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COMMENT

POST TRIAL MOTIONS UNDER THE NEW INDIANA RULES†

EDWIN H. GREENEBAUM‡

The new Indiana Rules of Procedure governing post-trial motions adopt the Federal Rules of Civil Procedure in some respects; in others they carry forward current Indiana Law. Yet other provisions of Trial Rules 50, 52, 59 and 60,¹ however, are novel in form and substance.

There are three central questions or issues which are confronted in the post-trial motion area. The first is: When and under what circumstances may a trial judge decide a case upon his own view of the merits? That issue, of course, must be approached in a very different manner in jury and non-jury trials. The second issue is: When and under what circumstances may a trial judge decide that the disposition of a case on the merits will not be final because of defects or unfairness in the proceedings? The third and last question is: Under what circumstances may a trial court relieve a party from the effects of a judgment which has become final?

In federal practice each of these issues is dealt with in separate rules.² Federal Rules 50 and 52 deal with the decision of cases in jury and non-jury trials respectively; Federal Rule 59 governs the granting of new trials; and Federal Rule 60(b) governs the reopening of judgments after they have become final.

In contrast to the federal practice, the new Indiana Rules deal with these matters in highly interrelated and overlapping provisions. With a few exceptions to be noted, this distinct drafting was not intended to alter the substantive standards applicable to these issues. But form has a way of controlling substance, even in this modern age, and the new rules will pose some challenging questions of construction and administration.

† Adapted from an Address to Annual Conference, Indiana University School of Law Alumni Association, November 7, 1969.

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1. INDIANA RULES OF PROCEDURE, TRIAL RULES (effective date, January 1, 1970) [hereinafter Trial Rules].

2. There are two minor exceptions: FED. R. CIV. P. 59(e) places a time limit on motions to amend judgments in the rule principally governing motions for new trial and FED. R. CIV. P. 60(a), governs the definitive correction of clerical errors. The Federal Rules of Civil Procedure will hereafter be referred to as "Federal Rules."

TRIAL RULE 50

Trial Rule 50 is entitled "Judgment on the Evidence (Directed Verdict)." Under this rule trial judges may displace juries even though a constitutional right to jury trial has been properly claimed. The new rule is intended to carry forward the traditionally restrictive standards regarding when trial judges may take such strong action. The language of the rule, the legislative history behind it³ and the use of the phrase "directed verdict" in parentheses in the title of the rule, apparently in apposition to the phrase "Judgment on the Evidence," so indicate. The Reporter's Comments to the Civil Code Study Commission Draft speak of motions under this rule as "subject to substantive law principles."⁴

There will, however, be sources of confusion on this matter. The title "Judgment on the Evidence" is much less effective in warning the court that a jury is being displaced than is the language in the Federal Rules: "Directed Verdict" and "Judgment Notwithstanding the Verdict." Also, the new rule explicitly joins constitutional juries and advisory juries, subjecting both to the same standard of review in motions for judgment on the evidence.⁵ Traditionally and constitutionally the rules governing when a trial judge may ignore an advisory jury are distinct matters, the trial judge having considerable latitude in this regard. Another source of confusion occurs because the question of displacing the jury is dealt with redundantly in Trial Rule 59, the Motion to Correct Errors. The ground that "the verdict or decision is not supported by sufficient evidence . . . , or is contrary to the evidence" is included in a list of nine grounds for the correction of errors.⁶ The various remedies for defects in the proceedings are then listed in a separate subdivision;⁷ there it is learned that granting a new trial because a verdict is contrary to the evidence is a burdensome

3. The Proposed Draft of this rule as advanced by the Civil Code Study Commission stated that trial judges could displace juries in cases where critical "issues . . . are not supported by any reasonable evidence or a verdict thereon is clearly erroneous as contrary to the evidence." Indiana Civil Code Study Commission, Indiana Rules of Civil Procedure (Proposed Final Draft, 1968) [hereafter Proposed Draft] Rule 50(A). The Supreme Court's Committee on Rules amended this to the rule's current articulation, speaking of issues not supported by "sufficient evidence" and has added to the concept of verdicts which are "clearly erroneous as contrary to the evidence" the language, "because the evidence is insufficient to support" them. This language conforms more closely to that previously used in Indiana cases on directed verdicts.

