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The Meaning of the Term Trial within the Ohio Rules of Civil Procedure

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A trial will be the focal point of any lawsuit. Procedural steps of the litigation process are classified as either pre-trial or post trial stages. In the legal profession, where words are assigned specific meanings, it would seem that a word such as “trial” would be specifically defined. Yet no precise formula has been developed to differentiate between those components of a lawsuit that are part of the trial and those that are not. Section 2311.01 of the Ohio Revised Code defines a trial as “a judicial examination of the issues, whether of law or fact, in an action or proceeding.” While this statute attempts to limit and explain the function of a trial, it does not provide a clear cut definition of what actually constitutes a trial. The precise definition has been left to judicial decisions, and as will be seen, the cases have not been helpful. Given the definition of a trial provided by the Ohio Revised Code, a hearing on a motion could properly be classified as a trial. The term “trial” has been held to include a hearing on a preliminary motion as well as a petition for a new trial. A hearing on a motion for summary judgment, on the other hand, has been held not to be a trial.

The word “trial” is not defined in the Ohio Rules of Civil Procedure. This is due largely to the absence of such a definition in the Federal Rules of Civil Procedure. The Ohio Rules were drafted using the Federal Rules as a model. The changes that were made in the Ohio Rules by the Rules Advisory Committee, the drafters of the Ohio Rules, were intended to reflect certain past procedural practices which the committee wished to retain. For the most part, however, the two sets of rules are substantially similar, and in some cases, particular rules are identical.

The lack of a definition of a trial in the Federal Rules has not posed any serious problems. Unlike the Ohio procedural system, the Federal Rules do not employ the term “trial” to delineate any rights of parties in-
olved in litigation. Thus, there is no pressing need for such a definition in the Federal Rules. Within the Ohio Rules, however, the word "trial" is frequently used to determine the rights of parties. The lack of a workable definition of a trial in the Ohio procedural system has therefore created problems not encountered in the federal courts.6

The first section of this Note will attempt to lay down some general guidelines concerning the definition of a trial. The following section will concentrate on the commencement of trial as that term is used in the Ohio Rules of Civil Procedure. The final section will examine the problems which have arisen in connection with the motion for a new trial.

I. GUIDELINES FOR THE DEFINITION OF TRIAL

The Ohio Revised Code provides that a trial shall be a judicial examination.7 Based upon this criterion, the court in Logue v. Wilson8 stated that a hearing before a referee could not be regarded as a trial. Under Rule 53, a referee has the power to hear testimony of witnesses and admit evidence.9 The referee does not, however, possess the authority to make ultimate findings of fact and conclusions of law. At the conclusion of a hearing, the referee is required to submit a report to the court.10 The court then reviews this report and may either accept it as the judgment of the court, modify it, or reject it completely.11 The important point is that the court makes the judicial examination of the issues presented, not the referee. While the hearing before the referee has all of the outward appearances of a trial, the referee is not capable of conducting a judicial examination. Hence it cannot be a trial as that term is defined by the Ohio Revised Code.

In Logue, the referee submitted a report to the court which the court accepted completely as its own. The appellate court commented in dicta that this practice was improper because the report did not provide the judge with any facts upon which he could base any independent analysis.12 Hence, there was no judicial examination. Lacking this essential element, there could not have been a trial.

6 It seems doubtful that the problems to be discussed in this Note concerning the term "trial" were realized by the drafters of the Ohio Rules of Civil Procedure. Neither the staff notes accompanying the Ohio Rules nor the transcripts of the proceedings of the Ohio Rules Advisory Committee even hint that problems involving the interpretation of the term "trial" might arise. The term was probably used by the Committee in its conventional sense, that is, an adversary proceeding, including pleadings, opening statements by counsel, presentation of evidence, closing arguments, and submission to the court or jury for final determination. These elements are set out in Ohio Rev. Code Ann. § 2315.01 (Page 1954), the section governing trial procedure. For a discussion of section 2315.01, see notes 162-64 and accompanying text, infra.


9 Ohio R. Civ. P. 53(C).


12 The complete text of the referee's report to the court was as follows: "Case called. Plaintiff and defendant in court. Show cause hearing heard. Judgment is rendered for plaintiff for writ of replevin for property described." 45 Ohio App. 2d at 132, 341 N.E.2d
A second element of the statutory definition of a trial is that the judicial examination be of the issues. An issue is defined by the Ohio Revised Code as an averment arising from the pleadings of one of the parties and controverted by the other. Thus, the statutory definition of a trial sets out not only who must conduct the examination, but also what must be examined. The definition applied to the term "issue" is a restricted one; it does not include every conflict between the parties, but rather, only those that are framed by the pleadings. This technical definition of the term "issue" serves in turn to refine the Revised Code’s definition of a trial.

Pleadings are defined by Ohio Rule 7(A) to include the complaint, answer, cross claims, counter-claims, third party claims, and their corresponding replies. Since a trial must necessarily involve the examination of issues, and since issues may only be raised in the pleadings, it follows that a trial must be initiated by one or more pleadings.

A hearing, on the other hand, is initiated by a motion to the court. Ohio Rule 7(B) governs the making of motions. Generally, a motion is an application to the court requesting the performance of a specific act.
When a motion is made, the judge may either dispose of it immediately or schedule it for hearing. A pleading, while filed with the court, is directed primarily to the opposing party for the purpose of making or responding to a specific allegation. It is apparent, both by definition and by separate treatment in the rules, that the drafters of the Ohio Civil Rules intended pleadings and motions to be distinct types of documents. Thus, it would seem that a trial could be distinguished from a hearing merely by looking to the method by which the particular proceeding was commenced. While useful in some cases, this approach cannot be applied universally. In practice it is often unclear whether a particular document is a motion or a pleading. When ambiguity occurs, it is the substance of the document, not its caption, that will determine the document's classification.

A third necessary component of a trial, but one that is not mentioned in the Revised Code's definition, is that the action or proceeding must end in a final order or judgment. A final order, for the purposes of this discussion, is one which affects a substantial right, determines the action, and prevents a judgment. Once a trial has begun there are three possible means of termination: (1) one of the parties will prevail, resulting in a judgment in his favor, (2) the parties may settle the case, voluntarily ending the lawsuit, or (3) the court may declare a mistrial. In the first two instances the court will enter a final order, but in the case of a mistrial, no final order will result.

The purpose of the trial process is to adjudicate finally the rights of the parties involved in the dispute before the court. The entry of judgment by the court satisfies this purpose. The entry is a final order

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19 "[A] pleading is judged, not by its title or form alone, but essentially by the subject matter it contains. If the title is not descriptive of the subject-matter, it is the latter that determines the character of the pleading. Substance prevails over form." Wagner v. Long, 133 Ohio St. 41, 47, 11 N.E.2d 247, 250 (1937). Further complications are created when one attempts to apply the "pleading or motion" test to a special proceeding. A special proceeding is included in the statutory definition of a trial but is commenced by application to the court. Ohio Rev. Code Ann. § 2311.01 (Page 1954). The problems related to special proceedings will be discussed in a later section of this Note. See notes 165-200 infra and accompanying text.
20 A judgment, as the term is defined in the Ohio Civil Rules, is any decree or order from which an appeal will lie. Ohio R. Civ. P. 54(A). Therefore, a final order is a judgment. For the purposes of this Note, the two terms, final order and judgment, will be used interchangeably.
21 Ohio Rev. Code Ann. § 2505.02 (Page 1954) provides: An order affecting a substantial right in an action which in effect determines the action and prevents a judgment, an order affecting a substantial right made in a special proceeding or upon a summary application in an action after judgment, or an order vacating or setting aside a judgment and ordering a new trial is a final order which may be reviewed, affirmed, modified, or reversed, with or without a retrial.
A "substantial right" has been defined as a legal right which is entitled to enforcement and protection by law. Armstrong v. Herancourt Brewing Co., 53 Ohio St. 467, 42 N.E. 425 (1895). See In re Estate of Wyckoff, 166 Ohio St. 354, 358, 142 N.E.2d 660, 664 (1957). Although the Ohio Revised Code sets out four tests for the finality of an order, the first test, relating to a trial in a civil action, is of primary concern; the second, relating to special proceedings, is discussed in another section of this Note. See notes 183-85 and accompanying text, infra.
that serves as a basis for the various post trial motions to the trial court, as well as for an appeal of the trial decision to a higher court. Since a mistrial results in no final order, however, it is neutral in its effect upon the rights of the parties. The mistrial eradicates all that has transpired since the commencement of trial, and the result is that, in effect, no trial has been conducted.\(^\text{22}\)

Often a hearing will appear to be similar to a trial, leaving no distinct line of separation between the two. One illustration of this similarity is the case of a pre-seizure hearing in an action for replevin. In *Fuentes v. Shevin*, the United States Supreme Court held that the granting of a prejudgment writ of replevin in an *ex parte* proceeding, without a hearing and prior notice to the other party, constituted a deprivation of the defendant’s property without due process of law.\(^\text{23}\) The court held that the defendant had a right to a hearing, and that in this hearing the plaintiff would be required to show the probable validity of his claim.\(^\text{24}\) Under this analysis, the pre-trial hearing takes on many of the characteristics of the trial itself. For instance, in *Computer Leasing Co. v. Computer & Software, Inc.*,\(^\text{25}\) an Ohio court carried the *Fuentes* reasoning a step further and held that in the pre-seizure hearing the defendant could raise not only those defenses directed to the issue of default, but also any other defenses which would be available at trial. Although the merits of the claim will be fully examined in the pre-seizure hearing, the hearing will only settle the issue of possession for the interim period before trial.\(^\text{26}\) The distinguishing characteristic between the pre-seizure hearing and a trial is the fact that the pre-seizure hearing results in no final order,\(^\text{27}\) and for that reason cannot be considered a trial.

The above examples serve to illustrate some of the basic characteristics of a trial. While these features alone are not completely determinative, they do help to distinguish a trial from other judicial proceedings. The term “trial,” however, should not be defined in the abstract, but rather in relation to the purpose and intent of the particular rule that employs the term. The rules use the term “trial” in different con-

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\(^{22}\) In Newark Shopping Center, Inc. v. Morris Skilken & Co., 5 Ohio App. 2d 241, 214 N.E.2d 674 (1964), the court distinguished an order granting a mistrial from an order granting a new trial. The appellate court held that an order granting a new trial favors one of the parties, while an order of a mistrial favors neither party. Moreover, a new trial entails a re-examination of the issues that were before the court in the previous trial. No similar re-examination occurs in the case of a mistrial, since the first trial is considered a nullity. But see Latimer v. Morris, 27 Ohio App. 2d 66, 67, 272 N.E.2d 494, 495 (1971), in which the court noted that a motion for a mistrial made after the jury had rendered its verdict would be taken as a motion for a new trial. Accordingly, the motion for a mistrial in such a situation would be a final order from which an appeal could be taken.


\(^{24}\) Id. at 96 nn.32 & 33.


\(^{26}\) It should be pointed out, however, that although the merits of the claim will be fully examined at the pre-seizure hearing, this will not preclude a re-examination at the trial. Since the hearing will only decide the question of possession for the period until trial, there is no res judicata effect on the parties at the subsequent trial.

\(^{27}\) *Ohio Rev. Code Ann.* § 2505.02 (Page 1954). For the text of section 2505.02, see note 21 *supra*. 
texts, thereby giving different implications to the term. To develop a rigid definition and apply it mechanically throughout the rules could lead to results neither intended nor desired by the drafters of the Ohio Rules of Civil Procedure. Therefore, the remaining two sections of this Note will examine the concept of trial in the context of specific provisions of the rules.

II. COMMENCEMENT OF A TRIAL

Under the Ohio Rules of Civil Procedure, the commencement of a trial is the point in the lawsuit at which the plaintiff's control over the litigation is substantially reduced. Up to this point the court has little involvement in the progress of the lawsuit. Excepting pretrial conferences and hearings on preliminary motions, the court does little more than supervise the actions of the parties. Once the trial actually begins, however, the court's involvement in the lawsuit increases considerably. As a result, certain actions by the plaintiff which may previously have been done as a matter of right, may now be done only upon application to the court.

Ohio Rule 41(A) states that the plaintiff may dismiss as a matter of right at any time prior to the commencement of trial. Such a dismissal is without prejudice to a future action involving the same parties and the same claims. After the trial has commenced, however, the plaintiff's right to dismiss the lawsuit without prejudice becomes conditioned upon the approval of the court. If the dismissal is granted by the court, most likely it will be done provisionally, upon the plaintiff's meeting the terms and conditions proscribed.

28 Ohio R. Civ. P. 41(A)(1) states in pertinent part:

[A]n action may be dismissed by the plaintiff without order of court (a) by filing a notice of dismissal at any time before the commencement of trial unless a counterclaim which cannot remain pending for independent adjudication by the court has been served by the defendant or (b) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court, an action based on or including the same claim.

For the sake of discussion of this aspect of voluntary dismissals, it is assumed that the lawsuit in question involves only one claim between two parties. Voluntary dismissal will be more complicated if multiple claims or counterclaims must be determined in the litigation. It is also assumed that, for purposes of this section of the Note, trial means a jury trial.

29 Ohio R. Civ. P. 41(A)(2) states in pertinent part: "Except as provided in subsection (1) an action shall not be dismissed at the plaintiff's instance except upon order of the court and upon such terms and conditions as the court deems proper."

30 Ohio R. Civ. P. 41(A)(2) authorizes the court to impose conditions on the plaintiff's dismissal. These conditions usually will be the payment of court costs and the expenses that the defendant has incurred to date. See note 47 infra.

The provisions of Rule 41(A)(2) should be distinguished from those of Rule 41(D). Rule 41(D) provides that, after the plaintiff has dismissed his action, upon recommencement, the court may stay the proceedings in the second suit until the plaintiff pays the costs of the previous action. Rule 41(D), however, only covers "court costs" and would not include attorney's fees or other expenses that the defendant incurred in the previous action. See Yetter Homes, Inc. v. Coastal Cabinet Works, Inc., 234 F. Supp.
tant as this stage of the trial process may seem, “commencement of trial” has escaped definition in both the Ohio Revised Code and the Ohio Rules of Civil Procedure.

A survey of other jurisdictions reveals that there are two major viewpoints concerning the commencement of a civil trial. The first view is based upon a strict definition of the word “trial,” holding that a trial actually begins upon opening argument to the jury, or, in the event none is made, then upon the presentation of the first evidence. At first glance, this first view would seem to be in accord with the Ohio Revised Code’s definition of a trial, limiting a trial to those components of the procedure that relate directly to the examination of the issues. The second view is based upon a more liberal concept of the word “trial.” This latter view goes beyond the mere examination of the issues and encompasses all of the events that would occur in the courtroom on the day set for trial. Thus, under the second view, a trial would be deemed commenced upon the administration of the oath to the array of prospective jurors and would include the voir dire examination.

This section will examine the above two interpretations of “commencement of trial” to determine how the courts should construe this phrase within the Ohio Rules of Civil Procedure. For this purpose, the commencement of a trial will first be examined in conjunction with Ohio Rule 41(A)(1) (voluntary dismissal) to determine which of the two views propounded best accomplishes the purpose of that rule. Thereafter, this view will be applied to other rules employing “commencement of trial” to determine whether a uniform definition should be applied throughout the Ohio Rules of Civil Procedure, or, if in the interest of justice, a different meaning should be applied in different rules.

A. Rule 41(A): Voluntary Dismissal by Plaintiff

As has been previously stated, Ohio Rule 41(A) provides that a plaintiff has a right to voluntarily dismiss his lawsuit at any time before the commencement of the trial. This limitation upon the plaintiff’s right to dismiss the action is relatively recent in Ohio. At common law the plaintiff was permitted to take a voluntary dismissal in his case at any time during the trial, up to the point at which jury rendered the final

568, 572 (E.D.S.C. 1964). Ohio Rule 41(D) is identical in form to the federal rule. For construction of Federal Rule 41(d), see 5 MOORE’S FEDERAL PRACTICE ¶ 41.16 (2d ed. 1966); 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE ¶ 2375 (1971). [Hereinafter cited as WRIGHT & MILLER].


34 The limitation imposed upon the plaintiff’s right to dismiss was one of the changes brought about by the adoption of the Ohio Rules of Civil Procedure in 1970.
verdict. Moreover, dismissal at a late stage in the proceedings was not a bar to the plaintiff's bringing a subsequent action against the same parties on the same claim. Because the plaintiff's right to dismiss the suit was almost completely unlimited, he was able to bring his lawsuit, uncover the defenses of his opposition during the course of the trial, and then, immediately before the termination of the trial, dismiss the lawsuit. The plaintiff was then in a position to prepare a second case, fortified with the knowledge of the strengths and weaknesses of his adversary's case. The plaintiff could also use the voluntary dismissal mechanism as a means of harassment, subjecting the defendant to enormous expense in terms of both time and money by forcing him to defend successive suits on the same claim.

