually showing the jurisdiction of the court under the Act must be pleaded and proved when jurisdiction is denied.⁸⁹

Under *Campbell*, a plea to establish the subject matter jurisdiction must be set out, and the parties do not establish the prerequisite jurisdiction by a failure to raise the issue, even if such failure is by positive consent. In short, parties cannot create subject matter jurisdiction by their consent.

An affirmative defense will be waived if not asserted, even if the affirmative defense is not listed among those defenses set out in Trial Rule 8(C).⁹⁰ Thus, in *United Farm Bureau Mutual Insurance Co. v. Wolfe*,⁹¹ the insurance company failed to raise the affirmative defense of performance of a condition precedent in its responsive pleading, and the court held that under Trial Rules 8(C) and 9(C)⁹² the defense was waived.⁹³

⁸⁸388 N.E.2d at 609 n.3 (citations omitted).

⁸⁹*Id.* at 608-10.

⁹⁰IND. R. TR. P. 8(C) lists the following affirmative defenses:

Accord and satisfaction, arbitration and award, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, lack of jurisdiction over the subject-matter, lack of jurisdiction over the person, improper venue, insufficiency of process or service of process, the same action pending in another state court of this state, and any other matter constituting an avoidance, matter of abatement, or affirmative defense.

⁹¹382 N.E.2d 1018 (Ind. Ct. App. 1978).

⁹²IND. R. TR. P. 9(C) states:

In pleading the performance or occurrence of promissory or non-promissory conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed, have occurred, or have been excused. A denial of performance or occurrence shall be made specifically and with particularity, and a denial of excuse generally.

⁹³382 N.E.2d at 1020. The defense in question was lack of written consent to bring an uninsured motorist's suit, a condition precedent to the suit.

In *Delaware County v. Powell*, 382 N.E.2d 958 (Ind. Ct. App. 1978), the plaintiff sued the county in a complaint filed very near the expiration of the statute of limitations, and did not give the county notice within 180 days of the loss or injury, as required by the applicable statute, IND. CODE §§ 34-4-16.5-7 to -12 (1976). The plaintiff was injured by a county highway truck. After the injury the county paid for the plaintiff's medical expenses and loss of wages. The question whether the county was estopped from asserting lack of notice was thus factually raised. The court of appeals held that

If an affirmative defense is properly in evidence before the court, even though not affirmatively pleaded, and the party opposing the defense fails to object to the evidence which supports it, the defense is not waived. In *Homemakers Finance Service, Inc. v. Ellsworth*,⁹⁴ the affirmative defense of accord and satisfaction was raised in that way, and the court in accordance with Trial Rule 15(B)⁹⁵ allowed the question to be litigated.⁹⁶

A similar case is *Puckett v. McKinney*,⁹⁷ a suit for defamation and interference with a contractual expectancy brought by a school teacher against the principal of the school. The defendant school principal did not plead the defense under Trial Rule 8(C) of a qualified privilege to make certain statements. The court of appeals held that the defense had been raised in the case by evidence not objected to by the plaintiff.⁹⁸ Thus, under Trial Rule 15(B), the issue was tried by the implied consent of the parties and treated as if it had been raised by the pleadings.⁹⁹

the notice provision in the tort claim statute was a procedural precedent which could be tolled by incompetency or waived under Trial Rule 8(C) by the defendant's failure to assert the plaintiff's noncompliance in the responsive pleading. *Id.* at 962. The court held that the notice provision is different from other affirmative defenses under Trial Rule 8(C), and that once the issue of notice has been raised by the defendant the plaintiff must show either actual or substantial compliance with the notice provision, or the action is barred. *Id.* The court observed that the notice provision is akin to a true statutory condition precedent: once it is properly placed in issue, it is not subject to either estoppel or waiver as a result of any prior action by the defendant or the defendant's agent. *Id.* The court affirmed a summary judgment against the plaintiff, holding that neither knowledge of the occurrence nor investigation of the accident by the defendant is sufficient to meet the purposes of the statute and that timely written notice to the county is imperative. *Id.* See Harvey, 1977 Survey, *supra* note 2, at 54-55.

⁹⁴380 N.E.2d 1285 (Ind. Ct. App. 1978).

⁹⁵IND. R. TR. P. 15(B) states that "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated . . . as if they had been raised in the pleadings." Accordingly, the pleadings may be amended upon a motion made at any time to show that the issues were tried.

⁹⁶380 N.E.2d at 1288.

⁹⁷373 N.E.2d 909 (Ind. Ct. App. 1978).

⁹⁸*Id.* at 911.

⁹⁹See *State v. Gradison*, 381 N.E.2d 1259 (Ind. Ct. App. 1978), a condemnation action for highway construction in which a deed conveying a certain parcel to the landowner was admitted *without objection from the state*. The court of appeals held that admission of the evidence created an issue in the litigation, and that the trial court may properly amend the pleadings under Trial Rule 15(B) to conform to the evidence in the case. *Id.* at 1263. The nature of the request to amend a pleading under Trial Rule 15(B) is discussed in *2625 Bldg. Corp. v. Deutsch*, 385 N.E.2d 1189, 1194 (Ind. Ct. App. 1979), in which the plaintiff's counsel in his opening statement indicated that he was proceeding on two theories of recovery, and at the close of the evidence informed the court that he was proceeding on only one theory. The court of appeals held that the plaintiff had, in effect, requested the trial court to amend the pleading to conform to the evidence. *Id.*

2. *Amended Pleadings and Failure to Respond.*—Trial Rule 8(D) provides that “[a]verments in a pleading to which a responsive pleading is required, except those pertaining to amount of damages, are admitted when not denied¹⁰⁰ The question then arises, may the pleading be amended under Trial Rule 15(A)?¹⁰¹ If there is no opportunity to amend as of right under the first sentence of Trial Rule 15(A), an amendment may be made only at the discretion of the trial court. The court in *B & D Corp. v. Anderson, Clayton & Co.*,¹⁰² a major class action, held that exercise of the trial court’s sound discretion would be reviewed on appeal only for an abuse of that discretion, and that this privilege allowed the trial judge to decide, within the confines of justice, what was equitable.¹⁰³

If that discretion is exercised, and a pleading is amended under Trial Rule 15(A), then certain rules concerning the time for filing pre-pleading motions are affected. In *DeHart v. Anderson*,¹⁰⁴ the court apparently held that an amended pleading under Trial Rule 15(A) will replace the original pleading for all purposes, and that when permission is given to amend a pleading, it will effect an extension of time for answers to the pleading, including preliminary motions.¹⁰⁵ Accordingly, the time for making a motion under Trial Rule 12(B) is governed by Trial Rule 12(B), and not Trial Rule 6(C), which speaks to the effect of a motion under Trial Rule 12(B) once it is made.¹⁰⁶ Thus, when the trial court allowed the defendant to file an amended answer, and thereby granted an extension of time in which to answer, the effect was to extend the time for preliminary motions as well. The complaint was filed on July 29, 1975, for recovery for personal injuries. The trial court allowed an amended answer to be filed on November 20, 1975. On the same date the defendant also filed a motion to dismiss, which raised the statute of limitations. The motion was timely filed because it was filed with the amended complaint.¹⁰⁷

¹⁰⁰*Construed in* *Inter-City Contractors Serv., Inc. v. Consumer Bldg. Indus., Inc.*, 373 N.E.2d 903 (Ind. Ct. App. 1978).