4. Proposed Draft at 186. Loosening of restrictions on directed verdicts may raise constitutional issues. See, *Galloway v. United States*, 319 U.S. 372 (1943).

5. "Where all or some of the issues in a case tried before a jury or advisory jury are not supported by sufficient evidence . . . the court shall withdraw such issues from the jury. . . ." Trial Rule 50(A).

6. Trial Rule 59(A)(4).

7. Trial Rule 59(E).

matter for a trial judge and that judgments on the evidence are much to be preferred to new trials.⁸

TRIAL RULE 52

Trial Rule 52 governs the decision of cases tried without juries. Of course, at the end of such a trial, the decision of the case is the sole responsibility of the trial judge. He is to exercise his own judgment with or without the help of an advisory jury. Questions do arise, however, regarding when a trial judge may change his mind.

In federal practice, motions for amended or additional findings under Federal Rule 52(b) serve primarily to permit the clarification of a court's findings in order to provide a sounder and more revealing record for appellate review.⁹ There is some dispute as to whether Federal Rule 52(b) may also be used for purposes analogous to rehearings; if a trial judge thinks he has made a mistake, however, there seems to be no reason why he should not be permitted to correct his findings.¹⁰ In any case under the Federal Rules, it is in his discretion, within the time provided, whether to take corrective action. Trial Rule 52 may have restricted this power. Subdivision (B) of Trial Rule 52 specifies that findings and judgments may be amended in four specified circumstances. The stated grounds are all ones which would be appropriate for granting a new trial, and the grammar of the rule suggests that these are the only four grounds upon which amended findings and judgments may be granted.¹¹ In spite of the drafting, it is unlikely that the enumeration of these four conditions was intended to be a limitation. Indiana Supreme Court Rule 1-8, which previously governed, did not contain the restrictive language, and the Reporter's Comments to the Proposed Draft

8. See notes 19-26 *infra* and accompanying text.

9. C. WRIGHT, *FEDERAL COURTS* 429 (1970).

10. See, Nordbye, *Comments on Selected Provisions of the New Minnesota Rules*, 36 MINN. L. REV. 672, 690-92 (1952).

11. Trial Rule 52(B);

Amendment of Findings and Judgment—Causes Therefor. Upon its own motion at any time before a motion to correct errors (Rule 59) is required to be made, or with or as part of a motion to correct errors by any party, the court, in the case of a claim tried without a jury or with an advisory jury, may open the judgment, if one has been entered, take additional testimony, amend or make new findings of fact and enter a new judgment or any combination thereof if: (1) the judgment or findings are either against the weight of the evidence, or are not supported by or contrary to the evidence; (2) special findings of fact required by this rule are lacking, incomplete, inadequate in form or content or do not cover the issues raised by the pleadings or evidence; (3) special findings of fact required by this rule are inconsistent with each other; or (4) the judgment is inconsistent with the special findings of fact required by this rule. . . ."

make no explanation.¹² The circumstances were probably specified to avoid technical objections regarding whether these matters may be raised on Rule 52 motions rather than solely in motions to correct errors, a kind of technicality which has been all too frequent in Indiana practice and which the new rules have tried in various ways to avoid.¹⁸

Indiana practice has been in the past, and will continue to be under Trial Rule 52, distinct from federal practice in two other matters. The Federal Rules require a trial judge to state findings of fact and conclusions of law in all cases which he tried on the facts without a jury.¹⁴ Except in three specified circumstances, Indiana is continuing its rule that specific findings will not be required unless a party has made a written request for them prior to the admission of evidence.¹⁵ This limitation is unduly embarrassing to attorneys. It may be those judges who would be most hostile to such requests from counsel from whom findings should most surely be required.

The remaining distinction between the federal and Indiana rules 52 meriting comment is the omission in the new Indiana rule of an explicit requirement that the judge state conclusions "of law," the language of the new rule being that, where required, the court "shall find the facts specially and state its conclusions thereon."¹⁶ The purpose of requiring stated conclusions of law has been to allow an appellate court to determine whether the trial judge has been asking the right legal questions of the evidence.¹⁷ I do not think that the change in language in the Indiana rule is dramatic enough to inhibit the appellate courts from administering Trial Rule 52 for this purpose.