Although the availability of the right to dismiss the action so late in the proceedings gave the plaintiff an unjust advantage in the lawsuit which many times led to abuse, it was regarded by courts as a right inherent in the person bringing the lawsuit. Based upon the assumption that no one was required to seek redress for a wrong done to him unless he chose to do so, the plaintiff had the right to abandon the suit whenever he desired. Since the defendant had no control over the plaintiff's decision to sue, he had no standing to object to the plaintiff's dismissal of the action. Only after the defendant had acquired substantial rights in the litigation, could he raise an objection to the plaintiff's practices. The defendant did not acquire any substantial rights in the action at common law until the jury rendered its verdict. In the modern procedural system the time for attachment of such rights has been advanced to an earlier stage in the lawsuit.

35 At common law, until the jury rendered its verdict there was no determination of the issues. Confiscation Cases, 74 U.S. (7 Wall.) 454, 457 (1868). See also American Electrotype Co. v. Kerschbaum, 105 F.2d 764, 765 (D.C. Cir. 1939). Once the issues were determined, the plaintiff was foreclosed from dismissing the case. Taylor v. Alexander, 6 Ohio 145 (1833). Jacob Laub Baking Co. v. Middleton, 118 Ohio St. 106, 160 N.E. 629 (1928). See generally Head, The History and Development of Nonsuit, 27 W. VA. L.Q. 20 (1920); Comment, The Voluntary Nonsuit in Virginia, 7 WM. & MARY L. REV. 357 (1966).

36 The following passage illustrates the potential for abuse by the plaintiff:

The plaintiff could bring his action, carry it through several years of litigation, subject the state and defendant to expense and loss of time, and then, having uncovered all the defenses, at any time before the jury rendered its verdict, assert his uncontrolled right to become nonsuit, leaving himself free to commence another action on the same cause immediately.

Head, supra note 35, at 24.

37 The right to dismiss the lawsuit has been regarded as one of the means by which the plaintiff was able to exercise control over the lawsuit. Goin v. Chute, 126 Ore. 466, 475, 270 P. 492, 494 (1928).

38 For the most part, the acquisition of substantial rights was equivalent to a verdict for the defendant. After that time, by a bar of res judicata, the defendant had the right to block the plaintiff in a subsequent lawsuit founded on the same claim.

39 In Medina v. Erickson, 226 F.2d 475, 483 (9th Cir. 1955), cert. denied, 351 U.S. 912 (1956), the court stated that a party has the right to dismiss unless the action has proceeded to the extent that substantial rights have accrued to the defendant. In Medina, an admiralty case, the court held that the mere payment of some pre-litigation costs did not vest substantial rights in the defendant. The dismissal will be denied when the defendant has materially altered his position as a result of the lawsuit. Marsch v. Southern New England R.R., 235 Mass. 304, 126 N.E. 519 (1920). See Note, Exercise of Discretion
A second reason for permitting the plaintiff to dismiss his case at any time prior to the final verdict stems from the fact that the initial suit was, for the most part, the only means of discovery available. As late as 1853, there was virtually no procedure for discovery in Ohio. To remedy this situation, the plaintiff often brought his first suit solely for the purpose of "deposing" his opponent's witnesses. Once this task was completed, but before the jury delivered its verdict, the plaintiff moved to dismiss his case. He then had sufficient information concerning his opposition to prepare a thorough prosecution of his case. As one might imagine, this method of discovery was highly cumbersome and expensive for both parties. Although the trial dockets of that time were not as crowded as they are today, this constant practice of relitigation must have been taxing upon the courts.

With the introduction of modern discovery procedures, however, the plaintiff no longer enters the courtroom unaware of the defendant's case. By the date of trial, the parties will have had ample opportunity to take depositions, submit interrogatories, and employ other methods of discovery. The plaintiff will also have had the chance to evaluate the relative merits of his own case. The inadequacy of discovery, therefore, is no longer a valid reason for the largely unrestricted right of the plaintiff to voluntarily dismiss.

in Permitting Dismissal Without Prejudice under Federal Rule 41(a), 54 COLUM. L. REV. 616, 621 (1954). See also Roth v. Great Atl. & Pac. Tea Co., 2 F.R.D. 182 (S.D. Ohio 1942) (denying the plaintiff's motion to dismiss on the grounds that the defendant had acquired substantial rights in the litigation after the filing of a motion for summary judgment).

Under the modern rules of procedure, substantial rights accrue to the defendant once he has been forced to come in and defend the suit. Thus, after the filing of an answer or a motion for summary judgment (federal system) or the commencement of the trial (Ohio system), the defendant has acquired rights in the litigation sufficient to cut off the plaintiff's ability to dismiss the action as of right. The rights acquired by the defendant are not so substantial to completely deny the plaintiff dismissal without prejudice, but merely to insure that such dismissal only will be granted when the plaintiff satisfies the conditions imposed by the court.

Although equity did have some provisions for the use of discovery, such methods were not available to parties in actions at law. Thus, until 1853, when law and equity were merged in Ohio by the adoption of the Field Code, the plaintiff was unable to depose an opposing party's witness in an action at law. Code of Civil Procedure of the State of Ohio, § 3, 1853 Ohio Laws 57 (codified at OHIO REV. CODE ANN. § 2307.02 (Page 1954) (repealed 1970)). "The greatest steps forward in expediting the judicial process and eliminating the sporting theory of justice occur in the area of discovery." Corrigan, A Look at the Ohio Rules of Civil Procedure, 43 OHIO BAR 727, 733 (1970). See also Pike & Willis, The New Federal Deposition — Discovery Procedure, 38 COLUM. L. REV. 1179, 1180-86 (1938).

Ohio R. Civ. P. 26(A) provides:
It is the policy of these rules (1) to preserve the right of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of such cases and (2) to prevent an attorney from taking undue advantage of his adversary's industry or efforts.

Parties may obtain discovery by one or more of the following methods: deposition upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission. Unless the court orders otherwise, the frequency and use of these methods is not limited.
This is not to advocate that the plaintiff should never have the right to voluntarily dismiss his case. Situations might arise where the plaintiff will need to dismiss the lawsuit without the danger that such an action on his part will foreclose his ability to recommence litigation on the same claim at a later date. For example, such a situation would arise when an essential witness for the plaintiff suddenly becomes unavailable, through no fault of the plaintiff, on the day trial was scheduled to begin. If the court refuses to grant any further continuances, there is little the plaintiff can do. Without this essential witness the plaintiff will be unable to properly present his case. If dismissal may only be procured by an order of the court or by a stipulation of the defendant, and neither is responsive to the plaintiff’s plight, the litigant is forced to choose between proceeding with a weakened case or dismissing the suit with prejudice. Either way, the plaintiff runs the risk of losing an otherwise meritorious claim.

By retaining the right to dismiss the action, the plaintiff may discontinue his suit and refile it at a later date. At the time of dismissal the defendant will have incurred very little expense that will not be recouped in the subsequent lawsuit.

Ohio Rule 41(A), governing voluntary dismissal by plaintiff, was based upon Rule 41(a) of the Federal Rules of Civil Procedure. The Federal Rule, however, is somewhat more restrictive in its treatment of the plaintiff’s right to voluntarily dismiss than is the Ohio Rule. Under Federal Rule 41(a), the plaintiff may only dismiss his action, as a matter of right, before the defendant either files his answer or moves for summary judgment. Thereafter, the plaintiff may dismiss only by leave of court or stipulation of all the parties involved in the action.

One of the reasons advanced for restricting the plaintiff’s right to dismiss his lawsuit has been to keep the defendant’s costs to a minimum. After the defendant files his answer or motion for summary

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42 One of the primary reasons for allowing the plaintiff to withdraw his case is to encourage private settlements between the parties. This, in turn, will help clear the crowded trial docket. Ohio Rule 41(A) was aimed at encouraging the voluntary termination of lawsuits. See Standard Oil v. Grice, 46 Ohio App. 2d 97, 345 N.E. 2d 458 (1975).

43 This example was posed during a session of the Ohio Rules Advisory Committee to illustrate the reasons for allowing the plaintiff an extended time period in which to dismiss the action without prejudice. Proceedings of the Ohio Rules Advisory Committee at 38-39 (Nov. 21, 1968) (on file with the Ohio Supreme Court Library).


45 The thrust of Federal Rule 41(a), in abridging the plaintiff’s common law right to dismiss without prejudice, is to protect the defendant. Armstrong v. Frostie Co., 453 F.2d 914 (4th Cir. 1971). Thus, in Harvey Aluminum v. American Cyanamid, 203 F.2d 105
judgment, a motion by the plaintiff to dismiss the lawsuit will only be granted upon the plaintiff meeting the terms and conditions, if any, imposed by the court. The court will usually require the plaintiff to pay court costs that have accrued as of the date of dismissal, plus any expenses of the defendant that were necessary for the first suit but would not have been necessary for a subsequent suit. 47

Ohio Rule 41 extends the plaintiff’s right to dismiss the action (2d Cir. 1953), cert. denied, 345 U.S. 964 (1954), noted in 63 YALE L.J. 738 (1954), the court held that once the defendant incurred considerable expense in preparing for a preliminary hearing, the plaintiff no longer could dismiss the suit as of right. The court, in a decision written by Augustus Hand, held that although the defendant had not filed an answer or a motion for summary judgment, the issues of the controversy had been raised and examined at the hearing for the preliminary injunction. The court compared the expense and time required to prepare for the hearing on the injunction with that required for a hearing on a motion for summary judgment. The 1948 amendment to Federal Rule 41(a)(1) (adding the motion for summary judgment as cutting off the plaintiff’s right to dismiss where previously it could only be done by answer) was meant to protect the defendant from considerable expense, and technical compliance with the Rule by the plaintiff should not be allowed to defeat the purpose of the amendment. 203 F.2d at 107-108.

In Tele-Views News Co. v. S.R.B. TV Publishing Co., 28 F.R.D. 303 (E.D. Pa. 1961), the court, in reversing its previous opinion on rehearing, held that the defendant’s motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6) was equivalent to a motion for summary judgment, thereby cutting off the plaintiff’s right to voluntarily dismiss. The court based its conclusion upon the similarity between a motion to dismiss for failure to state a claim upon which relief could be granted and a motion for summary judgment, both in effect and cost to the defendant in preparation. 28 F.R.D. at 308. Thus, as illustrated by Harvey and Tele-Views, technical compliance with Rule 41(a) is not necessarily sufficient to preserve the plaintiff’s right to dismiss without prejudice when the effect of the dismissal will be to work a hardship on the defendant. For a discussion of the effects of Harvey and Tele-Views, see 1962 DUKE L.J. 285.

In Littman v. Bache & Co., 252 F.2d 479 (2d Cir. 1958) the Second Circuit cut back on the broad pronouncement made in Harvey. In Littman, the defendant did not immediately file an answer, but instead, after securing a 3-week filing extension, moved the court to transfer the case to another district. After the motion to transfer had been argued twice, but before the case was transferred, the plaintiff filed a motion to dismiss. The defendant then filed a motion to vacate the order of dismissal, which was granted. On appeal, the court reversed the lower court’s decision to vacate, holding that the plaintiff had a right to dismiss the action as long as the dismissal was filed before the defendant had filed either an answer or a motion for summary judgment. The appellate court declined to follow its earlier holding in Harvey, but instead, limited the applicability of that case to those situations where the pre-trial proceedings went directly to the merits of the case. Id. at 481. See also Toulmon v. Indus. Metal Protec. Inc., 35 F. Supp. 925 (D. Del. 1955).

Thus, unless in a situation similar to the facts in Harvey, where the merits of the case have been fully explored in pre-trial proceedings, the plaintiff will not be precluded from his right to dismiss his case where neither an answer nor a motion for summary judgment had been filed. In most cases Federal Rule 41(a) will be given a strict reading. D.C. Elec., Inc. v. Norton Corp., 511 F.2d 294, 297 (6th Cir. 1975). See also Plain Growers, Inc. v. Ickes-Braun Glass, Inc., 474 F.2d 250 (5th Cir. 1973); Sheldon v. Amperex Elec. Corp., 52 F.R.D. 1 (E.D.N.Y. 1971).

47 In Goldlawr, Inc. v. Shubert, 32 F.R.D. 467 (S.D.N.Y. 1962), the court permitted the plaintiff to dismiss the action pursuant to Rule 41(a)(2) on the condition that the plaintiff pay the reasonable costs and attorney’s fees of the defendant. Because the parties were involved in another suit based on the same claim in Pennsylvania, the court withheld fixing the amount of costs payable to the defendant until the final outcome of that case. Since both of the suits went to the merits of the case, the court held that not all of the costs incurred by the defendant as of the date of dismissal would be chargeable against the plaintiff, but instead, only those expenses that would not have been duplicated in the preparation of the other action. Id. at 473.
throughout the pretrial stage of the litigation. Prior to the enactment of the Ohio Rules of Civil Procedure in 1970, the plaintiff was permitted to dismiss his action at any time before the issues in controversy were submitted to the jury. The current Ohio Rule 41 represents a compromise between the prior Ohio Code and Federal Rule 41(a). Ohio Rule 41(A) allows the plaintiff to use the various pretrial discovery methods to determine the relative merits of his claim and to prepare his case while still retaining his right to dismiss. In the federal system, however, the plaintiff's right to dismiss has vanished by the time the parties begin discovery. Therefore, Ohio Rule 41 is far more liberal in extending the time for the plaintiff to voluntarily dismiss as of right than is its federal counterpart.

On the other hand, Ohio Rule 41(A) attempts to protect the defendant from incurring unnecessary expenses by limiting the plaintiff's right to dismiss to the pretrial stage of the litigation. Ohio Rule 41(A), by allowing the plaintiff to dismiss his action at any time before the commencement of trial, extends the right of dismissal as long as possible without exposing the defendant to extensive and unnecessary costs. Thus, "commencement of trial" as used in Ohio Rule 41(A) should be construed with the rights of the parties in mind.

As was stated earlier, there are two basic views regarding when a trial actually commences. The broader view takes into account the entire trial process. Under this view, the impaneling and the voir dire of the jury would be considered part of the trial. This was the view taken by the Ohio Rules Advisory Committee in its initial draft of Rule 41(A).

The second view is that the trial commences immediately after the jury has been impaneled, upon opening argument by counsel. This is

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46 Code of Civil Procedure of the State of Ohio, § 372, 1853 Ohio Laws 57 (codified at Ohio Rev. Code Ann. § 2323.05 (Page 1953) (repealed 1970)) provided: "An action may be dismissed without prejudice to a future action: (A) by the plaintiff, before its final submission to the jury, or to the court, when the trial is by the court." See also Lee v. Jennings Transfer Co., 14 Ohio App. 2d 221, 237 N.E.2d 918 (1967).

There are three essential differences between dismissal by plaintiff under the prior code and under the current Rule 41:

1) The plaintiff may only dismiss before the commencement of trial, as opposed to anytime before final submission to the jury.
2) The plaintiff may now dismiss only once without prejudice, whereas before there was no limit to the number of times the plaintiff could recommence his action, providing he was still within the statute of limitations.
3) Rule 41(D) provides that upon the plaintiff's second action on the same claim, the court may order the payment of the outstanding costs from the previous action.

50 See notes 31-32 and accompanying text, supra.
the approach California has taken.\textsuperscript{52} Section 581 of the California Code, which governs voluntary dismissal by plaintiff, while roughly similar to Ohio Rule 41 in effect, defines the precise point in time that a trial will be deemed commenced:

A trial shall be deemed to be actually commenced at the beginning of the opening statement of the plaintiff or his counsel, and if there shall be no opening statement, then at the time of the administration of the oath or affirmation to the first witness, or the introduction of any evidence.\textsuperscript{53}

This view more narrowly construes the concept of trial to mean the commencement of the trial of facts. The statutory definition of trial in Ohio as the determination of issues of fact or law would, on its face, appear to be in keeping with the narrower concept of trial.\textsuperscript{54} Opening argument, presentation of evidence, examination and cross examination of witnesses, and closing arguments all tend to prove or disprove the issues in controversy. All of these components relate directly to determination of the issues. Therefore, it is clear that these items are part of the trial. On the other hand, the impaneling and the voir dire of the jury do not relate directly to the issues being litigated. Therefore, by a strict reading of the Ohio Revised Code's definition of a trial, this procedure would not be included as part of the trial, but instead, merely as one of the preliminary steps leading up to the trial.\textsuperscript{55}

One of the first decisions of record to address the question of whether or not the impaneling of the jury was included as part of the trial was \textit{United States v. Curtis}.\textsuperscript{56} In \textit{Curtis}, the federal court held that the impaneling process was separate from the actual trial. The court was construing a federal statute that stated that the defendant had a right to a copy of the indictment at least two days "before the trial." The court reasoned that the term "trial," as used in the statute, was intended to mean trial by jury, and therefore, the trial could not have begun until after the jury had been impaneled and sworn in.\textsuperscript{57} \textit{Curtis} was a criminal case, however, not a civil case. The purpose of the criminal statute in question was to insure that the defendant had notice of the charges contained in the indictment. The court held that the prosecution had

\textsuperscript{52} CAL. CIV. PROC. CODE § 581.1 (West 1976). For a discussion of the California dismissal statute prior to the enactment of section 581.1, see 30 CAL. L. REV. 76 (1941).

\textsuperscript{53} CAL. CIV. PROC. CODE § 581.1 (West 1976).

\textsuperscript{54} OHIO REV. CODE ANN. § 2311.01 (Page 1954).