¹⁰¹IND. R. TR. P. 15(A) provides in part:

A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted, and the action has not been placed upon the trial calendar, he may so amend it at any time within thirty (30) days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party

¹⁰²387 N.E.2d 476 (Ind. Ct. App. 1979).

¹⁰³*Id.* at 482.

¹⁰⁴383 N.E.2d 431 (Ind. Ct. App. 1978).

¹⁰⁵*Id.* at 436.

¹⁰⁶*Id.*

¹⁰⁷*Id.* at 436-37.

3. *Pre-Trial Motions.*—A motion to dismiss under Trial Rule 12(B)(6) attacks the adequacy of the complaint by stating that it fails to allege a claim for relief. Such a motion must meet the test in *State v. Rankin*.¹⁰⁸ A complaint is not subject to dismissal “unless it appears to a certainty that the plaintiff would not be entitled to relief under any set of facts.”¹⁰⁹

In 1970 a blight epidemic infested the 1970 corn crop yielded from T hybrid seed corn and reduced the crop nationwide by no less than 500 million bushels. That epidemic became the subject of an Indiana class action in *B & D Corp. v. Anderson, Clayton & Co.*,¹¹⁰ which came before the court of appeals after the trial court granted a motion to dismiss an amended complaint, apparently on the ground that the complaint did not adequately allege that the defendants were jointly and severally liable to the plaintiffs for damages arising from the same occurrence or series of occurrences.

The court of appeals treated the question as one in which “at the very least a description of the tortious conduct forming the basis of the plaintiff’s claim” must be alleged.¹¹¹ The court found that “the amended pleading in the present case reveals no fact allegations describing any such joint action as complained of by Corn Farmers [plaintiffs] in the second amended complaint.”¹¹²

It is suggested that the appellate court was in error in the decision. It applied a test to determine the adequacy of a complaint which was expressly rejected by the Indiana Supreme Court in *Rankin*.

In *Rankin* the supreme court stated: “We might note that certain cases from the Court of Appeals apparently state that the plaintiff is required to state in his complaint the theory upon which his claim is based. Although a statement of the theory may be highly desirable, it is not required.”¹¹³ The court in *B & D Corp.* quoted from the *Rankin* opinion but omitted the first sentence quoted above which gave meaning to the *Rankin* test.¹¹⁴ The *Rankin* court expressly rejected *Cheatham v. City of Evansville*,¹¹⁵ which embraced the theory-of-relief-in-the-complaint test instead of the standard that a complaint is inadequate only if it appears that the plaintiff would not be entitled to relief under any set of facts.

¹⁰⁸260 Ind. 228, 294 N.E.2d 604 (1973).

¹⁰⁹*Id.* at 230-31, 294 N.E.2d at 606.

¹¹⁰387 N.E.2d 476 (Ind. Ct. App. 1979).

¹¹¹*Id.* at 481 (quoting *Kiyose v. Trustees of Indiana Univ.*, 116 Ind. App. 34, 44-45, 333 N.E.2d 886, 891 (1975)).

¹¹²387 N.E.2d at 481.

¹¹³260 Ind. at 231, 294 N.E.2d at 606 (citations omitted).

¹¹⁴387 N.E.2d at 481.

¹¹⁵151 Ind. App. 181, 278 N.E.2d 602 (1972).

The facts in the *B & D Corp.* complaint were extensively pleaded in any event; it is suggested that this opinion attempts a revival of the test for determining the adequacy of a complaint which the Indiana Supreme Court has specifically rejected.¹¹⁶

If a motion to dismiss is granted under Trial Rule 12(B)(1), the dismissal will be a final and appealable order because the trial court has held that there is no subject matter jurisdiction.¹¹⁷ A motion for summary judgment in a pre-trial motion resting solely on the movant's answer with no further information provided shall be treated as one for judgment on the pleadings under Trial Rule 12(C).¹¹⁸

C. Parties and Discovery

1. *Joinder of Parties.*—In *Gumz v. Starke County Farm Bureau Cooperative*,¹¹⁹ the plaintiff grain elevator operators brought suit against four persons who farmed in excess of four thousand acres. The suit concerned twenty-five contracts for the production of grain to be sold to the grain elevators. The defendants were charged with conspiracy to defraud the plaintiffs by contracting to sell more grain than they could produce. The defendants argued that under Trial Rule 20(A)¹²⁰ joinder of parties was improper because there was no right to relief from the same transaction, although the defendants did not dispute that similar questions of fact applied to all parties. The court of appeals held that there was no error in the joinder and that Trial Rule 20(A) did not require a "precise congruence of all factual and legal issues."¹²¹ The court stated further that "[a] charge of conspiracy alleges a series of transactions related by a common purpose or intent and is usually sufficient to meet the requirements of Trial Rule 20(A)."¹²²

¹¹⁶The court of appeals correctly followed the *Rankin* test in *Mobile Enterprise, Inc. v. Conrad*, 380 N.E.2d 100 (Ind. Ct. App. 1978), and *Elmore v. City of Sullivan*, 380 N.E.2d 108 (Ind. Ct. App. 1978). The court found the complaint adequate in *Conrad*, 380 N.E.2d at 102, but affirmed a dismissal in *Elmore* because of the failure to set out an ordinance in the complaint. 380 N.E.2d at 110.

¹¹⁷*Huffman v. Eastern Bartholomew Water Corp.*, 376 N.E.2d 1171, 1172 (Ind. Ct. App. 1978).

¹¹⁸*Estate of Tanasijevich v. City of Hammond*, 383 N.E.2d 1081, 1083 (Ind. Ct. App. 1978).

¹¹⁹383 N.E.2d 1061 (Ind. Ct. App. 1978).

¹²⁰IND. R. TR. P. 20(A) allows, generally, parties to be permissively joined in one action if they assert a right, or if there is asserted against them a claim, which arises out of the same transaction, occurrence, or series of transactions or occurrences, and if there is a question of law or fact common to all plaintiffs or defendants in the action.

¹²¹383 N.E.2d at 1064.

¹²²*Id.* Cf. *United Farm Bureau Family Life Ins. Co. v. Fultz*, 375 N.E.2d 601 (Ind. Ct. App. 1978) (appellate rule correctly used to interplead multiple claimants to insurance proceeds).

2. *Intervention.*—In *Indiana Bankers Association v. First Federal Savings & Loan Association*,¹²³ certain bankers petitioned to intervene pursuant to Trial Rule 24(A),¹²⁴ and alternatively under Trial Rule 24(B).¹²⁵ The petition was denied, and an appeal was effected.