TRIAL RULE 59

Trial Rule 59 governs what is now to be termed the "Motion to Correct Errors." The name is worth quibbling about briefly. It is true

12. Proposed Draft at 194-95.

13. The appellate courts will have considerable latitude in deciding how strictly they wish to enforce these limitations, taking into account the harmless error principle. See Trial Rule 61.

14. Fed. R. Civ. P. 52(a).

15. Trial Rule 52(A). The exceptions are:

The court shall make special findings of fact without request: (1) in granting or refusing preliminary injunctions; (2) in any review of actions by an administrative agency; and (3) in any other case provided by these rules or by statute. . . . Findings of fact are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(B) (dismissal) and 59(E) (motion to correct errors).

16. Trial Rule 52(A). The corresponding provision of Fed. R. Civ. P. 52(a) reads, "The court shall find the facts specially and state separately its conclusions of law thereon. . . ."

17. See, *Commissioner v. Duberstein*, 363 U.S. 278, 292-93 (1960).

that "new trial" is not fully descriptive of the various things trial judges can do under Rule 59 of the Federal Rules or in motions for new trials in past Indiana procedure. On the other hand, granting a party a remedy for accident, surprise or newly discovered evidence¹⁸ cannot aptly be described as correcting an error. More substantially, the use of the word "error" calls to mind those things for which trial court judgments may be reversed in appellate courts. Two questions are posed: Is there in new Rule 59 a constriction of the trial court's privilege to grant new trials? Second, is the power of the trial court to make definitive dispositions increased at the expense of jury trial? The answer to these questions, in general, is "no," but the answer is not in all respects easy.

A correct and reasonable reading of Trial Rule 59(E)(7) carries forward the traditional distinctions regarding when new trials are appropriate as opposed to entering definitive judgments. The language in Trial Rules 50(A), 59(A), and 59(E)(7) is not fully consistent and parallel, which is unfortunate, but the intent regarding the treatment of jury verdicts is adequately clear.¹⁹ Somewhat more disturbing is the provision in the final paragraph of Trial Rule 59(E) which states that when a new trial is granted, the trial court shall specify its findings supporting its ruling and that if the ground is that "the decision is found to be against the weight of the evidence, the finding shall relate the supporting and opposing evidence to each issue upon which a new trial was granted." This last requirement had been deleted from the rule by the legislature,²⁰ but was reinstated by the Supreme Court in its promulgation of the Rules.²¹ It is striking that the trial judge is placed under a more stringent requirement of findings in awarding new trials than he is when providing for the definitive judgment in a case under Trial Rule 52.²² What is the purpose of this new requirement, which is more burdensome regarding new trials than that found in any other jurisdiction? Surely some trial judges will now be more reluctant to award new trials on the ground that a verdict is against the weight of the evidence. Is it also the intent of the rules that appellate courts will now review more closely such trial

18. Trial Rule 59(A)(2), (6).

19. See notes 3-4 *supra* and accompanying text. The Reporter's Comments to Proposed Draft, at 221, state,

[I]f a nonadvisory jury verdict is involved, the court must weigh the evidence. If the preponderance of the evidence is found to favor a contrary result, the trial court must order a new trial—the court cannot in this case enter judgment in accordance with its views.

20. Acts 1969, ch. 191, § 1 Rule 59(E).

21. This is only one of several places where the Supreme Court has not followed the Act of the General Assembly. Regarding the process of amending the rules, see Trial Rule 80.

22. See, *supra* notes 14-15.

court rulings? The Reporter's Comments to the Proposed Draft state that the requirement of findings "will give the court upon review some basis for determining whether or not the order was correct."²³ This articulation may assume a standard of review of orders granting new trials at variance with federal and Indiana law. The Indiana cases have consistently held that such rulings are reviewable only for abuse of discretion,²⁴ both before and after the enactment in 1959 of the statute treating orders granting new trials as final judgments for purposes of appeal.²⁵ It will be interesting to see under the new rule what becomes of the principle stated by the Indiana Supreme Court as early as 1877, and respected by our appellate courts since that time, that trial courts, having heard the actual evidence and testimony, "must clearly [find] that substantial justice has been done" by the verdict or else order a new trial.²⁶

Trial Rule 59(E)(5) provides that, "in the case of excessive or inadequate damages" the court in appropriate cases may enter "final judgment *on the evidence* for the amount of proper damages. . . ."²⁷ The Reporter's Comments to the Proposed Draft stated that, "It is now intended that the court is empowered to enter the final judgment fixing proper damages *when the evidence is clear and unrebutted* after the jury has committed error in assessing damages."²⁸ It seems clear on close reading that the rule merely implements the provisions of Trial Rule 50 for judgments on the evidence and is not an invitation to trial judges to weigh conflicting evidence on damages in jury trials and enter definitive judgments.