\textsuperscript{55} In Pfleeger v. Swanson, 229 Ore. 254, 367 P.2d 406 (1961), the court distinguished between the terms "trial" and "trial of facts." The court held that the voir dire was part of the trial, but not part of the trial of facts. \textit{Id.} at 258, 367 P.2d at 408. Under this rationale, it seems that the \textit{Ohio Rev. Code Ann.} § 2311.01 (Page 1954) would more aptly define the trial of facts. The term "trial," as used in \textit{Pfleeger}, seems to take into account not only the determination of the issues in controversy, but also, the entire process that is physically conducted before the court. \textit{See} notes 117-18 and accompanying text, \textit{infra}.

\textsuperscript{56} 25 F. Cas. 726 (C.C.D. Mass. 1826) (No. 14,905).

\textsuperscript{57} "In short, ... there can be no legal doubt, that by the term 'trial,' is generally intended, in the law, the actual trial of the prisoner by the jury." \textit{Id.} at 728.
met this requirement, and therefore that the defendant's due process rights had been satisfied. The holding in Curtis, however, should not be taken as a general statement concerning the commencement of a trial, for the case turned upon the particular language in the statute it was construing. Thus, the holding of the court was limited in its application.

In Palmer v. State, the Supreme Court of Ohio rejected the decision in Curtis and held that the impaneling process was included as part of the trial. In Palmer, the defendant appealed a conviction of murder based upon irregularities which had occurred during the voir dire of jurors. The prosecution moved to dismiss the appeal, contending that the court could only review those errors which occurred “during the trial.” Therefore, relying on Curtis, the prosecution concluded that because the voir dire of the jury took place before the trial, as opposed to during the trial, the appellate court was without jurisdiction to hear the appeal. The Supreme Court of Ohio rejected this contention, interpreting the wording of the statute to include the impaneling of the jury as part of the trial.

The question of when a trial actually begins in Ohio, or alternatively, what components of the litigation process are properly included in the definition of a trial, was one of first impression in Palmer. The court's

58 Id. at 727. The statute in question stated that the defendant had a right to a copy of the indictment, as well as a list of witnesses and jurors, at least two days before trial. Ch. 9, § 29, 1 Stat. 118 (1790). From a reading of that statute, logic would seem to dictate that the impaneling of the jury could not be considered part of the trial. Otherwise, the state would have been unable to comply with the statute by giving the defendant a list of juror's names before the trial.

59 42 Ohio St. 596 (1885).

60 In a criminal case at the time of Palmer, the Ohio Supreme Court was limited in its power to review “[o]nly errors of law, occurring at the trial or appearing in the pleading or judgment. . . .” 1883 Ohio Laws 170 (repealed).

61 The statute governing procedure at a trial at the time of the Palmer decision in 1885 stated that, “after the jury is impaneled and sworn, the trial shall proceed in the following order . . . .” (procedural steps omitted). Code of Criminal Procedure of the State of Ohio, § 151, 1869 Ohio Laws 287. The court in Palmer seized upon the use of the word “proceed” to arrive at its conclusion. The court reasoned that had the impaneling process not been intended to be part of the trial, the statute would have used the word “commence” as opposed to “proceed.” 42 Ohio St. at 602.

62 The issue had been raised in dictum in Wagner v. State, 42 Ohio St. 537 (1885), which was decided the same term as Palmer.

63 “[T]rial,” in the sense of this limitation, has reference upon a plea in bar, and does not extend to a hearing or a motion to quash, or trial upon a plea in abatement; it commences, at least, when the jury is sworn, and embraces questions as to the admissibility of evidence, refusals to charge and the charge given, and the like; and it ends with the rendition of the verdict. Quaere, whether “trial” extends to matters occurring during the impaneling of the jury.

Id. at 537 (3d paragraph of the syllabus of the court). The defendant in Wagner had alleged error in the impaneling of the jury. The court found, however, that there was error in the impaneling process, thus avoiding the question of whether the impaneling of the jury was part of the trial. Id. at 541. One could argue, however, that since the scope of the court's review was limited to those errors that had occurred at the trial, through its examination of the impaneling process, the court implicitly decided that this process was part of the trial.

See also State v. Hartnett, 42 Ohio St. 568 (1885), in which the court held that errors arising from the impaneling process were subject to review, but based its decision on the defendant's constitutional right to a trial by an impartial jury, not the fact that the impaneling process was part of the trial. Id. at 572.
holding in *Palmer* was based upon a construction of the statute that conferred jurisdiction on the appellate court. This statute applied to both civil and criminal appeals. Although *Palmer* was a criminal case, its holding was not so restrictive as to preclude its application in the civil area. Therefore, on the basis of the court’s reasoning in *Palmer*, a fairly respectable argument could be made for the proposition that the impaneling of the jury should be included in the definition of a civil trial.83

The only civil case in Ohio that directly addressed the question of whether or not the impaneling of the jury is part of the trial was *Bates v. State*.64 The defendant in *Bates* appealed on the grounds that the array of prospective jurors had been improperly selected. In dismissing the appeal, the court held that the drawing of the array was not part of the trial, and therefore, that the court had no jurisdiction to review the case.65 The court cited *Palmer* as authority for the proposition that the impaneling of the jury was part of the trial, but distinguished between the drawing and the impaneling of the jury on the basis that the impaneling process took place in open court and the proceedings were part of the trial’s record. Any irregularity which occurs during the impaneling or voir dire of the jury will be grounds for appeal.66 The trial record in *Bates*, however, did not reflect the manner in which the jurors were drawn.67

The holding in *Palmer* that the impaneling of the jury was part of the trial was recently reiterated in the case of *State v. Wright*.68 In *Wright*, the defendant appealed from a conviction of felonious assault on the grounds that the trial court erroneously overruled his motion to discharge the case. The defendant’s motion was predicated on the ground that he had not been brought to trial within the time set out by

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63 The holding in *Palmer* is consistent with subsequent case law. See, e.g., Thomas v. Mills, 117 Ohio St. 114, 119, 157 N.E. 488, 489 (1927).
64 17 Ohio N.P. (n.s.) 193 (C.P. 1914).
65 Id. at 195. The drawing of the array normally will not be subject to appellate review. This is primarily due to the fact that this act does not go directly to the issues being litigated. “The manner of selecting or drawing jurors concerns the public rather than the parties in a cause. The statutory provision therefore relates neither to the right of a party as to the merits nor to the remedy for the vindication of that right. . . .” State v. Barlow, 70 Ohio St. 363, 71 N.E. 726 (1904) (syllabus of the court). But see Ohio Rev. Code Ann. § 2313.41 (Page 1954), which gives the parties the right to challenge the whole array of jurors if the selection is carried out in a manner other than that prescribed by law. A challenge to the jury merely on the grounds that the array was improperly drawn, with no claim of prejudice, will not be sufficient to dismiss the jury. State v. Huling, 17 Ohio St. 583, 588 (1897).
66 Irregularities that occur during the impaneling of the jury are subject to appellate review. Although the errors alleged may not be so substantial as to require a new trial, they are, nonetheless grounds for appeal. See Krupp v. Poor, 24 Ohio St. 2d 123, 265 N.E.2d 288 (1970); Maggio v. City of Cleveland, 151 Ohio St. 136, 84 N.E.2d 912 (1949); Pearson v. Gardner Cartage Co., 148 Ohio St. 425, 76 N.E.2d 67 (1940); Petro v. Donner, 137 Ohio St. 168, 28 N.E.2d 503 (1940); Durbin v. Humphrey Co., 137 Ohio St. 17, 28 N.E.2d 563 (1940).
67 17 Ohio N.P. (n.s.) 193, 200 (C.P. 1914).
The court of appeals held that where the statute specified that such a motion to dismiss must be made before commencement of the trial, the raising of the motion after the impaneling of the jury was not timely. In deciding that the motion had been made after the trial had begun, the court stated: "A criminal trial commences when the parties appear before the court and announce that they are ready to proceed and thereupon a jury is waived by the defendant or the parties start to impanel the jury." Although the court in Wright expressly stated that it was addressing the issue with respect to a criminal trial, as in Palmer, the underlying rationale is also applicable to a civil trial.

The court in Wright was concerned with the timeliness of a pretrial motion. Ohio Civil Rule 12(C) states that a pretrial motion should be made at such time that it will not cause the trial to be delayed. On the day that a case is called for trial, the judge enters the courtroom to begin the proceedings; counsel for both sides are prepared to proceed with the trial; prospective jurors are administered an oath or affirmation; and voir dire begins. If this stage is not considered part of the trial, preliminary motions could be properly raised. These motions may require disposal only after written briefs have been submitted to the court or a hearing has been held on the matter.

Ohio Rev. Code Ann. § 2945.71(C) (Page Supp. 1977) provides that a person charged with a felony shall be given a preliminary hearing within fifteen days of arrest and brought to trial within two hundred and seventy days. Pursuant to Ohio Rev. Code Ann. § 2945.73(B) (Page 1975), a motion by the defendant to dismiss the charge on the ground of a denial of a speedy trial must be made "at or prior to the commencement of trial."

State v. Wright, No. 35040, slip op. at 6 (Ohio Ct. App., Cuyahoga Cty., filed July 29, 1976).

See, e.g., Ohio R. Civ. P. 12(C), which states: "Motion for judgment on the pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." Ohio R. Civ. P. 12(D) governs the regulation of preliminary hearings: "The defenses specifically enumerated in (1) to (7) in subdivision (B) of this rule, whether made in a pleading or by motion, and the motion mentioned in subdivision (C) of this rule shall be heard and determined before trial on application of any party."

Ohio Rule 12(D) differs from Federal Rule 12(d) in that the latter gives the court the option of either determining the preliminary motion at a hearing, or deferring the matter until trial. In Ohio, the court does not have the power to defer the matter until trial. Although Ohio Rule 12(D) states that a hearing will be granted upon application by any party, this should not be taken to mean that if no application is made, the motion will be determined at the trial.

When a preliminary motion is made, Ohio Rule 12(A) states that the time for filing a responsive pleading is altered, since the time for filing is dependent upon whether the motion is granted or denied. Therefore, the defendant, after filing his motion to dismiss, need not file his answer until the status of the motion has been determined. Federal Rule 12(a) contains an additional provision to correspond to the power of the court under rule 12(d) to defer the matter until trial. In the federal system, once the motion is deferred until trial, the time for filing the answer begins to run again. Ohio Rule 12(A) does not contain this additional time provision. Therefore, in the Ohio system, when the motion to dismiss is made, unless an application for determination followed, the litigation would grind to a halt. To prevent this from occurring, the court in State ex. rel. Keating v. Pressman, 38 Ohio St. 2d 161, 311 N.E.2d 524 (1974), added a gloss to Ohio Rule 12(D) by stating that an application for a hearing would be included in a motion to dismiss. Thus, despite the language in Rule 12(D), a separate application is not necessary.

Ohio Rule 7(B) provides that if local rules permit, the court may dispense with
would be delay in the litigation. At this stage of the process, the delay will involve more than merely setting the trial date back on the calendar. This delay will tie up the time of the judge, the jurors, and the attorneys. The policy behind including the impaneling of the jury as part of the trial is to reduce, if not eliminate, any unnecessary delay. This policy argument applies equally to the civil and criminal areas. Therefore, for the purpose of pretrial motions, the trial should be deemed commenced once the jury impaneling has begun.

This definition of the commencement of the trial finds support in the application of Ohio Civil Rule 41(A). Prior to the impaneling process the court costs will be relatively low. Most of the costs incurred up until that point will have been in the nature of filing fees, which will have already been paid by the parties themselves. Once the jury impaneling begins, however, the addition of jury and courtroom costs add considerably to the unpaid balance. If this stage is not considered part of the trial, the plaintiff could dismiss with impunity, leaving the court to bear the unallocated costs. Voluntary dismissal under Ohio Rule 41(A) is not discretionary with the judge, nor may dismissal be granted conditioned upon the plaintiff's paying these costs. It is a matter of absolute right as long as the notice of dismissal is filed before the trial commences. Once the trial has begun the judge may, and usually will, condition the dismissal upon the plaintiff paying the court costs.

oral hearings and decide a motion based on written briefs and affidavits. Ohio R. Civ. P. 7(B)(2).

Some costs, such as the fees of the sheriff in serving subpoenas and other papers, are not paid by the parties at the time the act is performed. Instead, these costs will be taxed against the parties by the court after the final outcome of the litigation. Ohio Rev. Code Ann. § 311.17-.18 (Page 1954). The bulk of court costs, however, will generally be in the form of filing fees, and therefore, already paid by one of the parties.

Some examples of the additional costs that would arise after the impaneling process has begun are court stenographer fees and jury costs. Ohio Rev. Code Ann. §§ 2301.21, 2313.34 (Page Supp. 1977). There are other costs involved, but these may vary depending on the local rules of court. To date, there is no uniform, statewide schedule of the various components of court costs.

The plaintiff's escape from payment of these costs may be short-lived. If he recommences the suit at a later date, Rule 41(D) provides that the court may order the payment of the costs which accrued in the previous action. Ohio R. Civ. P. 41(D). See note 30 supra.

"A dismissal by the plaintiff involves no action by the court; it is a voluntary withdrawal of his case. . . ." Seigfried v. New York, L. E. & W. R. Co., 50 Ohio St. 294, 297, 34 N.E. 331, 332 (1893).

Based, upon the only case to date construing the plaintiff's right to dismiss under Ohio Rule 41(A)(1), it appears that the rule will be strictly construed in favor of the defendant. Standard Oil Co. v. Grice, 46 Ohio App. 2d 97, 345 N.E.2d 458 (1975). In Grice, the plaintiff moved for the dismissal of the defendant's counterclaim. Following a ruling on the plaintiff's motion against the defendant, but prior to the journalization of this ruling, the defendant filed a notice of the voluntary dismissal of his counterclaim. The court of appeals, in an opinion by Judge McBride, held that the notice of dismissal had been timely filed pursuant to Rule 41(A)(1), since it had been filed before the commencement of trial. Id. at 101, 345 N.E.2d at 461. It would seem that the Ohio dismissal provision, based upon the holding in Grice, favors a strict construction of Rule 41(A). This is similar to the approach taken by the federal courts, except perhaps in the unusual situation where the defendant has incurred great expense, but neither an answer nor a motion for summary judgment has been filed. See note 46 supra.
that have accrued to date. Thus, it would seem that the better rule would be to define the impaneling process as part of the trial, thereby giving the court the power to assess costs against the plaintiff when, at that late stage, he is either unable or unwilling to proceed.

It seems clear, therefore, that for the purposes of the plaintiff's right to seek a voluntary dismissal, the trial should be deemed commenced when the oath or affirmation is administered to the array of prospective jurors. This is the definition that the Ohio Rules Advisory Committee intended when they drafted Ohio Rule 41(A). This is also the interpretation that best fits the rule's application in the Ohio system, since it allows the plaintiff the longest possible time to dismiss his action without adversely affecting the defendant. The impaneling process will usually take two or three days at most. This additional time will not be of such benefit to the plaintiff that it would outweigh the expense that would be incurred by the court and the defendant. Therefore, for the purpose of Ohio Rule 41(A), a trial commences upon the impaneling of the jury, and a motion to dismiss by the plaintiff after that point in time will not be granted as a matter of right, but still may be granted in the sound discretion of the court.

B. Rule 54(C): The Demand for Judgment

Ohio Civil Rule 15 governs the process by which a party may amend his pleading. The rule sets out specifically that a party may amend

79 The Court has the power to do this pursuant to Ohio R. Civ. P. 54(D).
80 A codification of this "better rule" may be found within the California dismissal statute, which states that the trial commences after the jury is impaneled and that the plaintiff must always pay the costs upon dismissal. Cal. Civ. Proc. Code § 581.1 (West 1976). See notes 52-53 and accompanying text, supra. Even when the dismissal is of right, it is conditioned upon the plaintiff's payment of the court costs. Federal Rule 41 solves this problem by shortening the length of time a plaintiff may dismiss without having to go through the court. The Ohio Rule, which extends the plaintiff's right to dismiss beyond the federal rule, lacks a provision pertaining to the payment of costs. Therefore, all costs not previously paid by the parties will be borne by the court.
81 There is some language in past Ohio cases from which one could infer support for this view of the commencement of a trial. Meyer v. Welsbacher, 80 Ohio App. 200, 75 N.E.2d 89 (1947). "It was the trial court's duty, under the statute, to make up the issue on an order on the journal before the impaneling of the jury, which is to say, before trial commenced. . . ." Id. at 203, 75 N.E.2d at 90. See also Cottmon v. Federman Co., 71 Ohio App. 89, 47 N.E.2d 1009 (1942).
82 Ohio Rule 41(A), as originally drafted, specified that the plaintiff's right to voluntarily dismiss the lawsuit without prejudice would terminate upon the impaneling of the jury. Proceedings of the Ohio Rules Advisory Committee at 40 (Nov. 21, 1968) (on file with the Ohio Supreme Court Library). When the rule was adopted by the committee in its final form, however, a change in its language substituted the term "call to trial" for the original, but more cumbersome, "before the jury is impaneled and sworn in actions triable to the jury." Id. at 234 (Nov. 22, 1968). Because of the local meanings attached to the term "call to trial," the Ohio Supreme Court substituted the term "commencement of trial." For a brief discussion of the evolution of Ohio Rule 41(A), see Standard Oil Co. v. Grice, 46 Ohio App. 2d 97, 100, 345 N.E.2d 458, 460 (1975).
83 See notes 48-49 and accompanying text, supra.
84 Ohio R. Civ. 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
a pleading as a matter of course before any responsive pleading is served, or in the event no responsive pleading is permitted, within twenty-eight days from the date the original pleading was filed.\textsuperscript{85} Rule 15 also permits the court to grant leave to file amendments at any other time when justice so requires.\textsuperscript{86} While Rule 15 lays out the general procedure that one must follow in seeking to amend a pleading, the rule is not exclusive. One exception to this general rule is contained in Ohio Rule 54(C).\textsuperscript{87} The amendment provision of Rule 54(C), applies when a party wishes to increase the amount of money damages contained in the complaint. Rule 54(C) states that a party wishing to amend the demand for judgment must do so at least seven days before the commencement of the trial. Again, because of the lack of a precise definition of "commencement of trial," a plaintiff will be unable to determine with any degree of certainty the point at which he will be foreclosed from amending the demand for judgment.