The court of appeals concentrated on the question whether the order was sufficiently final, especially in light of Trial Rule 24(C),¹²⁶ to be appealed and concluded that it was not.¹²⁷ The court said, however, that Trial Rule 24(C) should be read with Appellate Rule 4(B)(5),¹²⁸ and that an appeal should be encouraged under the latter rule, thus concluding that Appellate Rule 4(B)(5) should take precedence and provide a procedural avenue for appellate review of a ruling on a motion to intervene.¹²⁹

3. *Discovery.*—In *Augustine v. First Federal Savings & Loan Association*,¹³⁰ the supreme court held that before a trial court can consider the testimony found in depositions in ruling on motions before or during trial, the deposition must be published.¹³¹ The court considered the ruling to be consistent with Trial Rule 32(B)¹³² and Indiana Code section 34-1-16-2,¹³³ and held that it was error for the court of appeals to consider the depositions in reviewing a trial court's summary judgment order.¹³⁴ The third sentence of Trial Rule

¹²³387 N.E.2d 107 (Ind. Ct. App. 1979).

¹²⁴IND. R. TR. P. 24(A) permits intervention of right.

¹²⁵IND. R. TR. P. 24(B) allows permissive intervention.

¹²⁶IND. R. TR. P. 24(C) states in part: "The [trial] court's determination upon a motion to intervene may be challenged only by appeal from the final judgment or order in the cause."

¹²⁷383 N.E.2d at 107.

¹²⁸IND. R. APP. P. 4(B)(5) allows for the appeal of an interlocutory order which is otherwise not appealable as a matter of right under IND. R. APP. P. 4(B)(1) to (4), if the order is interlocutory and if both the trial court and the appellate court certify that the order is appealable. See *Costanzi v. Ryan*, 368 N.E.2d 12 (Ind. Ct. App. 1977), the leading case on this appellate rule of procedure, discussed in Harvey, *Civil Procedure and Jurisdiction, 1978 Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 42, 65 (1979).

¹²⁹387 N.E.2d at 109. See also *Hinds v. McNair*, 153 Ind. App. 473, 481, 287 N.E.2d 767, 770-71 (1972), cited in *Indiana Banker's Ass'n*, 387 N.E.2d at 108.

¹³⁰384 N.E.2d 1018 (Ind. 1979).

¹³¹*Id.* at 1020. Publication is "the breaking of the sealed envelope containing the conditional examination and making it available for use by the parties or the court." *Id.*

¹³²IND. R. TR. P. 32(B) states: "Subject to the provisions of Rules 28(B) and subdivision (D)(3) of this rule, objection may be made at the trial or hearing to receiving in evidence any depositions or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying."

¹³³IND. CODE § 34-1-16-2 (1976) provides: "The record of any deposition recorded under the provisions of the last section, and copies of such record, duly certified, may be used as evidence, whenever and wherever the original deposition might be used."

¹³⁴384 N.E.2d at 1022.

56(C)¹³⁵ requires *only* that the deposition be on file, not that it be published, and it is suggested that this decision was incorrect. In addition, if the *Augustine* decision is read as reviving a pre-1970 statute on depositions,¹³⁶ it would appear to be inconsistent with a number of decisions which have held that the Trial Rules govern if they are in conflict with prior statutory or decisional law.¹³⁷

In *J.Y. v. D.A.*,¹³⁸ the court held that, in the absence of a dispositive rule on the subject, it was within the discretion of the trial court to remove sanctions for failure to make discovery imposed under Trial Rule 37(B).¹³⁹ The trial court had entered a sanction against a party in a paternity action, enjoining him from introducing evidence upon certain matters contained in interrogatories. The trial court's grant of the plaintiff's oral motion to remove the sanction was sustained by the appellate court.¹⁴⁰ In *Motor Dispatch, Inc. v. Buggie*,¹⁴¹ the court of appeals sustained a similar order from the trial court rejecting admission of certain check registers because the defendant in the action failed to comply with discovery orders issued by the trial court.¹⁴²

In the criminal case of *Crocker v. State*,¹⁴³ the appellate court sustained a trial court order which refused to permit three persons to testify for the defense.¹⁴⁴ Defense counsel had failed to comply with a court order to disclose the names of witnesses no later than fourteen days before trial.¹⁴⁵ The opposite situation developed in *Richardson v. State*.¹⁴⁶ The defendant had moved for a protective

¹³⁵IND. R. TR. P. 56(C), in its third sentence, states: "The judgment sought shall be rendered forthwith if the pleadings, depositions, answer to interrogatories, and admissions on file, together with the affidavits and testimony, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." For a correct interpretation of IND. R. TR. P. 56(C), which has little if any impact on IND. R. TR. P. 32(B), see *Smith v. P. & B. Corp.*, 386 N.E.2d 1232 (Ind. Ct. App. 1979).

¹³⁶IND. CODE ANN. § 2-1520 (Burns 1968) (repealed 1969).

¹³⁷*E.g.*, *City of Mishawaka v. Stewart*, 261 Ind. 670, 310 N.E.2d 65 (1974).

¹³⁸381 N.E.2d 1270 (Ind. Ct. App. 1978).

¹³⁹*Id.* at 1271. IND. R. TR. P. 37(B) provides for such sanctions as contempt, damages, or default, for the failure to comply with orders which compel discovery.

¹⁴⁰381 N.E.2d at 1274.

¹⁴¹379 N.E.2d 543 (Ind. Ct. App. 1978).

¹⁴²*Id.* at 545.

¹⁴³387 N.E.2d 645 (Ind. Ct. App. 1978).

¹⁴⁴*Id.* at 647.

¹⁴⁵The Indiana court held that *Washington v. Texas*, 388 U.S. 14 (1967), was distinguishable because here no arbitrary decision or rule or statute had been invoked to totally deny the defendant the right to call any one of a class of witnesses to testify. 378 N.E.2d at 647. In *Ottinger v. State*, 370 N.E.2d 912 (Ind. Ct. App. 1977), the court held that an accused forfeits his right to call a witness by his own failure to comply with discovery orders. *Id.* at 916.

¹⁴⁶388 N.E.2d 488 (Ind. 1979).

order excluding the testimony of a witness because the witness had twice failed to appear for a scheduled deposition. The trial court granted, instead, a one-day continuance so that defense counsel could examine the witness. The supreme court held that issuance of such an order was discretionary and could properly be denied when the party who seeks the discovery does not ask the court's assistance until trial has begun.¹⁴⁷

In another criminal case, the defense counsel moved to take depositions in Florida at the state's expense. The appellate court sustained the trial court's denial of the motion and observed that in view of the alternative forms of discovery, such as those provided by Trial Rule 31,¹⁴⁸ and in light of the expense to be imposed on the state by the defendant's motion, the trial court's discretion was correctly exercised.¹⁴⁹

4. *Dismissal*.—In *Noble v. Moistner*,¹⁵⁰ the trial court had entered an order of dismissal because the plaintiff failed to answer certain questions on an interrogatory, in violation of the trial court's previous order to respond and answer. The court of appeals, in an interpretation of Trial Rules 37(B)(2) and (4), required that the trial court make two determinations before granting dismissal. First, the trial court must find responsibility on the part of the party and deponent under Trial Rule 37(B)(2)(c).¹⁵¹ Such a finding generally means that the party acted in bad faith, but that determination is not needed where, as here, the trial court's order is violated. Second, the trial court must find that the conduct in question violates the rights of the opposing party in such a way that no other relief would be adequate.¹⁵² The court of appeals reversed the order dismissing the plaintiff's action and remanded the case for a specific finding on the burden of proof so that the issue of prejudice could be determined.¹⁵³

D. Trial and Judgment

1. *Trial by Jury*.—The courts discussed the right to trial by jury in two decisions, *Owens v. State ex rel. Van Natta*,¹⁵⁴ and *Hines v. Elkhart General Hospital*.¹⁵⁵

¹⁴⁷*Id.* at 490.