Provisions in Trial Rule 59 promoting the use of partial new trials and allowing additur also raise questions regarding the displacement of juries. As noted, Trial Rule 59(E) discourages new trials. It states that the court shall correct error "without a new trial unless such relief is shown to be impracticable or unfair to any of the parties or is otherwise improper." It provides further that "if a new trial is required it shall be limited only to those parties and issues affected by the error unless such relief is shown to be impracticable or unfair."²⁹ In addition

23. Proposed Draft at 221.

24. *E.g.*, *Stinson v. Mettert*, 141 Ind. App. 354, 228 N.E.2d 43 (1967); *Bailey v. Kain*, 135 Ind. App. 657, 192 N.E.2d 486 (en banc, 1963); *Newsom v. Pennsylvania R.R. Co.*, 134 Ind. App. 120, 186 N.E.2d 699 (1962); *Topper v. Dunn*, 132 Ind. App. 306, 177 N.E.2d 382 (1961) (new trial granted prior to 1959 amendment); *Christy v. Holmes*, 57 Ind. 314 (1877).

25. Ind. Ann. Stat. § 2-3201 (Burns Repl. 1968) (Acts 1881 (Spec. Session), ch. 38, § 628; amended, Acts 1959 (91st session), ch. 25 § 1).

26. *Christy v. Holmes*, 57 Ind. 314, 316 (1877).

27. (Emphasis supplied).

28. Proposed Draft at 219 (emphasis supplied).

29. The phrase "impracticable or unfair" presumably refers to the considerable

to promoting partial new trials, the rules also provide for conditional new trials, not only by remittitur, but also by additur.³⁰ In 1935 additur was ruled unconstitutional in the federal courts,³¹ but the validity of that decision has been often doubted.³² Unfettered by prior explicit rulings, the Indiana Supreme Court will probably permit additur, although they should not feel bound by the fact that they have promulgated the rule.³³ The Comments to the Proposed Draft, however, fail to utter any caution whatever regarding the danger of compromise verdicts. Whenever damages are substantially less than would be required under the evidence, there is a suspicion of a jury compromise, and partial new trial and additur should be granted in such cases only after giving consideration to that possibility.

There are two other aspects of Trial Rule 59 which deserve comment. Subdivision (B) of this rule may be the most welcome reform in the entire set of rules.³⁴ It brings Indiana practice much closer to the federal and should overcome what has been a serious technical hurdle in obtaining appellate review of errors fairly called to the attention of the trial court.³⁵

The other matter of interest is the 60-day time limit for Motions to Correct Error.³⁶ The Federal Rules allow ten days for motions for a new trial.³⁷ The Proposed Draft provided a 30-day period,³⁸ and that may have been too long. Now the rule, as promulgated, allows two months. I realize that this lengthy period may be thought necessary because of Trial Rule 59(G) making a Motion to Correct Error a condition to appeal, thus making it desirable that a full opportunity to review the record of the case be available within the time limit provided.³⁹ On the other side, it should be noted that Trial Rule 62 provides for an automatic stay of

body of case law which has held that partial new trials are improper unless the issues are clearly severable from each other. *E.g.*, *Gasoline Products Co., Inc. v. Champlin Refining Co.*, 283 U.S. 494 (1931).

30. Trial Rule 59(E) (5).

31. *Dimick v. Schiedt*, 293 U.S. 474 (1934).

32. See, F. JAMES, *CIVIL PROCEDURE* 323-25 (1965).

33. *Cf. Sibbach v. Wilson and Co.*, 312 U.S. 17 (1940); *Schlagenhauf v. Holder*, 379 U.S. 104 (1964).

34. "Form of Motion. A motion to correct errors shall state the issues upon which error is claimed, but the issues are not required to be stated under or in the language of the reasons allowed by these rules, by statute or by other law. . . ." Trial Rule 59(B).