It appears that the amendment provision of Rule 54(C) was enacted to establish a separate procedure for amending the demand for judgment, distinct from other parts of the complaint. Neither Rule 15 nor Rule 54(C), nor their accompanying staff notes, contain any specific reference one to the other.

A brief examination of Federal Rule 54(c) will be of some assistance in tracing the development of Ohio Rule 54(C). Federal Rule 54, is primarily concerned with the type of judgment rendered in a lawsuit. In the federal system, Rule 54(c) does not contain any separate amendment provision. As a result, Federal Rule 15 is exclusive in the area of amendments to the pleadings. Secondly, the federal rule does not limit the defendant's potential liability to the amount stated in the demand for judgment as does Ohio Rule 54(C).

As originally proposed by the Ohio Rules Advisory Committee,
Ohio Rule 54(C) was identical to Federal Rule 54(c).\(^8\) A minority of that committee, however, expressed concern about leaving the defendant open to virtually unlimited liability.\(^9\) When the rule was adopted by the Ohio Supreme Court in its final form, it had been modified to incorporate the minority view on the limitation of damages.\(^90\) Thus, the primary purpose for imposing a deadline for amending the demand for judgment was to insert a provision that would govern the maximum liability of the defendant.\(^91\)

Ohio Rule 54(C), like Ohio Rule 41(A), represents a compromise between the Ohio system and the Federal Rules. The compromise gives the plaintiff the flexibility of increasing the amount of the demand for judgment up to a week before the trial, but at the same time places a ceiling on the liability of the defendant.\(^92\) The practical result, however, has been to create a special exception to the general procedure for amending the pleadings. Although both Ohio Rule 15 and Ohio Rule 54(C) relate to the amendment of the pleadings, Rule 54(C) is more narrow in its scope. Given the situation where the two rules overlap, the specific will prevail over the general.\(^93\)

While it is clear which rule applies to the amendment of the demand for judgment, it is not so clear when such an amendment is timely filed.

\(^8\) Proceeding of the Ohio Rules Advisory Committee at 285-88 (Nov. 21, 1968) (on file with the Ohio Supreme Court Library).

\(^9\) Id. at 287.

\(^90\) "[U]nder the rule [54(C)], defendant, at least at trial time, would be secure in the knowledge that he may be liable only to the extent of the amended demand for judgment." Ohio Rules Advisory Committee Staff Note to OHIO R. Civ. P. 54(C). Under Federal Rule 54(c), the defendant does not have this security. An illustration of the above situation is contained in the Staff Note to Ohio Rule 54(C). The attempt to limit the plaintiff's recovery, or conversely, the defendant's liability, was the primary purpose for inserting the additional clause limiting the plaintiff's right to amend his demand for judgment.

\(^91\) There has been a tendency by the Ohio courts to overlook the special amendment provision in Rule 54(C), and instead, look only to Rule 15 for guidance in this area.

In Kelchner Excavating v. Zimmerman, 25 Ohio Misc. 133, 264 N.E.2d 918 (C.P. 1970), the plaintiff moved to increase his demand for judgment at the commencement of the trial. The court allowed the amended pleading, holding that the procedure was governed by Rule 15. The same result was reached in Jasterbowski v. Michos, 44 Ohio App. 2d 201, 337 N.E.2d 627 (1975). Although neither case states exactly when the amended demand for judgment was filed, a close reading of the facts implies that it was done after the seven day time limit. In both cases, the courts erroneously applied Rule 15 to a situation in which it was clear that the amendments were within the confines of Rule 54(C). See also State ex rel. Dean v. Huddle, 45 Ohio App. 2d 163, 341 N.E.2d 860 (1975), rev'd. 45 Ohio St. 2d 234, 344 N.E.2d 138 (1975). The court of appeals held that since the plaintiff failed to demand a specific amount of money damages in his petition for mandamus, Ohio Rule 54(C) raised a bar to any monetary recovery in that action. Id. at 172-73, 341 N.E.2d at 867. The Ohio Supreme Court reversed without mention of Rule 54(C).

\(^92\) Under section 2325.12 of the Ohio Revised Code, a plaintiff might still be able to recover an amount greater than the amount demanded in his final amended demand for judgment. OHIO REV. CODE ANN. § 2325.12 (Page 1954). The validity of this section, however, after the enactment of the Ohio Rules of Civil Procedure, is questionable, being at least in partial conflict with Ohio Rule 54(C). 1 S. JACOBY, supra note 48, at 409. Even if section 2325.12 may still be invoked, it is limited to circumstances when the incorrect demand was the result of a mistake of the pleader.

The only limitation contained in Ohio Rule 54(C) is that the amendment be filed at least seven days before the commencement of the trial.\textsuperscript{94} Under one interpretation of the term “commencement of trial,” the plaintiff’s seven day period would be measured from the time of the opening arguments to the jury.\textsuperscript{95} Alternatively, the second interpretation would advance the seven day period to an earlier point in time in the lawsuit by including the impaneling process within the definition of the trial.\textsuperscript{96} As with Ohio Rule 41(A), the latter interpretation should be used in conjunction with Ohio Rule 54(C). That is, that the trial begins upon the commencement of the impanelling of the jury. A brief comparison between Ohio Rules 15 and 54(C) will reveal the soundness of this interpretation.

Although Ohio Rule 15 sets out a definite procedure for the filing of a timely amendment, it also gives the court the discretion to accept an otherwise untimely amendment. Therefore, technically there is no precise date on which an amendment must be filed under Rule 15.\textsuperscript{97} Ohio Rule 54(C) does not contain a similar discretionary provision. The amendment of the demand for judgment must be made by a specific date, seven days before the commencement of the trial.\textsuperscript{98} By including the impaneling of the jury as part of the trial, an element of definiteness is supplied, since the trial will commence on the date the case is called to trial\textsuperscript{99} rather than some indefinite date following the impaneling process. This interpretation, therefore, establishes a precise date for the purpose of determining the final day that the plaintiff may amend his demand for judgment.

Alternatively, if the impaneling of the jury is not included within the definition of a trial, a definite deadline for the amendment of the prayer cannot be established in advance. The day of commencement will depend upon the amount of time necessary to impanel the jury and will vary with each case. Thus, if the selection process of the jury is excluded from the definition of a trial, the plaintiff would not be able to determine the last day for amending the demand for judgment.

Excluding the impaneling process from the definition of a trial also leaves the operation of the rules open to abuse by a party not acting in good faith. This could occur when an amendment to the demand for judgment was filed less than seven days before the call to trial. If the impaneling process is part of the trial, then the amendment is not timely filed, and consequently, void. If, however, the trial commences after the jury is impaneled, the amendment may or may not be timely filed. There will be no way of determining the validity of the amendment

\textsuperscript{94} Ohio R. Civ. P. 54(C). For the text of Rule 54(C), see note 87 supra.
\textsuperscript{95} See note 31 and accompanying text, supra.
\textsuperscript{96} See note 32 and accompanying text, supra.
\textsuperscript{97} Ohio R. Civ. P. 15(A). For the text of Rule 15(A), see note 84 supra.
\textsuperscript{98} Ohio R. Civ. P. 54(C).
\textsuperscript{99} The term “call to trial” refers to the day that the trial is scheduled to begin. That is, the day of commencement of the proceedings in open court, not the day when the notice of trial is given. See note 82 supra.
until the trial actually commences. This interpretation could give rise to dilatory motions and unnecessary jury challenges during the voir dire solely for the purpose of stretching out the impaneling process and delaying the commencement of the trial. Therefore, if only to eliminate this potential abuse, the better view would be to include the impaneling of the jury as part of the trial.

This interpretation of "commencement of trial" is the same as the one suggested for Ohio Rule 41(A). Thus, another argument, although by no means conclusive, can be made in favor of including the impaneling of the jury as part of the trial because of the uniform language. The same terminology, when used in similar circumstances within the Ohio Rules of Civil Procedure should, if possible, retain the same meaning. Although mere uniformity should not be the sole criteria, the fact that the same definition applies to both rules is an additional benefit that aids in establishing an easier understanding of the mechanics of the Ohio Rules of Civil Procedure.

C. Rule 32(A): The Use of Depositions at Trial

If a party wishes to use a deposition as evidence in a trial, Ohio Rule 32(A) requires that the deposition be filed with the court at least one day before the day of trial. Rule 32(A) further provides, however, that if the deposition is not timely filed with the court, the deposition may still be used at trial, upon a showing of good cause for the late filing. Since any extensions are purely discretionary and dependent upon a showing of good cause, it is necessary to clarify the use of the ambiguous phrase "the day of trial" as it appears in Ohio Rule 32(A).

Two reasons have been advanced for requiring the pretrial filing of a deposition intended to be used in court. The primary reason for the filing requirement is to put the opposition on notice of the possible use of the deposition at trial. The second reason is that the filing requirement gives the court greater control over the conduct of the parties.

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100 See notes 81-83 and accompanying text, supra.

101 Ohio R. Civ. P. 32(A) provides in part: "(A) Use of Depositions. Every deposition intended to be presented as evidence must be filed at least one day before the day of trial or hearing unless for good cause shown the court permits a later filing." Although Ohio Rule 32(A) applies to both a trial and a hearing, for the purposes of this section, only the filing requirement with respect to a trial will be considered.

102 Id.

103 "This provision [the filing requirement] adds certainty to the rule. It puts opposing parties on notice that the deposition might be used in evidence and compliments Rule 56, the summary judgment rule, by putting the deposition in the court's hands prior to the hearing." Ohio Rules Advisory Committee Staff Note to Ohio R. Civ. P. 32(A). See also 1 S. Jacoby, supra note 54, at 293. The prior civil code, Code of Civil Procedure of the State of Ohio, § 356, 1853 Ohio Laws 57 (codified at Ohio Rev. Code Ann. § 2319.29 (Page 1954) (repealed 1970)), provided that any objection to the use of a deposition at trial had to be filed before the commencement of the trial. This provision worked in conjunction with Code of Civil Procedure of the State of Ohio, § 353, 1853 Ohio Laws 57 (codified at Ohio Rev. Code Ann. § 2319.26 (Page 1954) (repealed 1970)). For the text of section 353, see note 108 infra. Under Rule 32(B), a party may object to the admissibility of a deposition at the trial, thus making the written notice requirement far less crucial under the rules.
and the progress of the trial. A deposition may be used in a trial for one of two purposes: as a substitute for live testimony when the party’s own witness is unavailable to testify in person; or to impeach the testimony of an opposing witness. Regardless of the intended use of the deposition, an attorney will generally know in advance of the trial that a particular deposition might be needed during the trial. Thus, the filing requirement is not unduly burdensome. Moreover, by filing the deposition, both the court and opposing counsel will be put on notice of its potential use at trial and will be able to act accordingly. Thus, the filing requirement of Rule 32(A) is an attempt to shift the emphasis of a trial away from that of a sporting event and toward an open forum for the presentation of the issues in controversy.

The court has the power to allow the use of an untimely filed deposition at trial in the event the deposition is essential to the case and a good reason is shown for not having met the filing requirement. Generally, good cause can be shown when the need for the deposition at trial was not foreseeable, as in the case of a witness’ intervening death or incapacity. This late filing provision of Ohio Rule 32(A) represents a change from the prior code provision which gave the court no discretion to permit the use of a deposition that was not filed with the court at least one day before trial.

The discretion given to the court under Rule 32(A) to admit a deposition filed after the trial begins destroys the strictness of the filing requirement. By comparison, Ohio Rule 54(C) does not contain a provision giving the court the discretion to suspend the time requirement for

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108 Code of Civil Procedure of the State of Ohio, § 353, 1853 Ohio Laws 57 (codified at Ohio Rev. Code Ann. § 2319.26 (Page 1954) (repealed 1970)): “Every deposition intended to be read in evidence on the trial must be filed at least one day before the day of trial.” The primary distinction between the prior code provision and Rule 32(A) is the power of the court under the latter to admit depositions notwithstanding the late filing date. The modification in the procedure governing the use of depositions permits the court to avoid arriving at harsh determinations.

In Nicholas v. Yellow Cab Co., 116 Ohio App. 402, 180 N.E.2d 279 (1962), upon the defendant’s motion, the trial court recessed the trial for a day to permit the defendant to take additional depositions and submit them as evidence. Upon the plaintiff’s objection to this motion the lower court gave the plaintiff the option of either consenting to the recess or having the court declare a mistrial. The court of appeals affirmed, holding that the plaintiff had consented to the late filing of the deposition, and therefore, had waived his right to complain. Id. at 406, 180 N.E.2d at 282. In the absence of such a choice, however, a deposition could not be filed subsequent to the filing date. Superior Metal Prod. v. Modern Metal Express, 6 Ohio App. 2d 1, 215 N.E.2d 617 (1966). A plaintiff caught in this situation under the prior code could avoid hardship by dismissing the lawsuit pursuant to the liberal dismissal statute. See note 48 supra. Thus, the plaintiff did have a remedy of sorts in these instances. The defendant, however, was not in the same fortunate position, for there was little he could do but continue the trial without the benefit of the deposition. Ohio Rule 32(A), by permitting the late filing of depositions, puts the plaintiff and defendant on equal ground as far as relief in this type of situation is concerned.
amending the demand for judgment.\textsuperscript{109} Since Rule 32(A) is not mandatory, the commencement of the trial is not as crucial a stage in the litigation as it is in the case of the plaintiff's right to amend his demand for judgment, or his right to voluntarily dismiss the action.\textsuperscript{110} Consequently, the determination of the exact point in time when the deposition must be filed is not as important.

Originally, the primary function of the deposition in a civil action was to serve as a means of discovery.\textsuperscript{111} In contrast, a deposition in the criminal area has been used primarily in place of live witnesses, as a form of direct testimony.\textsuperscript{112} Thus, while it is the general rule in a criminal trial that a deposition will be offered into evidence, in civil cases the use of the deposition at trial has been more of an exception. This statement finds support in the fact that Ohio Criminal Rule 15(A), the rule governing the use of a deposition in a criminal trial, requires no pretrial filing with the court.\textsuperscript{113} A recent liberalizing amendment to Civil Rule 32(A) facilitates the use of a deposition as a substitute for live testimony at civil trials.\textsuperscript{114} This amendment seems to reflect a retreat from the notion that the primary role of a deposition in a civil action is for discovery purposes. Ohio Civil Rule 32(A) anticipates the use of depositions in civil trials equal to that permitted by Ohio Criminal Rule 15(A). Federal Civil Rule 32(a), upon which the Ohio Rule was patterned, does not contain a filing requirement similar to the one contained in Ohio Civil Rule 32(A).\textsuperscript{115} The purpose of giving notice to the court and opposing counsel, becomes less crucial as the exceptional use of depositions in civil trials gradually develops into the general rule. If, in fact, the use of depositions in civil trials is no longer a rarity, then there is no need to

\textsuperscript{109} For the text of Rule 54(C), see note 87 supra.
\textsuperscript{110} For instance, even though the plaintiff may still dismiss his case after the trial has commenced, a dismissal at that time may not be obtained as of right, but lies within the discretion of the court. See notes 28-30 and accompanying text, supra.
\textsuperscript{111} 5 ANDERSON'S OHIO CIVIL PRACTICE § 168.01 (1973).
\textsuperscript{113} OHIO R. CRIM. P. 15(A).
\textsuperscript{114} The 1972 amendment to Ohio Rule 32(A) substituted the words “presented as evidence” for the former “read in evidence.” This amendment provides for greater application of the rule, encompassing electronic recordings and videotape. The admissibility of a deposition in lieu of live testimony, however, is still subject to the restrictions of Rule 32(A)(3). But see Crist v. United States War Shipping Administration, 64 F. Supp. 934 (E.D. Pa. 1946), where the plaintiff introduced depositions and the defendant failed to timely object. The court held that since the defendant had not objected at the time of admission, it was presumed that the plaintiff had met one of the five provisions of admissability enumerated in Federal Rule 32(a)(3). \textit{Id.} at 937-38.
\textsuperscript{115} FED. R. CIV. P. 32(a). This omission of a filing requirement is due to the fact that in the federal system no distinction is made between a deposition taken solely for discovery purposes and one to be used as evidence in a trial. A party will be put on notice of the possible use of the deposition at the trial merely by the notice of the discovery proceeding itself.