¹⁴⁸IND. R. TR. P. 31 provides for depositions to be taken upon written questions, cross-questions, and redirect questions.

¹⁴⁹*Haskett v. State*, 386 N.E.2d 1012, 1014 (Ind. Ct. App. 1979).

¹⁵⁰388 N.E.2d 620 (Ind. Ct. App. 1979).

¹⁵¹*Id.* at 621. IND. R. TR. P. 37(B)(2)(c) speaks of conduct which is "in bad faith and abusively resisting or obstructing a deposition . . ." or other forms of discovery.

¹⁵²388 N.E.2d at 621. See IND. R. TR. P. 37(B)(4).

¹⁵³*Id.* at 621-22.

¹⁵⁴382 N.E.2d 1312 (Ind. Ct. App. 1978).

¹⁵⁵465 F. Supp. 421 (N.D. Ind. 1979). For discussion of another aspect of this case,

In *Owens*, the Indiana Court of Appeals held that the proceeding by which Owens' driver's license had been suspended for several years did not violate a right to trial by jury under either the United States or Indiana Constitutions.¹⁵⁶ The court relied upon *Hiatt v. Yergin*¹⁵⁷ in holding that the process wherein a habitual traffic offender's driver's license is revoked is an administrative hearing, which is neither a civil nor a criminal trial to which the right of trial by jury attaches.¹⁵⁸

In *Hines*, the federal district court concluded that the Indiana Medical Malpractice Act¹⁵⁹ did not foreclose or pre-empt a right to trial by jury, in that a jury trial may eventually result after compliance with the medical malpractice statute.¹⁶⁰ The court pointed out that, unlike some statutes and decisions in other jurisdictions, the medical panel's decision was not a final determination of the medical malpractice controversy.¹⁶¹ Thus, there was no total abolition of trial by jury that had caused statutes in other states to be held unconstitutional.¹⁶²

2. *Impeachment of Jury Verdict.*—In *Henry v. State*,¹⁶³ the appellants were convicted of offenses arising from the use or sale of heroin. On appeal, the appellants argued that the jury improperly arrived at the sentences which were imposed. In support, the appellants attached to their joint motion to correct error an affidavit in which their counsel related that he had been approached after the trial by two jurors who described the manner in which the jury arrived at the sentences.

The supreme court stated that "even assuming that the trial court was bound to accept the hearsay averments of the affidavit, the use of juror's testimony . . . to demonstrate improprieties in the method by which the jury reached its verdict constitutes impeachment of that verdict by the jurors, which is not permitted."¹⁶⁴

3. *Involuntary Dismissal.*—In *Puckett v. Miller*,¹⁶⁵ the plaintiff sued the defendant for shooting and killing two of the plaintiff's dogs which were loose and roaming in the defendant's property, and appeared to be attacking certain fowl belonging to the defendant. As a part of the plaintiff's case, the plaintiff called the defendant to

see text accompanying notes 19-22 *supra*.

¹⁵⁶382 N.E.2d at 1315.

¹⁵⁷152 Ind. App. 497, 284 N.E.2d 834 (1972).

¹⁵⁸382 N.E.2d at 1315.

¹⁵⁹IND. CODE §§ 16-9.5-1-1 to -9-10 (1976 & Supp. 1979).

¹⁶⁰465 F. Supp. at 426.

¹⁶¹*Id.* at 429.

¹⁶²*Id.* at 428-29.

¹⁶³379 N.E.2d 132 (Ind. 1978).

¹⁶⁴*Id.* at 139.

¹⁶⁵381 N.E.2d 1087 (Ind. Ct. App. 1978).

the witness stand. At the conclusion of the plaintiff's case, the defendant moved for an involuntary dismissal under Trial Rule 41(B), which the trial court granted.

Each member of the three-judge panel submitted a separate opinion. The majority opinion by Judge Staton held that it was proper for the trial court to weigh evidence upon a motion made under Trial Rule 41(B) when, as in this case, both parties had testified, and "both 'versions' of the story were before the court."¹⁶⁶

Judge Chipman concurred in the result and dissented in part and, after reviewing the history of Trial Rule 41(B), concluded that only a change in the rule would allow an Indiana trial court to weigh evidence under a Trial Rule 41(B) motion.¹⁶⁷ Judge Hoffman dis-

¹⁶⁶*Id.* at 1091.

¹⁶⁷*Id.* at 1092 (Chipman, J., concurring and dissenting). Judge Chipman made specific reference to a continuing debate which has been conducted between the author and certain members of the court about the standard to be used in Trial Rule 41(B). The judge stated:

The Court of Appeals has had this similar issue before it on several previous occasions. The most recent case was *Fielitz v. Alfred*, [364 N.E.2d 786 (Ind. Ct. App. 1977)] and was commented upon by Dean William F. Harvey in his works [W. HARVEY, 3 INDIANA PRACTICE 13 (Supp. 1979)] in which he stated, "it is submitted that the Court of Appeals erred in *Fielitz*, and in the line of cases it represents." Obviously Dean Harvey is urging that Indiana follow the various Circuit Courts of Appeal that have interpreted the comparable Federal Rule as giving the trial court the right to weigh the evidence in a trial to the court in deciding a TR 41(B) motion.

381 N.E.2d at 1092 (Chipman, J., concurring and dissenting) (footnotes omitted).

Judge Chipman reviewed the original advisory committee notes in 1968, as reported in R. TOWNSEND, INDIANA RULES OF CIVIL PROCEDURE 166-69 (1968), and observed that the proposed draft of Trial Rule 41(B) was "identical to the Federal Rule and not the rule finally adopted by the Indiana Supreme Court on July 29, 1969 after enactment by the 1969 General Assembly." 381 N.E.2d at 1092. The judge then observed that even before the change by the supreme court and the legislature, the advisory committee notes stated that no change would develop in former Indiana practice by adopting the original or federal rule under Trial Rule 41(B). *Id.* at 1093. The notes cited *Garrett v. Estate of Hoctel*, 128 Ind. App. 23, 142 N.E.2d 449 (1957), to support the proposition that a trial court cannot weigh the evidence when a motion is made under Trial Rule 41(B). R. TOWNSEND, INDIANA RULES OF CIVIL PROCEDURE 169 (1968). Judge Chipman concluded his opinion by stating, "I do not feel that it is the function of the Indiana Court of Appeals to either legislate or attempt to amend the existing Trial Rules." 381 N.E.2d at 1093.

Judge Chipman is entirely correct, of course, in his view of the judicial function. Nevertheless, the Indiana Supreme Court in *P-M Gas & Wash Co. v. Smith*, 375 N.E.2d 592 (Ind. 1978), discussed in Harvey, *Civil Procedure and Jurisdiction, 1978 Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 42, 67-68 (1979), demonstrated that it is always within the competency of the appellate court to correct mistakes or misinterpretations of the Trial Rules, however set in precedent they might have become. In *P-M Gas* the court expressly overturned at least twelve decisions which had incorrectly interpreted Trial Rule 59. *Id.* at 597-98. That decision might be instructive here.