35. See Reporter's Comments, Proposed Draft at 219-20.

36. Trial Rule 59(C).

37. *FED. R. CIV. P.* 59(b).

38. Proposed Draft, Rule 59(C).

39. In remarks to the Annual Conference of the Indiana University School of Law Alumni Association, November 7, 1969, Judge Roger O. DeBruler of the Indiana Supreme Court noted that the same provisions govern the perfection of appeals in criminal litigation, giving special emphasis to the need for adequate time to review the record.

execution during this 60-day period. Beyond that, the trial judge is given discretion to stay execution further if a Motion to Correct Error is made, and many judges may grant such stays as a matter of course.⁴⁰ It can be seen that a judgment debtor will have considerable opportunity to delay a claimant from having the benefit of his judgment.

TRIAL RULE 60(B)

The principal provisions of Trial Rule 60 governing relief from judgments conform quite closely to the Federal Rules. There are three departures from the federal rule which should be noted. In Federal Rule 60(b) the second listed ground for relief from judgments is "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." Indiana Trial Rule 60(B)(2) has modified this in a way which may give some trouble. It states as a ground for relief, "any ground for a motion to correct error, including without limitation newly discovered evidence, which by due diligence could not have been discovered in time to move for a motion to correct error under Rule 59." Trial Rule 60(D) permits "relief as provided under Rule 59. . . ." Most grounds for a motion to correct error, it would be thought, should be raised promptly or lost.⁴¹ Of course, all motions under Trial Rule 60(B) are required to be brought "within a reasonable time" and 60(B)(2) states that the ground for a motion to correct error must not have been discoverable "by due diligence" within the proper time limit. Even if trial courts take a conservative view of these limitations, however, there is nothing to prevent hopeful losers from making their motions and taking their appeals if they are refused. Trial Rule 60(B)(2), properly understood, adds no substance whatever to the Federal Rule. Indeed, the thought of the Indiana provision might have been more aptly stated in an inverted order as: Newly discovered evidence which by due diligence could not have been discovered in time for a Motion to Correct Error under Rule 59, including evidence bearing on any ground for a Motion to Correct Error. But if the rule drafter intended no new substance, why did they modify the language? This provision will, no doubt, be sensibly administered; however, the thought of a judgment displacing a jury verdict entered "on the evidence" up to one year after a final judgment is very disturbing. Such an event is at least a theoretical possibility under subdivisions (B)(2) and (D) of Trial

40. Trial Rule 62(B)(1).

41. It is difficult to see why grounds for motions to correct errors based on events which occur during trials or which appear on the face of the record cannot be raised in a motion to correct errors.

Rule 60.

Another departure from the federal rule in Trial Rule 60(B) is the inclusion of a specific ground for relief for defendants against whom default judgments have been rendered in cases where service has been by publication only and where the defendants were without actual knowledge of the proceedings.⁴² The provision is a good one. There should be no negative implications regarding availability of relief from default judgments for "mistake, surprise or excusable neglect" under (B)(1), but there may be an issue.

The other novelty of Indiana Trial Rule 60(B) is clause (5) governing relief from judgments where an infant or incompetent may not have been represented by a guardian or other legal representative in certain circumstances. I see two problems of construction. First, are there negative implications to be read into the introductory phrase excepting divorce decrees from the judgments to which this provision applies, and does "divorce decree" refer only to status or does it also include decrees for support? Secondly, what is the relation of 60(B)(5), the provision in question, to 60(B)(6) and (8) providing relief where "the judgment is void" and where there is "any other reason justifying relief from the operation of the judgment." These are clauses which would have governed this problem absent the inclusion of this novel provision.⁴³ Further, does this new provision by implication restrict the grounds which will be available to attack a judgment in a separate action? There may be a constitutional problem in protecting absolutely the party who had no "notice" of the infancy or incompetency, thus prompting alternative reliance on the other clauses and on independent actions.

In conclusion, the new Indiana rules governing post-trial motions promote a flexibility and practicality of administration which are very desirable. The novelty of their structure and drafting, however, will make it necessary to confront these provisions with great care.

42. Trial Rule 60(B)(4).

43. Judgments against minors are probably voidable, rather than void. The absence of reported cases dealing with this problem under FED. R. CIV. P. 60(b) is rather striking.

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