While the interrogation at the deposition will be broader than at the trial, the deposition can be edited, based on the objections raised at the deposition. Thus the deposition can serve effectively both as a discovery device and as evidence at trial. See Stewart v. Meyers, 353 F.2d 691, 696 (7th Cir. 1965); Independent Prod. Corp. v. Loews, Inc., 30 F.R.D. 377, 381 (S.D.N.Y. 1962); Rosenthal v. Peoples Cab Co., 26 F.R.D. 116, 118 (W.D. Pa. 1960).
give notice to opposing counsel and one questions the need for imposing a filing requirement. If the filing requirement is to remain part of Ohio Rule 32(A), however, then the deadline for filing should at least be extended for as long as possible.

The terminology employed in Ohio Rule 32(A) should be compared to that contained in Ohio Rules 41(A) and 54(C). Both of the latter rules use the term "commencement of trial." Rule 32(A), on the other hand, states that the filing should be at least one day before the "day of trial. . ." 116 The question arises whether a different meaning was intended by the use of different terminology. Stated conversely, if the same meaning was intended to apply to all three rules, why were different terms chosen?

In Pfleeger v. Swanson, the Oregon Supreme Court drew a distinction between the terms "trial" and "trial of facts." 117 The court construed the word "trial" to include all of the procedures conducted while the parties were physically before the court whereas "trial of facts" included only those stages of the proceedings that went directly to the determination of the issues in controversy. 118 A trial was held to encompass the trial of facts, but was not limited to the trial of facts. Thus, in Pfleeger, the use of two similar but not identical terms gave rise to two separate meanings.

The situation presented in Pfleeger is analogous to the situation that has resulted from the use of the terms "commencement of trial," in Rules 41(A) and 54(C), and "day of trial" in Rule 32(A). The two terms, while only slightly variant, take on different meanings. The better interpretation would appear to be to construe the language in Rule 32(A) to mean that the filing of the deposition must be made before the trial of facts, as that term was defined in Pfleeger. According to this definition the deposition would have to be filed before the opening argument of counsel, or in its absence, before presentation of the first evidence. The distinction being that commencement of trial, as used in Ohio Rules 41(A) and 54(C), means the commencement of the trial process, which begins at an earlier stage than the trial of facts. The liberal language of Rule 32(A) supports this conclusion by providing for later filing.

Unlike Ohio Rules 41(A) and 54(C), a late filing under Rule 32(A) will not substantially impair the rights of the opposing party. As a rule, both parties will be represented at the taking of a deposition 119 and will have a transcript of the testimony before the trial. Thus the filing of the deposition with the court will not be essential to the opposing counsel's preparation for trial. Requiring that the filing deadline be at an earlier stage in the trial process will only serve to exclude otherwise proper evidence. 120

118 Id. at 258, 367 P.2d at 408.
119 Ohio R. Civ. P. 30(B).
120 Testimonial statements not subject to an opportunity for cross examination will be
Ohio Rule 32(A)(3) states, in effect, that when a witness is dead or unavailable, his deposition will serve as an adequate substitute. In such a situation, it would be an injustice to prevent the use of the deposition at the trial merely because the party failed to timely file the deposition. If the witness is merely unavailable temporarily, and the choice is either to admit the untimely filed deposition or to grant a continuance or dismissal without prejudice, the latter options would only result in wasted time for both the court and the parties. When the testimony would be almost identical in content, whether live or by deposition, there seems no reason to delay the trial once it has begun.

The better interpretation of the term "day of trial," as used in Ohio Rule 32(A) would be to permit a party to file his deposition with the court at any time up to one day before the opening statement. This interpretation will allow the court the ability to regulate the proceedings and to give the opposing party notice of the possible use of the deposition at the trial, but it will not do so at the expense of excluding otherwise valid evidence from the consideration of the jury. While the terms are similar they need not imply identical meanings. This minor distinction in terminology, when coupled with the differing purposes of the rules sustains the contention that the time limitation imposed by Rule 32(A) should not be the same as that imposed by Ohio Civil Rules 41(A) and 54(C). Moreover, the distinction may be maintained without impairing the desirable uniformity established thus far in the Ohio Rules of Civil Procedure.

excluded by the hearsay rule. A deposition does offer the opposing side the opportunity to cross-examine, hence, the requirement of the hearsay rule is satisfied. See 5 Wigmore, Evidence in Trials at Common Law, § 1370 (Chadbourn rev. 1974). Ohio R. Civ. P. 30(C) states that the opposing party has the same right to cross examine at a deposition as he does at a trial. Therefore, when a deposition is offered into evidence, the opposing party has had the opportunity to cross-examine the witness and the hearsay requirement has been met. Fed. R. Evid. 804(B)(1) allows the admission of depositions into evidence at trial as an exception to the hearsay rule as long as both the oath and an opportunity for cross-examination were present at the taking of the deposition. But see Derewecki v. Pennsylvania R.R. 353 F.2d 436, 443 (3d Cir. 1965). It must be remembered, however, that "A deposition is a substitute, or second best, not to be used when the original is at hand, for it deprives of the advantage of having the witness before the jury." Armstein v. Porter, 154 F.2d 464, 470 (2d Cir. 1946) (quoting Napier v. Bossard, 102 F.2d 467, 468-69 (2d Cir. 1939)). For the most part, the deposition of a witness as a substitute for live testimony, will only be admissible when the witness is dead or unavailable.

In some situations a party may be given the option of using a live witness or his deposition at the trial. Ohio Rule 32(A)(3)(b) permits a deposition to be used instead of a live witness when the witness is outside the subpoena power of the court and his absence was not procured by the party attempting to use the deposition. Where the witness is willing to come into court at the request of one party, but reluctant to do so for the other, an attorney finds himself in the favorable position of being able to choose the method by which he will put the witness' testimony before the jury. The situations where an attorney will have such an option, however, are rare. See Ohio Rev. Code Ann. § 4123.519 (Page 1973), which permits the use of the deposition of a physician in lieu of live testimony in an appeal from a decision of the industrial commission, even when the physician is within the jurisdiction of the court.

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III. The Motion for a New Trial

A motion for a new trial is a petition directed to the trial court by the losing party requesting a retrial of the issues in controversy. The motion for a new trial is governed by Rule 59 of the Ohio Rules of Civil Procedure. The basis for this motion is that the court erred during the course of the previous trial, and that the error worked to the prejudice of the moving party. Ohio Rule 59(A) lists nine grounds upon which the movant may base his motion for a new trial. In addition to the grounds enumerated, Ohio Rule 59 also gives the court the power to set aside a jury verdict when, in the sound discretion of the court, good cause has been shown. Rule 59 reflects the merger of the common law motion for a new trial and the equitable petition for rehearing. At common law the judge had the power to grant a new trial in an action before a jury. Rule 59 has extended this power to non-jury actions. The rule further provides that in some situations the court may

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122 Ohio R. Civ. P. 59(A) provides in part:

A new trial may be granted to all or any of the parties and on all or part of the issues upon any of the following grounds:

In addition to the above grounds, a new trial may also be granted in the sound discretion of the court for good cause shown.

When a new trial is granted, the court shall specify in writing the grounds upon which such new trial is granted.

On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and enter a new judgment.

123 Id.


125 The Advisory Committee note accompanying Federal Rule 59 refers to this rule as an amalgamation of the petition for rehearing in equity and the motion for a new trial. Federal Advisory Committee Staff Note to Fed. R. Civ. P. 59. This is in keeping with the structure of the Civil Rules, consolidating actions at law and equity into one civil action.

126 While the jury renders the verdict, it does not become an enforceable judgment until the court makes the journal entry. Thus, if the judge is not satisfied with the verdict, he has the duty to set it aside and try the matter again. In Aetna Cas. & Sur. Co. v. Yeats, 122 F.2d 350 (4th Cir. 1941), the court discussed the relationship between the power of the jury to render a verdict and the power of the court to grant a new trial:

On such a motion it is the duty of the judge to set aside the verdict and grant a new trial, if he is of the opinion that the verdict is against the clear weight of the evidence, or is based upon evidence which is false, or will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict. The exercise of this power is not in derogation of the right of trial by jury, but is one of the historic safeguards of that right.

127 Id. at 352-53. For a discussion of the historical evolution of the power of the court to grant new trials, see Sunray Oil Corp. v. Allbritton, 187 F.2d 475, 477-79 (5th Cir. 1951) (dissenting opinion). See generally Riddel, New Trial at Common Law, 26 Yale L. J. 49 (1916).
A motion for a new trial is not an appeal, for jurisdiction remains lodged with the trial court at all times. It is an opportunity for the trial court to review the rulings that it made during the past trial, and with the aid of hindsight, to determine for itself whether any reversible errors were made. While the motion is usually made by the losing party, the rule states that a new trial may be granted to any of the parties in the lawsuit. Ohio Rule 59(D) also permits the court upon its own initiative to order a new trial. Thus the trial court may correct its own errors, as opposed to being reversed in a subsequent appeal. Because the motion is heard by the same court, the record is readily available and the judge is familiar with the case. Therefore, review by the trial court will be far more expeditious than by the appellate court.

Although a motion for a new trial is not an appeal, it does not preclude the party making such a motion from subsequently appealing the case in the event a new trial is not granted. The appeal may be based upon the trial court's denial of the motion for a new trial, or on the original

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128 Ohio R. Civ. P. 59(A)(4). For one way in which this ground could be used, see note 234 infra.

129 Ohio R. Civ. P. 59(D). The rule provides, for instance, that a party may make a motion for a new trial on the grounds of inadequacy of damages. Ohio R. Civ. P. 59(A)(4). For one way in which this ground could be used, see note 234 infra.

130 One of the points stressed by Judge Burger in his dissent in Jackson was that when the alleged error would merit a new trial at the trial court level, it will also merit one at the appellate court level. Consequently, the movant will still be able to get his new trial, but will have to take an extra step to do so by going through the court of appeals. 243 F.2d at 221 (Burger, J., dissenting).
judgment of the court. Only one appeal per final order is permitted, however, and any errors not raised in that appeal are thereby lost. The effect of a motion for a new trial, then, is to give the losing party two chances for review of the merits: once at the trial level and again at the appellate level.

In the Ohio System, Appellate Rule 4(A) states that an appeal must be filed within thirty days of the entry of judgment. Of the array of post trial motions an attorney has at his disposal, only two of them, the motion for a new trial pursuant to Rule 59 and the motion for judgment notwithstanding the verdict pursuant to Rule 50(B), will suspend the time for filing a notice of appeal. Absent this feature of suspension, a party would be forced to choose between seeking relief at the trial level or in the appellate court. Given the crowded dockets facing the trial courts, it would be a rare occasion when a motion for a new trial could be made, argued, and decided within the thirty day time limit for filing notice of appeal. On the other hand, upon the filing of a notice of ap-


133 Once the appellate court has reviewed the order being appealed, the doctrine of the law of the case will apply. This does not, however, preclude multiple appeals in one case, but merely on the same final order. Thus in Jolley v. Martin Bros. Box Co., 158 Ohio St. 416, 109 N.E.2d 652 (1952), the court held that a party could file a motion for judgment notwithstanding the verdict, and later, a motion for a new trial. The overruling of both these motions may be reviewed in separate appellate proceedings. On the second appeal, however, the court could only examine those matters that were not determined in the first review. While the practice of dual appeals is possible under the Ohio Rules of Civil Procedure, such practice is nonetheless infrequent, for courts are generally reluctant to entertain unnecessarily fragmented appeals. Whitaker-Merrell Co. v. Geubel Constr. Co., 29 Ohio St. 2d 184, 187, 280 N.E.2d 922, 924-25 (1972). See also Linz v. Linz, 33 Ohio App. 2d 174, 293 N.E.2d 100 (1972).

134 Ohio R. App. P. 4(A) states in part:

In a civil case the notice of appeal required by [Appellate] Rule 3 shall be filed with the clerk of the trial court within 30 days of the date of entry of the judgment or order appealed from. . . .

The running of the time for filing a notice of appeal is suspended as to all parties by a timely motion filed in the trial court by any party pursuant to the Civil Rules hereafter enumerated in this sentence, and the full time for appeal fixed by this subdivision commences to run and is to be computed from the entry of the last of any of the following orders made upon a motion under such rules granting or denying a motion (1) for judgment under Rule 50(B); (2) for a new trial under Rule 59. A judgment or order is entered within the meaning of this subdivision when it is filed with the clerk of the trial court for journalization.

135 Id. Ohio R. App. P. 14 (B) expressly states that "the court [of appeals] may not enlarge or reduce the time for filing a notice of appeal." Prior to the enactment of the Ohio Rules of Civil Procedure, the Ohio Revised Code provided for an extension of twenty days to be given by the trial court in the case of death or insanity. Ohio Rev. Code Ann. § 2505.07 (Page 1954) (This section has been superseded by Appellate Rule 14(B) where that rule is applicable). The Ohio Civil Rules do not contain a similar provision, implying that the trial court does not have the power to extend the filing date. But see Boscoe v. City of Euclid, 38 Ohio App. 2d 40, 311 N.E.2d 870 (1974), where the court implied that this exception might be carried over from the prior code section. Id. at 42 n.5, 311 N.E.2d at 872 n.5.
peal, the trial court loses its jurisdiction over the case, and any pending motion for a new trial is reduced to a nullity. Therefore, as the thirty day deadline for filing an appeal approached, the party would have to elect between his motion for a new trial, or a notice of appeal. Because of the suspension provision in Appellate Rule 4(A), however, the motion for a new trial and the motion for judgment notwithstanding the verdict are more attractive than their common law counterparts, the motions for rehearing and for reconsideration.

It is important to determine after what proceedings a Rule 59 motion for a new trial will be appropriate. At first glance the answer would appear to be only after a trial. A trial, however, is defined as the judicial examination of issues of law or fact. According to this definition, every judicial proceeding involving the examination of at least one issue can be properly classified as a trial. This would mean that a motion for a new trial could apply to almost all judicial proceedings. The language of the Ohio Rules of Civil Procedure seems to indicate that this was not the intention of the members of the Ohio Rules Advisory Committee. Rather, it appears that a trial was intended to be defined and treated as something separate from a hearing. This intention, however, has in some cases been defeated by the manipulation of the term "trial" to encompass a hearing, and as a result, the motion for a new trial has been made applicable to a hearing.

It is not clear whether a final order in a hearing should be treated differently than a final order in a trial. If there are adequate reasons to support a difference between the two types of judgments, then a trial should be sufficiently defined to maintain this difference. If, on the other hand, there is no distinction between the two types of final orders, then a change should be made in the Ohio Rules of Civil Procedure rather than allowing the language of the rules to be manipulated to achieve the desired result. The statutory definition of a trial is not adequate to solve the problems that arise from the application of a motion for a new trial. Therefore, some modifications in this definition should be made. This section will attempt to develop a workable definition of the word "trial" with respect to the Rule 59 motion for a new trial.

A. The Motions for Rehearing and Reconsideration: The Ghosts of the Common Law

There has been much confusion in the Ohio courts with respect to the common law motions for rehearing and reconsideration. They have

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136 Majnaric v. Majnaric, 46 Ohio App. 2d 157, 347 N.E.2d 552 (1975). In that case, the appellant filed both a motion to vacate and a notice of appeal with the trial court. The appellate court held that the lower court could not pass on the motion to vacate while the appeal was pending, for the trial court had been divested of its jurisdiction in the matter by the filing of the notice of appeal. Id. at 159-60, 347 N.E.2d at 554. See also Vavrina v. Greczanik, 40 Ohio App. 2d 129, 318 N.E.2d 408 (1974).

137 For a discussion of these common law motions, see notes 140-60 and accompanying text, infra.

138 See Notes 229-34 and accompanying text, infra.

been confused with a motion for a new trial\textsuperscript{140} as well as with each other.\textsuperscript{141} This is primarily due to the fact that they are common law motions with no express recognition by either the Ohio Revised Code or the Ohio Rules of Civil Procedure, and as a result they have not been clearly defined.

A motion for rehearing and motion for reconsideration are not interchangeable terms, although they have been used as such in the past due to a lack of understanding. As it has developed, a motion for rehearing is comparable to a motion for a new trial. Both ask the trial court for a second opportunity to determine the issues in the litigation.\textsuperscript{142} On the other hand, a motion for reconsideration may be roughly analogized to a Rule 50(B) motion for judgment notwithstanding the verdict.\textsuperscript{143} The common element between a motion for reconsideration and a motion for judgment n.o.v. is that they both request the court to enter a judgment opposite that of the verdict. Therefore, while a motion for a new trial and a motion for rehearing petition the court for an opportunity to re-present the evidence, a motion for judgment n.o.v. and a motion for reconsideration ask the court for a re-evaluation of the evidence previously presented. The definitions of the common law motions, however, are not absolute, for a motion for reconsideration has also been held to be the equivalent of a Rule 60(B) motion for relief from judgment.\textsuperscript{144}

A motion for a new trial is defined by Ohio Rule 59. In contrast, a motion for rehearing has been characterized as merely an informal local practice.\textsuperscript{145} A motion for a new trial is limited in its application and will only be available when Rule 59 so provides.\textsuperscript{146} On the other hand, a motion for rehearing is not limited, and will have broader applicabili-


\textsuperscript{141} LaBarbera v. Batsch, 117 Ohio App. 273, 182 N.E.2d 632 (1962); United Fireworks Mfg. Co. v. Tichenor, 113 Ohio App. 470, 178 N.E.2d 626 (1960). The confusion of the two terms is inferred from their interchangeable use throughout the opinions.