The *Garrett* decision was a claim in probate for services rendered to a deceased

sented, but concurred with Judge Chipman's concurring opinion.¹⁶⁸

4. *Motion for Judgment on the Evidence.*—Trial Rule 50(A) allows a motion for judgment on the evidence to be made at the close of the plaintiff's case, and after the presentation of all of the evidence. In *Ortho Pharmaceutical Corp. v. Chapman*,¹⁶⁹ the plaintiff Chapman sued the defendant for personal injury suffered as a result of taking an oral contraceptive manufactured by the defendant. The defendant offered evidence on its own behalf after the close of the plaintiff's case. As a result, any error which occurred in overruling the defendant's motion for judgment on the evidence made at the close of the plaintiff's case was waived.¹⁷⁰

The defendant renewed the motion at the close of all of the evidence. The appellate court stated that such a motion may be granted only if there is a complete failure of proof, that is, no substantial evidence or reasonable inference which is derived therefrom, supporting an essential element of the plaintiff's or non-moving party's claim.¹⁷¹

before death. After the conclusion of the plaintiff's case, the defendant "moved for judgment" and the probate court granted the motion. The Indiana Court of Appeals treated the motion as if it were one for a directed verdict in a jury case and discussed the standard for that motion against a presumption that the plaintiff's services to the deceased were a gratuity. 128 Ind. App. at 32-33, 142 N.E.2d at 453.

The conclusion is clear that either the advisory committee note could not have been correctly addressed to the committee's proposal to adopt Federal Rule 41(b), or the federal rule was plainly misunderstood by the advisory committee.

The legislature added the following words to Trial Rule 41(B): "considering all the evidence and reasonable inferences therefrom in favor of the party to whom the motion is directed, to be true, there is no substantial evidence of probative value to sustain the material allegations of the party against whom the motion is directed." That sentence merely directs the trial court's attention to the body of evidence, which under this trial rule must be considered. It did not deny to the trial court the competency to *find the facts*, after considering that evidence. That is the meaning of the very next sentence in Trial Rule 41(B): "The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence."

In short, an Indiana trial court under Trial Rule 41(B) still has the power to weigh the evidence and find the facts either at the end of the plaintiff's case, or at the conclusion of the entire case, and the standards that have developed under Trial Rule 50, which are applicable to a jury trial and are a correlative diminution of a trial court's power, are not applicable to Trial Rule 41(B).

The appellate court decisions in this area, *Fieltiz v. Allred*, 364 N.E.2d 786 (Ind. Ct. App. 1976); *Building Systems, Inc. v. Rochester Metal Prods., Inc.*, 340 N.E.2d 791 (Ind. Ct. App. 1976), and several of the cases cited therein, are in error.

I would be the first to agree that the so-called legislative history on Trial Rule 41(B) is in confusion, but it cannot be understood to support the decisions which have superimposed Trial Rule 50 standards upon Trial Rule 41(B).

¹⁶⁸381 N.E.2d at 1093 (Hoffman, J., dissenting).

¹⁶⁹388 N.E.2d 541 (Ind. Ct. App. 1979).

¹⁷⁰*Id.* at 544 (citing *Meadowlark Farms, Inc. v. Warken*, 376 N.E.2d 122 (Ind. Ct. App. 1978); *Lamb v. York*, 252 Ind. 252, 247 N.E.2d 197 (1969)).

¹⁷¹388 N.E.2d at 544, 558.

The court held that the trial court must consider only the evidence and reasonable inferences which are favorable to the non-moving party, and that the motion must be denied "where there is *any* evidence or legitimate inference therefrom tending to support at least one of the allegations. Where the evidence is such that the minds of reasonable men *might* differ, a directed verdict is improper and the resolution of conflicting evidence is for the jury."¹⁷²

5. *Burden of Proof in Civil Commitment Proceedings.*—In *In re Commitment of Binkley*,¹⁷³ the court of appeals held that the standard of proof required in civil cases, proof by a preponderance of the evidence, was applicable to commitment proceedings pursuant to Indiana Code section 16-14-9.1-7.¹⁷⁴ That decision was overturned *sub silentio* by the United States Supreme Court in *Addington v. Texas*.¹⁷⁵ The Court held that an involuntary commitment proceeding in a state court pursuant to state mental health commitment law must at least meet the evidentiary standard of clear and convincing proof, and that proof by a preponderance of the evidence would not meet the requirements of the due process clause of the fourteenth amendment.¹⁷⁶

6. *Judgment in Favor of Governmental Entity.*—In *Delaware County v. Powell*,¹⁷⁷ the court of appeals held that a judgment or settlement in favor of a governmental entity "bars an action by the claimant against an employee [of the governmental entity] whose conduct gave rise to the claim resulting in the judgment or settlement."¹⁷⁸

¹⁷²*Id.* at 544 (quoting *Vernon Fire & Cas. Ins. Co. v. Sharp*, 264 Ind. 599, 606-07, 349 N.E.2d 173, 179 (1976)). The leading Indiana case, cited by the court, 388 N.E.2d at 544, is *Huff v. Travelers Indem. Co.*, 266 Ind. 414, 363 N.E.2d 985 (1977). *Huff* cites, in turn, to *Vernon. Id.* at 421, 363 N.E.2d at 990. There is a difference in the two opinions which has caused some confusion. The court in *Huff* stated that a trial court may enter judgment only if there is no substantial evidence, or reasonable inference to be adduced therefrom, to support an essential element of the plaintiff's claim. *Id.* The court in *Vernon* indicated that if *any evidence* tends to support at least one of the plaintiff's allegations, a motion for judgment on the evidence directed against the plaintiff's case must be denied. 264 Ind. at 606, 349 N.E.2d at 179.

The language in *Huff* would allow a trial court to determine that evidence was not available which would allow a reasonable inference in support of a plaintiff's allegation, but under *Vernon* a trial court is not permitted to make even that determination. The language in *Vernon* will lead, logically, to the scintilla rule, of which the court in *Huff* specifically disapproved. 266 Ind. at 422, 363 N.E.2d at 990.

¹⁷³382 N.E.2d 952 (Ind. Ct. App. 1978).

¹⁷⁴382 N.E.2d at 955. *But cf.* *State ex rel. Kiritsis v. Marion County Probate Court*, 381 N.E.2d 1245 (Ind. 1978) (privilege against self-incrimination not applicable to civil commitment proceedings).

¹⁷⁵99 S.Ct 1804 (1979).

¹⁷⁶*Id.* at 1810.

¹⁷⁷382 N.E.2d 958 (Ind. Ct. App. 1978).

¹⁷⁸*Id.* at 963 (quoting IND. CODE § 34-4-16.5-5(a) (1976)).