\textsuperscript{142} In LaBarbera v. Batsch, 117 Ohio App. 273, 182 N.E.2d 632 (1962), the court construed a motion for rehearing as a motion for a new trial. The court held that where the common law motion for rehearing was in substance a motion for a new trial the time for appeal will be suspended. \textit{Id.} at 276, 182 N.E.2d at 634-35. See notes 154-57 and accompany text.

\textsuperscript{143} See \textit{Ohio R. Civ. P. 50(B)}.


\textsuperscript{146} Rule 59 lists nine grounds upon which a party may base a motion for a new trial. \textit{Ohio R. Civ. P. 59(A)}. In addition the rule provides that a new trial may be granted for good cause shown.
A motion for a new trial implies that there has already been a trial and that the moving party is asking that the judgment be set aside and the trial process repeated. Based upon that assumption, a motion for a new trial will only properly lie when a trial has been conducted and has resulted in a final order.

A motion for rehearing applies to all orders, whether final or interlocutory in nature, regardless of whether the prior proceeding was a hearing or a trial. Therefore, in the case of a final order that was rendered in a trial, a motion for a new trial and a motion for rehearing would be equally applicable. The motion for new trial, however, has an advantage over its common law counterpart, for only the Rule 59 motion for new trial will suspend the time for filing a notice of appeal. It can be argued that in a case in which a Rule 59 motion is appropriate, a motion for rehearing would not lie. This is based on the theory that the codification of the principles of trial practice and procedure in the Ohio Rules of Civil Procedure preempts the use of any similar common law motions. Notwithstanding this argument, there is no reason why an attorney should file a motion for rehearing and jeopardize his right of appeal when a motion for a new trial is available to him. In light of the devastating consequences that would follow, a motion for rehearing in that situation would always be improper. Therefore, only in limited cases, such as the granting of an interlocutory decree or a final order from a hearing, will the motion for rehearing be of current utility to the practitioner.

Similarly, a motion for reconsideration and a Rule 50(B) motion for judgment n.o.v. will be equally applicable in many instances. Moreover, both motions request the same relief. A motion for rehearing will lie after a jury trial or after a matter tried to a court. The Rule 50(B) motion for judgment n.o.v., however, is limited in its applicability to jury trials. Although the motion for reconsideration will be applicable in more cases, it also has the same limitation as the common law

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147 This distinction in applicability also holds true between a motion for judgment notwithstanding the verdict defined by Rule 50(B) and the common law motion for reconsideration.

148 When the Ohio Rules of Civil Procedure were enacted in 1970, any code section superseded by the rules was repealed. Law of June 5, 1970, § 3, 1969-70 Ohio Laws 3017. Like the former code sections which governed civil procedure, any common law form of procedure that overlaps the territory of one of the civil rules should also be deemed superseded. Further, Rule 1(C) states that the Ohio Rules of Civil Procedure are not applicable when specific procedures are provided by the Revised Code. The motions for rehearing and reconsideration, however, are not set out in the Ohio Revised Code. Hence, they do not fall within the exception contained in Rule 1(C). See LaBarbera v. Batsch, 117 Ohio App. 273, 282 N.E.2d 632 (1962).

149 See Morris v. First Nat'l Bank & Trust Co., 15 Ohio St. 2d 184, 239 N.E.2d 94 (1968).

150 As with the case of a motion for rehearing, a motion for reconsideration is not equivalent to a motion for judgment notwithstanding the verdict. When a motion for reconsideration is made on the same grounds that would support a motion for judgment n.o.v., however, and within the same time limitation and directed against the same type of final order, the caption of the motion will be disregarded and the court will treat the motion as if it had been made pursuant to Ohio Rule 50(B).

152 Ohio R. Civ. P. 50(B).
motion for rehearing; it does not suspend the time for filing the notice of appeal. The motion for reconsideration, therefore, will only be of value in those instances when a motion for judgment notwithstanding the verdict is not available.153

A problem arises when, following a final order from a trial, a party only files a motion for rehearing. This problem confronted the court in *LaBarbera v. Batsch*.154 The losing party filed a motion for rehearing with the trial court seven days after the filing of the judgment entry. Three weeks later the motion for rehearing was denied. Two weeks after the denial of his motion the plaintiff filed his notice of appeal. The court of appeals denied the defendant's motion to dismiss, holding that the notice of appeal was timely filed. In doing so, however, the court did not hold that the motion for rehearing suspended the time limitation imposed upon an appellant filing a notice of appeal.155 Instead, the court treated the motion for rehearing in *LaBarbera* as a motion for a new trial since it was based upon one of the grounds enumerated in the Ohio Revised Code.156 In addition, the appellate court pointed out that had the motion been designated a motion for a new trial, it would have been handled in the same manner. Thus, the court concluded that the caption of the motion should not prevail over its substance. It is important to note, however, that it was a motion for a new trial, not a motion for rehearing, that suspended the time for appeal.157

The holding that a motion for rehearing will be taken as a motion for a new trial in those situations in which Ohio Rule 59 would apply was reinforced in *North Royalton Education Association v. North Royalton Board of Education*.158 In that case, as in *LaBarbera*, the court stated

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152 Although technically, a motion for judgment notwithstanding the verdict may not be used in a case tried to the court without a jury, the same result may be achieved by a Rule 59(A) motion for a new trial. This provision allows the court to open the judgment, take additional testimony, and enter a new judgment. Thus it accomplishes the same purpose as a motion for judgment n.o.v. in a jury trial. The added provision in Rule 59(A) further limits the practical utility of a motion for reconsideration.

If this provision in Rule 59(A) were not available, a resourceful party trying a case to the court could still accomplish the same result, although in a less direct manner, by submitting a motion for a new trial coupled with a motion for reconsideration. This would have the same effect as a motion for judgment notwithstanding the verdict. The motion for a new trial would suspend the time for appeal while the motion for reconsideration would request the court to enter judgment in the opposite way. This situation is discussed in *North Royalton Educ. Ass'n v. North Royalton Bd. of Educ.*, 41 Ohio App. 2d 209, 325 N.E.2d 901, 908 (1974) (Krenzler, J. concurring).


155 Id. at 276, 182 N.E.2d at 634.


157 It is doubtful that the ultimate holding of the court was correct. In *LaBarbera*, the defendant filed a preliminary motion to dismiss the action. The order was granted and the plaintiff filed his motion for reconsideration. While the motion for reconsideration (which should be rehearing) was similar to a motion for a new trial with respect to the grounds of the motion, a motion for a new trial itself was not applicable to the situation, for there had been no previous trial. Therefore, there could not have been a new trial.

that it would look to the substance of motion to determine whether it was capable of suspending the thirty day deadline for filing a notice of appeal. This misuse of motions presents the court with something of a Hobson's choice. On the one hand, the court is faced with the choice of defeating a meritorious claim merely because the attorney placed the wrong label on the motion. On the other hand, by allowing the common law motion in a situation that is covered by the rules of procedure, the court encourages, or at least condones, noncompliance with the Ohio Rules of Civil Procedure. Additionally, such a practice forces the appellate court to evaluate separately each motion for rehearing to determine its proper character. Thus, regardless of which option the court selects, the consequences are undesirable.

A motion for a new trial is only available when the two requisite elements are present: a previous trial that resulted in a final order. If either one or both of these requirements have not been met, the motion will be in substance a motion for rehearing. The key in determining the substance of the motion, therefore, lies in the character of the previous action to which the motion was applied. If the prior proceeding was a trial resulting in a final order, then the motion will be for a new trial. If the previous action was not a trial, whether resulting in either a final or an interlocutory order, only a motion for rehearing will apply. The question then, is to determine which judicial proceedings constitute a trial and which do not.

Because Appellate Rule 4(A) was meant to be restrictive in its application, a motion for a new trial pursuant to Rule 59 should be strictly construed. A policy of strict construction, however, will be defeated by the overly broad definition of a trial provided in section 2311.01 of the Ohio Revised Code. Therefore, a more refined definition of the word "trial" is needed to determine the availability of a motion for a new trial as opposed to a motion for rehearing. Thus, for purposes of Ohio Rule

159 Id. at 211-12, 325 N.E.2d at 904.

160 While a party should be given the benefit of the doubt with respect to the substance of his post-judgment motion, this benefit may be subject to abuse. The following example illustrates one problem that could arise under the "substance over form" rule. After the entry of judgment in a jury trial, the losing party files a motion for judgment notwithstanding the verdict. The following example illustrates one problem that could arise under the "substance over form" rule. After the entry of judgment in a jury trial, the losing party files a motion for judgment notwithstanding the verdict. The following example illustrates one problem that could arise under the "substance over form" rule. After the entry of judgment in a jury trial, the losing party files a motion for judgment notwithstanding the verdict. See note 151 supra. Under the doctrine of Ruse v. Ruddy, 30 Ohio App. 2d 171, 283 N.E.2d 818 (1972), the court could enter an order for a new trial from the motion for judgment notwithstanding the verdict. See note 129 supra. As a result, a party has the ability to make all three motions in one, leaving the court to disregard the caption to determine what relief the movant was seeking. In light of Judge Krenzler's warning in North Royalton Educ. Ass'n v. North Royalton Bd. of Educ., 41 Ohio App. 2d 209, 252, 325 N.E.2d 901, 909 (1974), however, this may not be a good practice to follow. Moreover, there is no guarantee that the motion for reconsideration would not be taken as something other than a motion for judgment notwithstanding the verdict, such as a Rule 60(B) motion for relief from judgment. See note 144 and accompanying text, supra.

161 Technically, these two elements may be combined into one, for a trial was defined previously to include a final order as one of its essential elements. Note 20 and accompanying text, supra. The purpose of the repetition in this case is to distinguish a completed trial from a mistrial, for under a liberal reading of the statutory definition of a trial, a party might attempt to argue the applicability of a motion for a new trial to a mistrial. See note 22 and accompanying text, supra.
59, a trial should not envelop every judicial examination of issues of fact or law, but instead, only those judicial examinations that conform to the conventional concept of a trial. 162 Under this restricted definition, a trial would consist of those judicial proceedings that include the impaneling of the jury, opening statements by counsel, admission of evidence, examination and cross examination of witnesses, closing statements by counsel, and instructions to the jury, followed by a final order.

The elements of a trial that are listed above are contained in section 2315.01 of the Ohio Revised Code. 163 This section of the code sets out the proper course of procedure to be followed in a civil trial. It is not necessary for all these components to be present for there to be a trial, as long as the opportunity existed for the presence of each component. As an example, the absence of witnesses during the proceeding would not impair the characterization of the proceeding as a trial so long as the lack of witnesses was due to the choice of the participants, and not to the nature of the proceeding. 164

By listing these elements, section 2315.01 partially defines a trial. Thus, it would appear that section 2311.01, which sets out the definition of a trial, should not be read as the complete definition of a trial. When read in light of this accompanying section of the code which further refines the concept of a trial, the definition of a trial does not appear to be as vague as it originally seemed. Therefore, with respect to an action at law, a trial should be defined as a judicial examination of the issues in controversy, whether of law or fact, resulting in a final order, and conducted pursuant to the procedural steps enumerated in section 2315.01 of the Ohio Revised Code.

B. Special Proceedings

The statutory definition of a trial, contained in section 2311.01 of the Ohio Revised Code, includes both actions and proceedings. 165 An action is defined as an ordinary proceeding which involves process and pleadings and ends in a final order. 166 A special proceeding, however, is not defined by the code. As a result, special proceedings are generally determined on a case by case basis. 167

162 The conventional concept of a trial appears to be the one used by the Ohio Rules Advisory Committee. See note 6 supra.

163 Ohio Rev. Code Ann. § 2315.01 (Page 1954). After providing for the impaneling of the jury, this section lists the following components as elements of a trial: (A) Opening statements by the parties. (B) Presentation of evidence by the party who has the burden of going forward. This would include both physical evidence and testimony of witnesses. (C) Presentation of evidence by opposing party, the evidence being confined to that of rebuttal. (D) Closing statements by both parties. (E) Jury instructions submitted to the court by both parties for the charge to the jury. (F) The court's charge to the jury.

164 The opportunity for cross examination of an opponent's witnesses is crucial to a trial. See notes 206-07 and accompanying text, infra.


167 "Neither the General Assembly nor this court has attempted to define with specificity the identifying characteristics of a 'special proceeding' under R.C. 2505.02. In-
A special proceeding, as that term is known today, can be traced to the adoption in Ohio of the Field Code in 1853. The merger of law and equity into one form of action resulted in a unified code of procedure by which a party was able to prosecute another for a wrong suffered. Thus, all of the forms of actions that existed prior to 1853, whether in equity or at law, were codified into a single form called a civil action.\(^{168}\) When the law conferred a right upon a person, the enforcement of which would not be accomplished through one of the forms of action codified in the Field Code of 1853, the judicial proceeding that followed was not an ordinary proceeding, but rather a special proceeding.\(^{169}\) Thus a special proceeding may be characterized generally as any judicial proceeding that does not follow the procedure set out in either the Ohio Revised Code or the Ohio Rules of Civil Procedure with respect to the prosecution of an action.\(^{170}\)

While this explanation of a special proceeding may seem less than illuminating, an examination of the definition of an action may tend to shed some light on special proceedings. The Ohio Revised Code provides that an action, or ordinary proceeding, is begun by process and pleadings.\(^{171}\) A special proceeding, on the other hand, is initiated by application to the court. In *Missionary Society of the M. E. Church v. Ely*,\(^{172}\) the court drew upon this distinction, stating that in an ordinary proceeding a party prosecutes another to enforce a legal right. In a special proceeding, however, a party seeks his remedy or relief by means of direct application to the court.\(^{173}\) While only infrequently employed, special proceedings have been held to cover those situations involving an award of attorney's fees,\(^{174}\) the validity and priority of liens,\(^{175}\) the stead, each case has been decided by reviewing the specific proceeding in question.”


\(^{169}\) Watson v. Sullivan, 5 Ohio St. 43, 44 (1855). *See also* Village of Canfield v. Brobst, 71 Ohio St. 42, 48, 72 N.E. 459, 460 (1904).

\(^{170}\) The distinction between an action and a special proceeding has been retained by the Ohio Rules of Civil Procedure. Rule 1(C) states that certain special statutory proceedings are exempt from the general applicability of the rules. The nature of the particular special proceeding will necessitate special provisions not found in the Ohio Rules of Civil Procedure. *See* the example illustrating this point in the Ohio Rules Advisory Committee Staff Note to Ohio R. Civ. P. 1(C).


\(^{172}\) Id. at 407, 47 N.E. at 538. *The issue in Missionary Society was whether an order of the common pleas court refusing to admit a will to probate was a final order from a special proceeding. The court drew the distinction between a special proceeding and an action, stating:*

"We suppose that any ordinary proceedings in a court of justice, by which a party prosecutes another for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense, involving process and pleadings, and ending in a judgment, is an action, while every proceeding other than an action, where a remedy is sought by an original application to a court for a judgment or an order, is a special proceeding." *Id.*

\(^{173}\) Id. at 407, 47 N.E. at 538. *This definition of an action has now been codified in the Revised Code. Ohio Rev. Code Ann. § 2307.01 (Page 1954).*


enforcement of a divorce decree,\textsuperscript{176} and the discharge of an attachment of property.\textsuperscript{177} In all of the above examples the remedy was sought by direct application to the court. In this respect, a special proceeding resembles a hearing on a motion more than a trial.\textsuperscript{178}

The concept of a special proceeding was further refined by the Ohio Supreme Court in the case of \textit{In re Estate of Wyckoff}.\textsuperscript{179} The court stated that a special proceeding was essentially an independent judicial proceeding initiated by a petition to the court, in which no other pleadings need be filed and only notice to interested parties, not service of summons, was required.\textsuperscript{180} This definition of special proceeding is consistent with the previously stated purpose of a special proceeding; that is, the means by which a party can enforce a legal right for which the Rules set out no procedure to be followed.\textsuperscript{181} In a special proceeding the petition,\textsuperscript{182} along with any responsive papers the court might request, will frame the issues to be decided.

A special proceeding fits the definition of a trial, as set out by section 2311.01 of the Ohio Revised Code, for it involves a judicial examination of the issues of law and fact. As a trial, a special proceeding must end in a final order. Section 2505.02 of the Revised Code sets out a separate test for the finality of an order in a special proceeding: the order is final when it affects a substantial right of a party. In contrast, an order is only final in an action when that order affects a substantial right of a party, determines the action, and prevents a judgment. Thus, for an order to be final in a civil action, the order must terminate the lawsuit.\textsuperscript{184} In a special proceeding, however, a final or-
der need not terminate the judicial examination, so long as it affects a substantial right.\textsuperscript{185}

A special proceeding may be an independent proceeding or a proceeding relating to an independent aspect of an ongoing civil action. One example of a special proceeding within a civil action is an application for attorney’s fees.\textsuperscript{186} The application and subsequent proceeding, while arising out of the action, are collateral to the action. In \textit{Mitchell v. Crain}\textsuperscript{187} the court construed the term “final order” to include any order of the court that gave final effect to the central purpose of an independent branch of the litigation. A special proceeding that is contained within a civil action will focus upon issues that are separate and distinct from the issues of the action itself.\textsuperscript{188} In such a situation, a special proceeding is a proceeding within a proceeding. Thus, a special proceeding may begin and end within the course of a civil action. Because the order resulting from a special proceeding is a final one, the losing party has an immediate right to an appeal, even though the action out of which the special proceeding arose has not yet terminated.\textsuperscript{189} Moreover, be-

\textsuperscript{185} In \textit{Kelly v. Runyon}, 170 Ohio St. 94, 162 N.E.2d 843 (1959), the court held that an application to the court by a minor to strike a journal entry approving an unliquidated tort claim was a special proceeding. By vacating the prior settlement, the defendant was now subject to liability in an action on the plaintiff’s tort claim. Accordingly, this reinstatement of potential liability affected a substantial right of the defendant. \textit{Id.} at 96, 162 N.E.2d at 844-45.


\textsuperscript{187} 108 Ohio App. 143, 144-45, 161 N.E.2d 80, 83 (1958). The "independent branch" theory may be traced back to the adoption of the Field Code in 1853. In \textit{Teaff v. Hewitt}, 1 Ohio St. 511 (1853) the court stated:

A final decree is one which determines and disposes of the whole merits of the cause before the court, or a branch of the cause, which is separate and distinct from other parts of the case, reserving no further questions or directions for future determination; so that it will not be necessary to bring the cause, or that separate branch of the cause, again before the court for further decision. \textit{Id.} at 520. The above quote was relied upon by the court in \textit{Sellman v. Schaaf}, 17 Ohio App. 2d 69, 73-74, 244 N.E.2d 494, 498 (1969) to distinguish between a special proceeding and an action. While in \textit{Sellman} the dismissal of one claim was separate from the remainder of the case, both claims had been raised in the plaintiff’s complaint. Hence both claims were part of the civil action and there could be no finding of a special proceeding.

\textsuperscript{188} In \textit{Kennedy v. Chalfin}, 38 Ohio St. 2d 85, 310 N.E.2d 233 (1974), the plaintiff argued that a motion for attorney’s fees and expenses had been determined in a special proceeding. In that case, the expenses requested were to compensate the plaintiff for the costs incurred due to the failure of the defendant to appear at a deposition. The court held that the overruling of the plaintiff’s motion was not a final order arising out of a special proceeding. The court based its conclusion on prior case law, holding that discovery orders were part of the action being tried, not subject to immediate appellate review. While the decision in \textit{Kennedy} seems correct, a very good argument could be made in favor of a special proceeding. The issue in the proceeding was whether or not the defendant should be compelled to pay attorney’s fees. While the proceeding may be included under the heading of "discovery procedures," unlike the cases relied on by the court in \textit{Kennedy}, the issue was not the scope of discovery which would be an integrated part of the ongoing action, but instead, attorney’s fees. Thus the issue in the proceeding was severable from the rest of the action. Moreover, the issue raised by the plaintiff’s application to the court was not one raised in the original complaint.

\textsuperscript{189} \textit{Ohio R. Civ. P. 54(A)}.
cause a special proceeding is a trial, the unsuccessful party may preserve his right to appeal and seek review of the order in the trial court by filing a motion for a new trial.\(^{190}\)

The recent case of *Heller v. Heller*\(^ {191}\) has shed some light on the nebulous area of special proceedings, albeit, inadvertently. In *Heller*, the plaintiff filed a motion with the court requesting an award of attorney’s fees for expenses she incurred in her previous divorce action. At the time the motion was made, a divorce had already been granted to the plaintiff. The court granted the plaintiff’s motion for attorney’s fees and the defendant filed a motion for a new trial. The court denied the motion and the defendant subsequently filed an appeal.

In its original journal entry, the court of appeals held that the defendant’s motion for a new trial was not proper, because the order granting attorney’s fees arose from a hearing, rather than a trial. The court treated the motion for a new trial as a motion for rehearing and dismissed the appeal as untimely.\(^ {192}\) The court in *Heller* relied on the analogous case of *Taray v. Sadoff*\(^ {193}\) to arrive at its conclusion. In *Taray* the plaintiff filed a motion for an increase in alimony. The motion was granted, but the order granting the increase was subsequently amended in favor of the defendant. The plaintiff filed a motion for rehearing with the trial court. Seven weeks later the motion for rehearing was overruled by the trial court and the plaintiff then filed her notice of appeal. In dismissing the appeal as untimely, the appellate court held that the motion for rehearing was not equivalent to a Rule 59 motion for a new trial which would have suspended the time for appeal, but rather, more closely resembled a Rule 60(B) motion for relief from judgment.\(^ {194}\)

Upon the defendant’s motion for reconsideration\(^ {195}\) to the court of appeals, the court in *Heller* reversed its prior decision.\(^ {196}\) In its second opinion the court of appeals held that the defendant’s motion for a new trial was proper, and that therefore, the appeal had been timely filed. The *Heller* court, basing its second decision on the statutory definition of a trial, concluded that the granting of the motion for attorney’s fees involved a judicial examination of that issue.

While the court in *Heller* arrived at the correct result, it did so by a

\(^{190}\) *Ohio R. Civ. P. 59(A).*


\(^{192}\) *Id.* slip op. at 3. Additional facts are needed to explain the *Heller* case. After the appellee had filed her motion for attorney’s fees, the court set a date for a hearing. Before the day of the hearing the court postponed the hearing to a later date. A few hours after the rescheduling, the Judge notified the parties that he had cancelled the hearing completely and would rule on the motion. It was from the ruling on the motion, which occurred without a hearing, that the appellant filed his motion for new trial.


\(^{194}\) *Id.* at 204, 331 N.E.2d at 449.

\(^{195}\) The motion for reconsideration at the appellate court level is governed by the appellate rules of procedure. *Ohio R. App. P. 26.* It is not the same as the common law motion for reconsideration that exists at the trial court level.

tenuous route, creating unnecessary confusion between a trial and a hearing.\textsuperscript{197} The \textit{Heller} opinion may be read as allowing the motion for new trial to be applied to any judicial determination, be it a trial or a hearing. Thus, the opinion is overly broad, with the potential of effectively destroying the time limitations imposed by Appellate Rule 4(A). The same result could have been reached in \textit{Heller} on the basis that the application for attorney’s fees constituted a special proceeding. The act of granting the motion was a final order which affected a substantial right of the defendant. Moreover, the proceeding involved an issue that was separate and distinct from the action for divorce. In \textit{Heller}, although the motion for attorney’s fees arose out of the action for divorce, it was an independent branch of that litigation. In addition, the plaintiff in \textit{Heller} made her motion directly to the court. Thus the proceeding was begun by an application to the court, as in a special proceeding, not by a pleading against the defendant as in the case of a civil action. It seems apparent that the order granting the attorney’s fees in \textit{Heller} arose from a special proceeding, not from a hearing on a motion.

The question of whether or not a proceeding is a special proceeding will be determined on a case by case basis. Section 2315.01 of the Ohio Revised Code, governing trial procedure, relates only to the procedure to be followed at the trial of a civil action.\textsuperscript{198} A trial in a special proceeding does not follow any standard course of procedure. Thus, the earlier advocated proposal, that the statutory definition of a trial (as contained in section 2311.01 of the Ohio Revised Code), should be supplemented by section 2315.01, relates only to trials in civil actions, not to those in special proceedings. The proposed supplementation of the statutory definition of a trial was offered as an attempt to distinguish between a hearing and a trial of a civil action.\textsuperscript{199} A special proceeding does not fall neatly into either one of these categories, for while in many respects it resembles a hearing on a motion, it is nonetheless expressly included in the definition of a trial.\textsuperscript{200}

\textbf{C. A Hearing as a Trial}

Under the definition of a trial contained in section 2311.01 of the Ohio Revised Code, a hearing on a motion could be characterized as a trial. Although a hearing is begun by a motion, as opposed to a pleading, the hearing may cover some of the same issues framed by the pleadings in the civil action out of which the hearing arose. In that event, the hearing would be a judicial examination of issues of law or fact, and if the hearing ended in a final order, it would seem that the hearing meets all the requirements of a trial. Furthermore, if the hearing termi-
nates the action, it would have served the same function as a trial; that is, the determination of the rights of the parties to the lawsuit. This would mean that upon receiving an adverse ruling in a hearing, resulting in a final order, a party could file a motion for a new trial pursuant to Ohio Rule 59. Based on this theory, it has been suggested that a motion for a new trial could be applied to any matter decided by the court without a jury.

Part of the confusion concerning hearings is based upon the present definition of that term. Prior to the adoption of the Field Code in Ohio in 1853, there were two types of actions; trials at law and hearings in equity. The definition of a hearing in the sense of the equitable counterpart to a trial at law has been abandoned and is no longer employed in the Ohio Rules of Civil Procedure. The term "hearing," as used by the Ohio Rules, contemplates the determination of motions that arise during the course of an action. A hearing is intended to be merely one component of a trial and not, in and of itself, a trial.

An examination of the Ohio Rules will also reveal that a hearing was intended to be something distinct from a trial. Ohio Rule 32(A), for example, states that any deposition intended to be used as evidence must be filed with the court at least one day before the trial or hearing. Similarly, Ohio Rule 7(B) states that all motions must be in writing unless made during the trial or hearing. By the use of the disjunctive connector between the words "trial" and "hearing" it is clear that two separate concepts were intended by the drafters of the Ohio Rules. Because a hearing is not a trial within the framework of the Ohio Rules, a motion for a new trial will not lie after an adverse ruling on a motion at a hearing. Therefore, a motion styled as a motion for a new trial made after a hearing will not have the effect of suspending the time for appeal even though the order was final. The motion at best will be regarded as a motion for rehearing.

The fact that a hearing was meant to be something other than a trial is not only clear from the language of the Ohio Civil Rules, but also from prior case law. In Trustees v. McClanahan, the Ohio Supreme Court stated that a hearing on a motion does not take the place of a trial. The court based its conclusion on the fact that the only evidence offered at the hearing consisted of affidavits. These affidavits

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201 11 Wright & Miller, supra note 30, at § 2804. See note 251 infra.
203 The voluntary dismissal statute in Illinois, while similar to Ohio's, allows a plaintiff to dismiss his case without prejudice "before trial or hearing begins." Civil Practice Act § 52, Ill. Rev. Stat. ch. 110, § 52 (1975). There is no further explanation of the term "hearing" as it is used in that statute. As a result, many problems have arisen as to whether a hearing is used in the sense of a preliminary motion or as the equitable counterpart to a trial. See Comment, The Vanishing Right of a Plaintiff to Voluntarily Dismiss his Action, 9 J. Mar. J. Prac. & Proc. 583 (1976).
204 Ohio R. Civ. P. 32(A).
205 Ohio R. Civ. P. 7(B)(2).
206 53 Ohio St. 403, 411, 42 N.E. 34, 36 (1895).
did not afford the opposing party an opportunity for cross examination.\textsuperscript{207} It was proposed earlier in this Note, that the definition of a trial provided in section 2311.01 of the Ohio Revised Code should not be read in isolation, but rather, with reference to section 2315.01. One of the elements of trial procedure listed in section 2315.01 is the right of examination and cross examination of witnesses. While this right is an essential feature of a trial, it is generally not a right afforded to parties in a hearing, for a hearing is usually conducted in a summary manner. Moreover, some of the other elements listed in section 2315.01 of the code are also unavailable to parties in a hearing. Therefore, the proposed supplementation of the statutory definition of a trial would assist in differentiating between a hearing and a trial in those circumstances where the line of demarcation is not clearly drawn. Further, this reading of the definition of a trial would be in keeping with prior case law in Ohio, as exemplified in \textit{McClannahan}. The opportunity to cross examine an opposing party's witness is indispensable to the adversary system, and is one of the prime characteristics that distinguishes a trial from a hearing.

In \textit{Railway Company v. Thurstin}\textsuperscript{208} the court held that the concept of a hearing was not identical either in nature or effect to that of a trial. In \textit{Thurstin}, a motion to dismiss was granted after the admission of affidavits and oral testimony. The appellant filed a notice of appeal from the order of the lower court granting the motion to dismiss. In dismissing the appeal, the appellate court held that the hearing on the motion was not a trial. Because the appellate court's power was limited to review of those errors that occurred during trial, the court concluded that it had no jurisdiction to review the lower court's dismissal. The \textit{Thurstin} court based its conclusion on the statutory definition of a trial as the examination of the issues in controversy.\textsuperscript{209} Issues, however, are to be framed by the pleadings.\textsuperscript{210} The questions raised during the hearing on the motion to dismiss did not go to the issues framed by the pleadings, hence, there had been no trial from which an appeal would lie.

It has been repeatedly recognized by the courts that a hearing on a motion for summary judgment is not a trial. A motion for summary judgment will only be granted when there are no genuine issues of material fact to be tried.\textsuperscript{211} When the issues presented by the pleadings are genuine, they must be resolved at trial. Thus, summary judgment will

\begin{itemize}
\item \textsuperscript{207} Id.
\item \textsuperscript{208} 44 Ohio St. 525, 9 N.E. 232 (1886).
\item \textsuperscript{209} Id. at 528, 9 N.E. at 233-34. The definition of a trial that the court examined in \textit{Thurstin} is the same one that currently appears in the Ohio Revised Code. \textit{See} note 1 and accompanying text, \textit{supra}.
\item \textsuperscript{210} OHIO REV. CODE ANN. § 2311.02 (Page 1954).
\item \textsuperscript{211} Bowlds v. Smith, 114 Ohio App. 21, 180 N.E.2d 184 (1961). "\textit{[T]he purpose of the statute [former version of summary judgment rule] is to terminate useless and expensive litigation when there is no genuine issue as to any material fact. It is to be used when issues are feigned and when there is really nothing to try.}" \textit{Id.} at 28, 180 N.E.2d at 188-89. The court in \textit{Bowlds} based its conclusion on the case of Petroff v. Commercial Motor Freight, Inc., 82 Ohio L. Abs. 433, 165 N.E.2d 840 (Ct. App. 1960). \textit{See also} DeWitt Motors v. Bodnark, 84 Ohio L. Abs. 48, 169 N.E.2d 660 (Ct. App. 1960).
\end{itemize}
be granted by the court in lieu of a trial, and therefore, such a proceeding will be something other than a trial, namely, a hearing. A trial and a hearing on a motion for summary judgment are also distinguishable, because in a summary judgment proceeding the court must determine whether there are any issues of material fact based on only a limited right to examine the evidence. While oral testimony is a common and essential part of a trial, Ohio Rule 56(C) limits the court’s scope of examination in a hearing on a motion for summary judgment to written records. Moreover, Ohio Rule 56(A) states that if an action has been set for trial, a motion for summary judgment may only be made upon leave of court. This language indicates that a trial and a hearing on a motion for summary judgment were intended to be two separate entities. Therefore, at least with respect to summary judgment, it is clear that a hearing on a motion is not a trial.

With respect to hearings predicated on motions other than for summary judgment, the distinction between a trial and a hearing has not been as clear cut. In Rhode v. Kolb the court held that a motion for a new trial would properly lie from the granting of a motion to dismiss for failure to join a necessary party. After the order of dismissal with prejudice had been journalized, the plaintiff moved to vacate the order and also for leave to amend the complaint. The trial court overruled both of these motions, and the plaintiff appealed. The defendant moved to dismiss the appeal which had been filed out of rule. The appellate court held that the plaintiff’s motion to vacate was essentially a motion for a new trial. Because of this conclusion, the court held that the appeal had been timely filed. The court based its decision on the statutory definition of a new trial as it existed at that time, stating that a new trial was a re-examination of the issues of law or fact.

Ohio R. Civ. P. 56(C) states in part:

Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Ohio R. Civ. P. 56(A).

Id. at 353, 113 N.E.2d at 747.

Code of Civil Procedure of the State of Ohio, § 297, 1853 Ohio Laws 7, amended by Act of July 10, 1945, § 1, 1945 Ohio Laws 306 (codified at OHIO REV. CODE ANN. § 2321.17 (Page 1954) (repealed 1970)). This code section defined a new trial and listed the grounds that were a basis for the motion. A new trial was defined as “[A] re-examination, in the same court, of the issues after a final order, judgment, or decree by the court.”