7. *Reinstatement of Dismissed Claim.*—*State ex rel. Jansville Auto v. Superior Court*,¹⁷⁹ concerned a motion under Trial Rule 60(B)(8)¹⁸⁰ to reinstate an action which had been dismissed under Trial Rule 41(E)¹⁸¹ for failure to prosecute or proceed with it. The action, filed originally in April 1972, had been dismissed by the trial court in January 1975 because it had not proceeded. In September 1977 the plaintiff was granted reinstatement by the trial court. The Indiana Supreme Court held that the trial court had the discretion to determine what constituted a reasonable time within the meaning of Trial Rule 60(B) and that it would review only for an abuse of that discretion.¹⁸² Here it appeared that the plaintiff did not receive notice of the dismissal of the cause, and the trial court correctly reinstated the action.

8. *Clerical Mistakes.*—In *Drost v. Professional Building Service Corp.*,¹⁸³ the court of appeals held that a clerical mistake in a judgment, which arose from an oversight or omission, could be corrected even though the mistake was observed after an appeal and “could have been raised in the appeal had proper diligence been exercised.”¹⁸⁴ If the mistake were one of substance, however, then the principle of finality would prevent its correction after the appeal had been taken and concluded.¹⁸⁵

9. *Preliminary Injunctions.*—In *Rees v. Panhandle Eastern Pipe Line Co.*,¹⁸⁶ the plaintiff had an easement through property owned by the defendant Rees. Rees interfered with the plaintiff’s efforts to clear trees and brush from the easement, and the plaintiff obtained a preliminary injunction against Rees’ interference.

On appeal, the court stated that a preliminary injunction can be supported by affidavits, without oral evidence, and that it can be granted on the plaintiff’s affidavit alone.¹⁸⁷ Regarding the showing necessary to make a prima facie case for the issuance of a preliminary injunction, the court adopted the language of *Indiana Annual Conference Corp. v. Lemon*,¹⁸⁸ which established that a party

¹⁷⁹387 N.E.2d 1330 (Ind. 1979).

¹⁸⁰In addition to the specific grounds for relief from judgment enumerated in IND. R. TR. P. 60(B)(1) to (7), 60(B)(8) provides for relief from judgment for “any other reason justifying relief.”

¹⁸¹IND. R. TR. P. 41(E) provides for dismissal of a civil action for failure to take any action for a period of 60 days.

¹⁸²*Id.* at 1331-32.

¹⁸³375 N.E.2d 241 (Ind. Ct. App. 1978).

¹⁸⁴*Id.* at 244. IND. R. TR. P. 60(A) provides for the correction by the court on its own initiative of clerical errors in judgments and orders.

¹⁸⁵375 N.E.2d at 244.

¹⁸⁶377 N.E.2d 640 (Ind. Ct. App. 1978).

¹⁸⁷*Id.* at 645.

¹⁸⁸235 Ind. 163, 167, 131 N.E.2d 780, 782, (1956).

must show a necessity for maintaining the status quo¹⁸⁹ prior to trial, yet need not produce evidence sufficient for a favorable decision on the merits.¹⁹⁰

E. Appeals

1. *Motion to Correct Errors: P-M Gas and Its Progeny.*—In *P-M Gas & Wash Co. v. Smith*,¹⁹¹ the supreme court effected major changes in trial and appellate practice, in relation to Trial Rule 59 and the procedure for perfecting an appeal. Because *P-M Gas* has become critical to Indiana appellate practice, the opinion and its subsequent interpretations require an extensive analysis here.

The case was in the supreme court on transfer from the court of appeals, which had dismissed a cross-appeal by the plaintiff Smith.¹⁹² The court of appeals had ruled that Smith had not complied with Trial Rule 59(D) on assigning cross-errors and thus dismissed Smith's cross-appeal.¹⁹³

After the jury verdict, Smith had filed a motion to correct error which was granted in the trial court and a new trial was ordered. At that point, the defendant-appellant filed a motion to correct error and perfected its appeal. In his appellate brief, Smith cross-assigned error and raised those questions found in his original motion to correct error which had been overruled by the trial court.

The supreme court in *P-M Gas* overruled twelve decisions which had required the filing of a second motion to correct error if, as a result of the first motion to correct errors, a trial court had effected a change other than granting a new trial in a final order or judgment.¹⁹⁴

The court held that Appellate Rule 4(A)¹⁹⁵ should be understood to allow either, or any, party to appeal a ruling on a motion to correct error.¹⁹⁶ Trial Rule 59(G) requires a party to make a motion to correct error if that party seeks to raise error which occurred at

¹⁸⁹Status quo means that the parties should be placed in their "non-contested" position, that is, the "last actual, peaceable, and non-contested status which preceded the pending controversy." 377 N.E.2d at 646 (quoting *Professional Beauty Prod., Inc. v. Schmid*, 497 S.W.2d 597, 599 (Tex. Ct. App. 1973)).

¹⁹⁰377 N.E.2d at 646.

¹⁹¹375 N.E.2d 592 (Ind. 1978), discussed in Harvey, *Civil Procedure and Jurisdiction*, 1978 *Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 42, 67-68 (1979).

¹⁹²352 N.E.2d 91 (Ind. Ct. App. 1976).

¹⁹³*Id.* at 93.

¹⁹⁴375 N.E.2d at 594.

¹⁹⁵IND. R. APP. P. 4(A) states in part: "A ruling or order by the trial court granting or denying a motion to correct errors shall be deemed a final judgment, and an appeal may be taken therefrom."

¹⁹⁶375 N.E.2d at 595.

trial or later in a verdict or judgment. But once a motion to correct error is made, a second motion should never be required from that party.¹⁹⁷

The court also ruled that Trial Rule 59(D) is applicable only when matters *dehors* the record are raised.¹⁹⁸ The parties in this case agreed that no matter *dehors* the record was presented in the appeal.¹⁹⁹

The court explained that

a motion to correct error served three purposes: (1) to present to the trial court an opportunity to correct error which occurs prior to the 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.²⁰⁰

Thus the court held that "[o]ne motion for each party or each appellant, if there is more than one, shall be sufficient,"²⁰¹ and that a "second motion to correct error is not needed, and it is not required by the second sentence found in [Trial Rule] 59(G)."²⁰²

The court, recognizing that it had substantially changed past appellate practice even though it had not altered the language of Trial Rule 59, made a number of rulings, anticipating probable questions which might arise in view of the principal decision. A summary of those rulings follows:

(1) Party *Y* received relief on a motion to correct error; party *X* will complain about it on appeal, and can commence an appeal under Appellate Rule 2(A)²⁰³ without making a motion to correct error. *X*

¹⁹⁷*Id.*

¹⁹⁸*Id.* at 596.

¹⁹⁹The decision in *In re Marriage of Myers*, 387 N.E.2d 1360 (Ind. Ct. App. 1979), is instructive on Trial Rule 59(D). There, an affidavit executed by an attorney concerning a conversation he had with the trial judge suggested that the trial judge had incorrectly interpreted a statute which speaks to the best interest of a child in a custody dispute. The appellate court held that because the affidavit, made under Trial Rule 59(D) and raising matters outside the record, was not contradicted by the opposing attorney or the trial judge, it would be accepted as true and the appeal would be determined on that basis. *Id.* at 1362.

²⁰⁰375 N.E.2d at 594. See the discussion of the purpose of a motion to correct error in *Libunao v. Libunao*, 388 N.E.2d 574, 578 (Ind. Ct. App. 1979).

²⁰¹375 N.E.2d at 595.

²⁰²*Id.* In *Bridge v. Board of Zoning Appeals* 381 N.E.2d 1060 (Ind. 1978), the appellant filed a motion to correct error in the trial court, which was granted in part. An appeal to the court of appeals was dismissed because a second motion to correct error had not been made. On transfer, the supreme court reversed and remanded the case to the court of appeals for an opinion on the merits. *Id.* at 1061.

²⁰³IND. R. APP. P. 2(A) states in part: "An appeal is initiated by filing with the

would then become the appellant, who would appeal the disposition made on *Y*'s motion to correct error. The court stated: "If appellant seeks [only to appeal the favorable relief given to the appellee] because it was incorrect . . . , then it is not necessary for the appellant to do more than request relief on brief in the appellate court."²⁰⁴

These facts were present in *Schmal v. Ernst*.²⁰⁵ There, Schmal appealed because escrow money of \$1,200 was given to Ernst, but was not credited against a judgment of \$12,500. This fact was stated in Ernst's motion to correct error. The appellate court observed that "Schmal was not required to file a motion to correct errors on his own behalf since the only error alleged is the failure of the court to apply the \$1,200 against the judgment."²⁰⁶

(2) If an appellee in the appellate court does no more than answer the appellant's positions and brief, then it is not necessary for the appellee to file a motion to correct error in the trial court. Here an appeal would be perfected from a trial error. Normally, of course, it would be the appellant who would perfect that appeal. The critical distinction which the court made in this situation was between that party who suffered some kind of adverse ruling or disposition before the verdict or judgment, which can be raised only by first making a motion to correct that claimed error, and the party who is now responding, on appeal, to a disposition made in the trial court on another party's motion to correct error.

(3) If the appellant is a party who, for example, seeks to reinstate a jury verdict in his favor which was changed on the appellee's motion to correct error, it is *not* necessary for the appellant to file a motion to correct error if the appellant does not himself raise error adverse to the appellant which occurred before the appellee's motion to correct error. Thus, it is not necessary for the appellant to do more than request relief on brief in the appellate court, after initiating the appeal under the Appellate Rules.

In the foregoing situation, "the complaint on appeal will be measured . . . by the original verdict and judgment and the motion to correct error filed by the appellee *and* the favorable relief given to that motion by the trial court."²⁰⁷

(4) If a party was harmed by error which occurred prior to a verdict or judgment, that party must file a motion to correct error in

clerk of the trial court a praecipe designating what is to be included in the record of proceedings"

²⁰⁴375 N.E.2d at 597.

²⁰⁵387 N.E.2d 96, 98 (Ind. Ct. App. 1979).

²⁰⁶*Id.* at 98.

²⁰⁷395 N.E.2d at 597. See *DeHart v. Anderson*, 383 N.E.2d 431, 434 (Ind. Ct. App. 1978).

order to raise that claimed error on appeal. The errors claimed in the motion to correct error form the basis for his "complaint on appeal."²⁰⁸

An appellee who wants to raise error adverse to him in the course of a trial must also make a motion to correct error. Such a situation could occur when the appellee believes that a judgment which he received might be overturned by the appellate court. Rather than having the appellate court reverse and enter judgment for the appellant, the appellee might be entitled to a new trial. This situation, it is suggested, prompted the supreme court to state the following:

If each party makes a motion to correct error, then each can raise the ruling on that motion and the ruling on the other party's motion on appeal as cross-errors, respectively.

. . . If a party does not make a motion to correct error, he has nothing belonging to him which can be appealed, unless, of course, he is harmed if the other party moves to correct error and the motion is granted in some aspect.²⁰⁹

A major problem remaining after the *P-M Gas* decision concerns the time for making the motion. If an appellant waits until the fifty-ninth day to make a motion to correct error, the appellee may not have sufficient time to make a motion if he wants to raise error on appeal. In this situation, absent a change in the rule, the appellee should be entitled to relief under Trial Rule 60, which provides for relief from judgment, and a trial court should entertain his motion as if it were made under Trial Rule 59.

Another major problem relates to the finality of the order or judgment which the trial court enters. For example, suppose a motion to correct error is made, and the trial court enters an order which is not, in fact, responsive to the motion and does not alter the judgment to which the motion was directed. Perhaps a second motion to correct error is filed by the appellant several days later, and the trial court then enters an order correcting the preceding order and amending the judgment. Question: When does time begin to run for filing the praecipe under Appellate Rule 2(A), which is jurisdictional?

It is suggested that time should begin to run from the order or entry which the trial court regards as its final entry or order and one which finally concludes all matters or questions in the trial court, even if the last entry came as a result of an unnecessary, but

²⁰⁸375 N.E.2d at 597.

²⁰⁹*Id.*

permitted, second or third motion to correct error. If it is necessary to make more than one motion to obtain a clear and final entry by the trial court, the praecipe should be filed and time should run from that last or final entry, and not from the first response to the initial motion to correct error.

2. *New Trial Limited to Damages Only.*—In *State v. Tabler*,²¹⁰ substantial evidence was offered which showed that one plaintiff sustained a loss of \$12,000 in wages, \$31,000 in medical bills, and eighty-five percent disability because of injuries which were described as “horrible.” Even so, the jury awarded only \$7,500 for that plaintiff. Awards to other plaintiffs were also well below that warranted by the evidence. The trial court granted the plaintiffs’ motions to correct errors and awarded a new trial solely on the issue of damages, unless the State would agree to additur in an amount in excess of \$800,000.

On appeal, the court reiterated the principle that a new trial could be limited solely to the issue of damages or, alternatively, additur, although that limitation was not proper in this case.²¹¹ The court cautioned that a new trial limited to damages was proper only when it was clear that the verdict was not a product of compromise, and that when liability was close and other evidence indicated that the jury might have been compromised, a new trial on damages alone would be improper.²¹²

3. *Raising Different Questions on Appeal.*—A party who has made a motion to correct error cannot raise an error or question on appeal different from that which was addressed in his motion, nor can he raise for the first time a question in a motion to correct error which was not preserved during trial by objection or an offer to prove. These statements of law appear often in the appellate court decisions in Indiana, and they raise the inference that trial court practice is not as carefully done as it should be.²¹³

4. *Newly Discovered Evidence.*—The civil case of *Legon Specialized Hauler, Inc. v. Hott*,²¹⁴ and the criminal case of *Bryant v. State*,²¹⁵ support the proposition that a new trial on the basis of newly discovered evidence will be granted if the petitioner can show:

- (1) that the evidence has been discovered since the trial;
- (2) that it is material and relevant; (3) that it is not

²¹⁰381 N.E.2d 502 (Ind. Ct. App. 1978).

²¹¹*Id.* at 504-06.

²¹²*Id.* at 506.

²¹³*E.g.*, *Contech Architects & Eng’rs, Inc. v. Courshon*, 387 N.E.2d 464, 467-68 (Ind. Ct. App. 1979).

²¹⁴384 N.E.2d 1071 (Ind. Ct. App. 1979).