Section 2321.17 was expressly repealed in 1970 with the enactment of the Ohio Rules of Civil Procedure. 1970 Ohio Laws 3017. This Act further provided that:

Unless the court shall determine that one of such sections, or some part thereof,
Part of the problem with the decision in Roscoe lies in the court's use of the term "issue." The appellate court did not employ the term in the restricted sense of the Ohio Revised Code's definition. Instead, it used the term in a more liberal sense, thereby encompassing the dispute that was before the court at the hearing on the motion to dismiss. The holding of the court, however, is substantially weakened as the underlying assumption disintegrates. The assumption made by the appellate court in Roscoe was that the lower court had examined an issue of law at the hearing on the motion to dismiss. While the failure to join a proper party may have been a source of conflict between the parties, it was not an issue as that term is defined by the Ohio Revised Code, because it did not arise out of the pleadings of the parties.

Thus, although the lower court made its decision on a matter of law, it did not do so on an issue of law. The plaintiff's motion, therefore, should not have been characterized as a motion for a new trial, but instead, as a motion for relief from judgment pursuant to Ohio Rule 60.

The holding in Roscoe, standing alone, can be read for the proposition that the hearing on a motion to dismiss with prejudice for failure to join a proper party constitutes a trial, from which a motion for a new trial will lie. The court in Roscoe based its decision on an overly broad reading of the definition of issues and of a new trial. This is similar to the approach that was taken in the Heller case. The difference between the two cases is that in Heller there was an alternate ground, the use of a special proceeding, for permitting the motion for a new trial. With Roscoe, however, there were no alternate grounds to justify the result.

The defense raised by the defendant in Roscoe would be equivalent to a Rule 12(B)(7) motion to dismiss in the Ohio Rules. The motion to dismiss in Roscoe, however, was made prior to the closing of the pleading stage. A motion to dismiss at that point in the lawsuit

has clearly not been superseded by such rules and that in the absence of such section or part thereof being effective, there would be no applicable standard of procedure proscribed by either statutory law or rule of court.

Id. at 3021. While Ohio Rule 59 superseded section 2321.17 with respect to motions for a new trial, the rule fails to provide a definition of a new trial. This absence was probably due more to an attempt by the Ohio Rules Advisory Committee to conform to the Federal Rules of Civil Procedure than to a decision to delete the definitional provision.

In Heller v. Heller, No. 34381 (Ohio Ct. App., Cuyahoga Cty., filed Feb. 4, 1976), the Cuyahoga County Court of Appeals relied on the repealed definition of a new trial to find that the defendant's motion for a new trial was proper. Id. at 3. In light of the language of the act quoted above, it would appear that the decision in Heller has put that part of section 2321.17 of the code defining a new trial back into effect. While section 2321.17 in general was repealed, the provision defining a new trial was not clearly superseded by Ohio Rule 59. Moreover, in the absence of this provision, there is no definition of a new trial in either the Ohio Revised Code or the Ohio Rules of Civil Procedure.

219 93 Ohio App. at 354-56, 113 N.E.2d at 748.
221 Ohio R. Civ. P. 60(B). See note 194 and accompanying text, supra.
222 See note 195-96 and accompanying text, supra.
223 Ohio R. Civ. P. 12(B)(7).
224 The defendant's motion to dismiss was filed two years after the plaintiff's origi-
THE MEANING OF "TRIAL"

would be governed by Ohio Rule 12(D). This latter rule expressly states that all defenses raised in a Rule 12(B) motion shall be heard and determined before trial. Upon examination of Ohio Rule 12(D) it is clear that a motion of this nature, raised before trial, will be determined by a hearing, not by a trial. First of all, Rule 12(D) states that motions raised under Rule 12(B) "shall be heard," as opposed to "shall be tried." Secondly, Ohio Rule 12(D) states that the motion shall be determined "before the trial." If the hearing on the motion to dismiss was itself a trial, it would be impossible to determine the merits of the motion "before trial." Therefore, under the current Ohio Rules of Civil Procedure, a decision similar to that in Roscoe would be erroneous. The determination of a Rule 12(B) motion to dismiss would be at a hearing, not a trial and a motion for a new trial pursuant to Rule 59 could not lie. Such a motion could only be a motion for a rehearing and would not stop the running of the time to appeal.

Similar to other types of hearings discussed above, a hearing on a motion for judgment on the pleadings would also not be deemed a trial. Ohio Rule 12(C) states that a motion for judgment on the pleadings may only be made if that motion will not delay the trial. The language of this rule indicates that something other than a trial is anticipated as the vehicle for determining the merits of the motion. Instead the motion for judgment on the pleadings is closer in comparison to a hearing on a motion for summary judgment. The court does not examine the issues at a hearing on a motion for judgment on the pleadings, but instead, examines the pleadings to determine if any issues exist to be tried.

As was indicated earlier, the effect of allowing a motion for a new trial to lie from a hearing on a pretrial motion would be to make the hearing a trial. This result, was neither contemplated nor desired by the Ohio

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Rules Advisory Committee. An examination of the plaintiff's right to voluntarily dismiss the lawsuit pursuant to Ohio Rule 41(A) will exemplify the problem. If a hearing on a motion could be characterized as a trial, then the plaintiff would no longer have the right to dismiss the action without prejudice once the hearing has commenced. This result, however, is contrary to existing Ohio case law which has held that a party may dismiss his claim without prejudice after an adverse ruling has been made at a pretrial hearing, but prior to the journal entry by the court. Moreover, the equating of a hearing to a trial would have the effect of advancing to the early stages of the litigation the plaintiff's right to dismiss his lawsuit. Thus, a hearing on a pretrial motion to dismiss with prejudice would cut off the plaintiff's right to voluntarily dismiss in much the same way that the making of a motion for summary judgment cuts off the plaintiff's right to dismiss in the federal system. This effect, however, was clearly rejected by the Ohio Rules Advisory Committee, as reflected by the committee's choice to modify the federal rule to permit the plaintiff an extended period of time to dismiss his lawsuit.

A final comparison should be made between a hearing and a special proceeding. A special proceeding will determine the entire controversy before the court, whereas a hearing goes only to those matters raised by the motion. Moreover, a hearing may or may not terminate the proceeding, depending on whether the hearing results in a final order. A second distinction is that a special proceeding determines an issue independently of the trial of the civil action, while a hearing on a motion is concerned with a matter that is ancillary to the trial of the action. Finally, in a special proceeding, as in the trial of an action, there is a judicial examination of the issues involved. In a hearing, however, the conflict focused upon by the court may not necessarily be an issue, as

233 FED. R. CIV. P. 41(a).
234 The rejection of a dismissal provision identical to that of the federal system was discussed in the Ohio Rules Advisory Staff Note to Ohio R. Civ. P. 41(A). See also note 49 supra.

A corollary question arises concerning the right of a plaintiff to voluntarily dismiss the lawsuit after the court has granted an order for a new trial. If the effect of the court's order is totally to eradicate the effect of the first trial and place the parties back at point zero, then the plaintiff's right to dismiss without prejudice would be reinstated. This result, while logically sound, would be contrary to the policy of protecting the defendant from exposure to unnecessary, burdensome expenses. There has been no case to date in Ohio deciding this particular effect of an order of a new trial.

A brief example will illustrate the utility of the above procedure. The plaintiff brings an action in the state court and requests a jury trial. A trial is conducted, and the verdict is rendered in favor of the plaintiff. The amount recovered, however, is far less than what the plaintiff had expected. The plaintiff then files a timely motion for a new trial pursuant to Ohio Rule 59(A)(4) (inadequate damages). If the motion is granted, the plaintiff will then be free to dismiss the suit and recommence it elsewhere (assuming that there is proper venue in some other state court or that the federal system is open to him). The only penalty the plaintiff would incur would be payment of the previous court costs, as per Rule 41(D). See note 30 supra.

235 See notes 187-88 supra.
The term "trial" is technically defined, even though the hearing may result in a final order.²³⁸ In conclusion, a hearing on a motion is neither a trial of an action nor a special proceeding. Therefore, a motion for a new trial will not lie from a determination of the hearing. This will be true even in those cases when the hearing results in a final order which terminates the action between the parties. The only post-trial motions that will properly lie from a final order in a hearing are the common law motions for rehearing or reconsideration or a Rule 60(B) motion for relief from judgment. None of these motions, however, will be effective in suspending the time which the appellant has for filing his notice of appeal.²³⁷

D. The Adoption of Federal Rule 59(e): A Recommendation

Under current Ohio law, only a Rule 59 motion for a new trial or a rule 50(B) motion for judgment notwithstanding the verdict will toll the thirty day time limit to file a notice of appeal.²³⁸ As previously stated, a motion for a new trial will only lie when it is predicated upon a final order that was rendered in a previous trial. Hence, a final order rendered at a hearing as opposed to a trial, will not provide a basis for a motion for a new trial. The appellant who finds himself in this position has the option of either filing a motion for rehearing and taking his chances with the trial court, or abandoning that avenue to relief by filing a notice of appeal. The limitations imposed by Ohio Rule 59 dictate that a party in this situation cannot have both.

In the federal system the appellant in the identical situation as that outlined above is not placed in such a precarious position. This is due to section (e) of Federal Rule 59 which gives the court additional power to alter or amend a judgment.²³⁹ The attractiveness of Federal Rule 59(e) lies in the fact that it is not limited solely to a judgment entered from a trial, but will apply to a judgment that resulted from a hearing as well.²⁴⁰ Section (e) of Federal Rule 59 is a partial codification of the common law motion for rehearing.²⁴¹ Section (e) in Federal Rule 59 re-

²³⁹ Fed. R. Civ. P. 59(e) provides: "(e) Motion to Alter or Amend Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment."
²⁴⁰ The title of the two rules governing motions for new trials is indicative of their scope. Ohio Rule 59 is titled "New Trials." Federal Rule 59, on the other hand, is titled "New Trials, Amendment of Judgment." Thus, while the Ohio Rule is limited to those situations involving a trial, the federal rule also applies to judgments, without delineating the proceeding from which the judgment must arise.
²⁴¹ In many cases a Fed. R. Civ. P. 59(e) motion to alter or amend a judgment has been characterized as a motion for reconsideration. Hattersley v. Bolt, 512 F.2d 209 (3rd Cir. 1975); Pacific Maritime Ass'n v. Quinn, 465 F.2d 108 (9th Cir. 1972); Theodoropoulos v. Thompson-Starrett Co., 418 F.2d 350 (2d Cir. 1969). Conversely, a motion for reconsideration directed to the trial court, has been regarded as a motion to alter or amend pursuant to Rule 59(e). Pierre v. Jordan, 333 F.2d 951, 955 (9th Cir. 1964) cert. denied, 379 U.S. 974 (1965).
moves the plight that an appellant is faced with in the Ohio system when his lawsuit is terminated by a hearing rather than a trial. Federal Rule 59(e) permits a party who has received an adverse judgment in a hearing to seek both a rehearing at the trial level and an appeal to a higher court. In the Ohio system the pursuit of one will most likely be at the cost of the other.

A motion pursuant to Federal Rule 59(e) is not a motion for a new trial. It is a motion to alter or amend a judgment. It applies to all judgments of the court, not merely those from a trial. Because the post judgment motion is a Rule 59 motion, it will still have the effect of suspending the time for filing a notice of appeal. Such an amendment to Ohio Rule 59 would eliminate the incentive for a party to attempt to manipulate the current operation of the rule and devise solutions to problems the Ohio Rule was not designed to meet. There would be no need for any manipulation where the same result could be achieved by legitimate means. Moreover, such an amendment would minimize the holdings of cases like *Heller* and *Roscoe*.

The question to consider in weighing the effects of a Rule 59(e) provision is whether or not a final order from which an appeal will immediately lie, but which resulted from a hearing on a motion, should be given the protection of a suspended period of time to file a notice of appeal. Stated otherwise, should a final order from a hearing be treated differently than a final order from a trial? The staff note accompanying Ohio Rule 59 gives no indication why section (e) of the Federal Rule was not adopted along with the rest of Federal Rule 59. Although one commentator has suggested that the same result could be accomplished through the language in the last sentence of Ohio Rule 59(A), this conclusion seems doubtful. One reason is that Federal Rule 59(a) has an almost identical provision, yet a party must still resort to the use of Federal Rule 59(e) to secure review at the trial level of a final order from a hearing without the risk of loss of appellate review.
A consideration against a Federal Rule 59(e) type provision is that by providing the appellant in this situation with two opportunities for review, the proposed amendment would prolong the finality of the litigation while the appellant sought both avenues of review. At first glance this result might seem undesirable and the opportunity for two methods of review unnecessary. This dual method of review, however, is currently available to the losing party in a trial. It would seem to follow that such methods should apply equally to all judgments, unless a sufficient distinction can be made between a final order resulting from a trial and one resulting from a hearing. Moreover, in the federal system, where the losing party does have the ability to make a motion to alter or amend a judgment from a hearing, it does not appear that this additional provision in Federal Rule 59 has proved unduly burdensome. Finally, in the long run, the incorporation of a Federal Rule 59(e) provision in the Ohio Rules of Civil Procedure would serve to greatly simplify post-trial procedure.

IV. CONCLUSION

This Note has attempted to deal with the two problems that arise from the use of the term “trial” by the Ohio Rules of Civil Procedure. The first problem, concerning the commencement of trial, could be solved by amending the particular Ohio Civil Rules which create the problem. For example, with respect to a plaintiff’s right to voluntarily dismiss his claim pursuant to Rule 41(A), the language could be changed from the current “before the commencement of trial” to “before the jury is impaneled and sworn in actions triable to a jury.” A similar amendment could be made to Ohio Rule 54(C), concerning the plaintiff’s right to amend his demand for judgment. Such an amendment would define a trial to include the impaneling of the jury. Hence, at the beginning of the impaneling process, the plaintiff’s rights with respect to the above two mentioned rules would be terminated. The analysis presented earlier in this Note concerning these two areas indicates that the case law in Ohio would support this view of commencement of trial.

With respect to the deadline for filing a deposition intended to be used during a trial, analysis of the case law in Ohio and of the language of the rule shows that a different time limitation was intended than the limitations of Ohio Rules 41(A) and 54(C). Hence an amendment to Ohio Rule 32(A) would change the current wording of that rule from “at least one day before the day of trial or hearing,” to “at least one day before the day the deposition is intended to be used at the trial or hearing.” Thus a party would not lose his right to use a deposition in a trial once

249 The proposed amendment to Ohio R. Civ. P. 41(A) is nothing more than the reinstatement of its originally proposed language. Proceedings of the Ohio Rules Advisory Committee at 234 (Nov. 22, 1968) (on file with the Ohio Supreme Court Library). See note 82 supra. An alternative means of amendment would be to leave the present language of Ohio Rule 41(A) intact, but separately define the commencement of a trial in a later part of the rule. This alternative approach has been adopted by the current California Civil Code. See note 53 and accompanying text, supra.
the trial had commenced so long as the opposing counsel had at least one day of notice before such use.

Both of the above proposed amendments serve to delineate exactly when a party has the option of exercising one of the rights conferred upon him by the Ohio Rules of Civil Procedure. While such amendments would create an even wider gap between the language of the Ohio Rules and the Federal Rules, upon which the Ohio Rules were modeled, the effect would be to eliminate the problems discussed in this Note. Thus, the overall effect would be a narrowing of the gap between the two sets of procedural rules, for as was stated earlier, the problems concerning the plaintiff's right to dismiss or amend his demand for judgment do not exist in the federal system.250

The second problem discussed in this Note concerned the use of the motion for a new trial in Ohio. Unlike the first problem, the issue in question here is not due to any ambiguous language in Ohio Rule 59, but rather, the situations to which the rules have been applied. From the language of Rule 59, it is clear that the rule was meant to apply to final orders from a trial. The moving party is not satisfied with the result of the first trial and is requesting the court to grant a second trial. For there to be a second trial, there has to have been a first.

The problem arises when the proceedings terminating in a final order are not a trial, for to seek relief in such a case at the trial level will be to preclude any chance of relief at the appellate level. As with the first problem, this problem does not exist in the federal system. This is due to the addition of section (e) to Federal Rule 59. This additional provision allows the federal courts to treat all final orders equally, whether they were entered from a trial or a hearing.251 Accordingly, because Federal Rule 59(e) applies to all judgments, there is no need to determine the type of proceedings involved. The addition of section (e) to Ohio Rule 59 would likewise eliminate the necessity of distinguishing between a hearing and a trial for the purposes of preserving all available avenues of post-judgment relief.

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250 See note 6 and accompanying text, supra.

251 Fed. R. Civ. P. 59, because of the additional provision of section (e), applies to all judgments. By contrast, Ohio R. Civ. P. 59 applies only to judgments from trials. Technically, a motion pursuant to Federal Rule 59(e) is not a motion for new trial, but rather, a motion to alter or amend a judgment. For its application there is no prerequisite that the judgment be rendered in a trial. Due to the fact that the motion to alter or amend is a Rule 59 motion, it is commonly referred to as a motion for a new trial. Thus, the statement by Professors Wright and Miller, cited and approved in Heller v. Heller, No. 34381 (Ohio Ct. App., Cuyahoga Cty., filed Feb. 4, 1976), that a Rule 59 motion would apply to any matter decided by the court without a jury, is only true in those instances where Rule 59 is not limited in its application to final orders from trials. See note 201 and accompanying text, supra. Thus, the reliance on both this statement and federal case law by the court in Heller was misplaced, for the authority would only apply in a situation using the Federal Rule 59 motion, not the more restrictive Ohio Rule 59 motion.