²¹⁵385 N.E.2d 415 (Ind. 1979).

cumulative; (4) that it is not merely impeaching; (5) that it is not privileged or incompetent; (6) that due diligence was used to discover it in time for trial; (7) that the evidence is worthy of credit; (8) that it can be produced upon a retrial of the case; and (9) that it will probably produce a different result.²¹⁶

5. *Small Claims.*—In *Reynolds v. Meehan*,²¹⁷ the court of appeals held that the motion to correct error was the correct and proper method by which an appeal is to be effected from a county court, and that the motion must be filed in compliance with Trial Rule 59.²¹⁸

6. *Entry of Appealable Final Judgment of Order.*—Final orders and judgments are defined, generally, in Indiana by case law as well as by trial rules. A final order or judgment is one which finally determines the rights of the parties involved. If a final judgment or order does not dispose of all of the issues, it will be appealable if it disposes of some distinct and definite branch of the proceeding and leaves no further determination to be made by the trial court on that particular issue.²¹⁹

Trial Rule 54(B)²²⁰ and Trial Rule 56(C)²²¹ each define "finality."²²² An order under Trial Rule 23(C)(1), which allows an action to exist as a class action, is a final determination and appealable as such.²²³ However, a discovery order or an order effecting discovery, without

²¹⁶*Id.* at 421 (quoting *Tungate v. State*, 238 Ind. 48, 54-55, 147 N.E.2d 232, 235-36 (1958)).

²¹⁷375 N.E.2d 1119 (Ind. Ct. App. 1978).

²¹⁸*Id.* at 1122. In *Strube v. Sumner*, 385 N.E.2d 948 (Ind. Ct. App. 1978), the court of appeals sustained MARION COUNTY R. SM. CL. 16(B), which requires the appellant to post an appeal bond in appealing from the Marion County Small Claims Court to the Marion County Superior Court, against a constitutional attack made under the equal protection clause of the Indiana Constitution, art. 1, § 12, and the fourteenth amendment to the United States Constitution. 375 N.E.2d at 952. The small claims court had set Strube's appeal bond at \$1,215.04. Compare IND. CODE § 33-11.6-4-5 (1976), under which MARION COUNTY R. SM. CL. 16(B) was adopted, with IND. CODE § 33-11.6-6-10 (1976 & Supp. 1979) (effective Jan. 1, 1979).

²¹⁹*Hansbrough v. Indiana Revenue Bd.*, 164 Ind. App. 56; 61, 326 N.E.2d 599, 602 (1975).

²²⁰IND. R. TR. P. 54(B) states in part that a trial court may direct the entry of a final judgment on fewer than all of the claims of the parties "upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment."

²²¹IND. R. TR. P. 56(C) allows the entry of a final judgment on an order for summary judgment which is directed to less than all of the issues involved.

²²²*Stanray Corp. v. Horizon Constr., Inc.*, 342 N.E.2d 645 (Ind. Ct. App. 1976), is a leading Indiana case on the subject. See also *Geyer v. City of Logansport*, 317 N.E.2d 893 (1974).

²²³*Gulf Oil Corp. v. McManus*, 363 N.E.2d 223 (Ind. Ct. App. 1977).

a special certification under Appellate Rule 4(B)(5), is not appealable as an interlocutory order.²²⁴

In *Hudson v. Tyson*,²²⁵ the court of appeals held that a trial court order which directs a defendant to make payment to the plaintiff is a final judgment and not an interlocutory order appealable under Appellate Rule 4(B).²²⁶ No motion to correct error need be filed in order to perfect an appeal from an interlocutory order.²²⁷ If a motion to correct error is filed, however, then the time sequence which is built into that motion will control the time sequence in the appeal. Nevertheless, the court appeared to hold that the final judgment in these circumstances might be appealed as if it were an interlocutory order or judgment.²²⁸ If so, the time sequence established for an interlocutory order appeal would control the appeal. The court's opinion appears to be squarely opposite to the same court's opinion in *Protective Insurance Co. v. Steuber*.²²⁹

In *Pounds v. Pharr*,²³⁰ the court of appeals held that a default entry not reduced to judgment is a final and therefore appealable order.²³¹

7. *Appeals: Interlocutory Orders.*—The circuit court in *In re Estate of Garwood*²³² had entered an order which directed a special administrator of an estate to effect the sale of certain real property in the estate to a buyer. The order was entitled a "judgment," but the court of appeals did not accept it as a final judgment or appealable as such.

The majority held that the order to sell real estate was interlocutory under Appellate Rule 4(B)(2).²³³ Because the appeal was effected pursuant to a motion to correct error, and not pursuant to the filing of the record of proceedings within thirty days under Appellate Rule 3(B),²³⁴ the appeal was dismissed sua sponte.²³⁵

A concurring opinion said that the appellate court had the authority to remand the case to the trial court for determination of

²²⁴*Greyhound Lines, Inc. v. Vanover*, 160 Ind. App. 289, 311 N.E.2d 632 (1974).

²²⁵383 N.E.2d 66 (Ind. Ct. App. 1978).

²²⁶*Id.* at 69-71.

²²⁷IND. R. TR. P. 59(G).

²²⁸383 N.E.2d at 72.

²²⁹370 N.E.2d 406 (Ind. Ct. App. 1977).

²³⁰376 N.E.2d 1193 (Ind. Ct. App. 1978).

²³¹*Id.* at 1194-95.

²³²382 N.E.2d 1020 (Ind. Ct. App. 1978).

²³³*Id.* at 1021. IND. R. APP. P. 4(B)(2) provides for the appeal of an interlocutory order, as of right, which is "[f]or the delivery of the possession of real property or the sale thereof"

²³⁴Under IND. R. APP. P. 3(B), appeals of interlocutory orders shall have the record of proceedings filed within 30 days of the interlocutory ruling being appealed.

²³⁵382 N.E.2d at 1022.

whether the order was appealable as a final order under Trial Rule 54(B), but that remand was not proper here.²³⁶

8. *Remittitur.*—In a condemnation action against certain church property for the purpose of highway construction, the court of appeals had concluded that the award was nearly \$17,000 over and above any proper evidence of the highest damages assessable, and ordered a remittitur of that amount.²³⁷ The supreme court held that the authority of an appellate court to modify judgments was not only inherent but also specifically provided in Appellate Rule 15(N)²³⁸ and Indiana Code section 34-5-1-2.²³⁹ That authority includes, in a proper case, the power “to direct a remittitur or to affirm, conditioned upon a remittitur.”²⁴⁰ The supreme court believed, however, that the court of appeals might have speculated on certain evidence in the case, and concluded that additional determinations were needed in the courts below.²⁴¹

²³⁶*Id.* at 1023 (Lybrook, J., concurring).

²³⁷*State v. Church of the Nazarene*, 354 N.E.2d 320, 324 (Ind. Ct. App. 1976).

²³⁸IND. R. APP. P. 15(N) provides in part: “An order or judgment upon appeal may be reversed as to some or all of the parties and in whole or in part.”

²³⁹377 N.E.2d 607, 610 (Ind. 1978). *See* IND. CODE § 34-5-1-2 (1976).

²⁴⁰*Id.* at 610.

²⁴¹*Id.* at 611.