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Post-Judgment Reconsideration for Judicial Error in Cases of Non-Trial Adjudication under the Ohio Rules of Civil Procedure: A Modest Proposal for Reform

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ARTICLES

POST-JUDGMENT RECONSIDERATION FOR JUDICIAL ERROR IN CASES OF NON-TRIAL ADJUDICATION UNDER THE OHIO RULES OF CIVIL PROCEDURE: A MODEST PROPOSAL FOR REFORM

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I. INTRODUCTION

It is a cornerstone of our jurisprudence that parties to litigation should have available to them a procedural mechanism to challenge an erroneous judgment. While an aggrieved party always has the right to file an appeal to a higher court,[1] appeals are costly and time-consuming procedures. To avoid unnecessary costs and delays and to achieve justice, the law has always recognized the wisdom of providing a method for the trial court to self-correct errors it has made in arriving at its final judgment in a case.[2] However, the countervailing principle of safeguarding the finality of judgments requires that matters fully adjudicated by a trial court must not be subject to open-ended reconsideration.[3]

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1. Of course, the right to file an appeal in Ohio is not an inherent right, but rather one created by statute or constitution. *See* Lindblom v. Board of Tax Appeals, 151 Ohio St. 250, 253, 85 N.E.2d 376, 377 (1949); Young v. Shellenberger, 53 Ohio St. 291, 302, 41 N.E. 518, 522 (1895). Article IV of the Ohio Constitution has been interpreted to provide every litigant with at least one review. State v. Nickles, 159 Ohio St. 353, 357, 112 N.E.2d 531, 534 (1953). *See generally* 4–5 OHIO JUR. 3D *Appellate Review* §§ 1–732 (1978). In addition to an appeal, in some limited circumstances, a litigant can collaterally attack a judgment. *See generally* 63 OHIO JUR. 3D, *supra, Judgments* §§ 525–47.

2. *See infra* note 36 and accompanying text (discussing a trial court's common law power to affect its own judgments during term).

3. The doctrine of finality rests upon the necessity that there be an end to litigation. First Nat'l Bank v. First Nat'l Bank, 68 Ohio St. 43, 49, 67 N.E. 91, 93 (1903); *see also* Mount Olive Baptist Church v. Pipkins Paints and Home Improvement Center, Inc., 64 Ohio App. 2d 285, 287, 413 N.E.2d 850, 853 (1979) (discussing the policy which underlies vacation of judgments pursuant to OHIO R. CIV. P. 60(B) (Anderson 1981)). *See generally* 63 OHIO JUR. 3D, *supra* note 1, *Judgments* §§ 375–99.

To satisfy these sometimes competing goals, the Ohio Rules of Civil Procedure (hereinafter "Rules") currently provide an Ohio litigant with two procedural devices which allow a trial court to review or vacate its own final judgment. The first is the motion for relief from judgment pursuant to Rule 60[4] and the second is the motion for new trial authorized by Rule 59.[5]

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4. Relief from judgment is authorized by OHIO R. CIV. P. 60 as follows:

(A) Clerical mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time on its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(B) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud; etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (B) does not affect the finality of a judgment or suspend its operation.

The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules.

5. OHIO R. CIV. P. 59(A) provides that:

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:

(1) Irregularity in the proceedings of the court, jury, referee, or prevailing party, or any order of the court or referee, or abuse of discretion, by which an aggrieved party was prevented from having a fair trial;

(2) Misconduct of the jury or prevailing party;

(3) Accident or surprise which ordinary prudence could not have guarded against;

(4) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice;

(5) Error in the amount of recovery, whether too large or too small, when the action is upon a contract or for the injury or detention of property;

(6) The judgment is not sustained by the weight of the evidence; however, only one new trial may be granted on the weight of the evidence in the same case;

(7) The judgment is contrary to law;

(8) Newly discovered evidence, material for the party applying, which with reasonable diligence he could not have discovered and produced at trial;

(9) Error of law occurring at the trial and brought to the attention of the trial court by the party making the application.

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

In Ohio, pursuant to Rule 58,[6] an adjudication becomes final for the purpose of appeal upon the entry of judgment. A litigant has thirty days from the entry of that judgment to file a notice of appeal.[7] Yet, post-judgment relief is not limited solely to the appeal process. A party has fourteen days after the entry of judgment to move for a new trial, and the filing of the new trial motion suspends the running of the thirty day appeal period until after the trial court decides the new trial motion.[8] In some additional circumstances a party can move to vacate or modify a final judgment during the pendency of the thirty day statutory appeal period pursuant to Rule 60.[9] However, if a party fails to file its motion for a new trial within fourteen days following the entry of final judgment[10] and neglects to appeal within the thirty day limitation period for filing a notice of appeal,[11] then the substantive correctness of the judgment will generally be beyond judicial review.[12]

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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.

6. OHIO R. CIV. P. 58 provides that upon the announcement of a decision or verdict "the court shall promptly cause the judgment to be prepared and, the court having signed it, the clerk shall thereupon enter it. A judgment is effective only when filed with the clerk for journalization . . . ."

7. OHIO R. APP. P. 4(A) (Anderson 1981) provides that "in a civil case the notice of appeal . . . shall be filed with the clerk of the trial court within thirty days of the date of entry of the judgment or order appealed from." With some exceptions, the statutory appeal period is mandatory. *See* State *ex rel.* Kotch v. DeGrab, 168 Ohio St. 506, 507, 156 N.E.2d 465, 466 (1959).

8. *See infra* notes 10 and 88 and accompanying text.

9. A clerical mistake in a judgment can be remedied pursuant to OHIO R. CIV. P. 60(A) at any time. *See generally infra* note 115 and accompanying text. In addition, OHIO R. CIV. P. 60(B) requires only that a motion seeking to vacate a judgment must be filed "within a reasonable time," and for certain enumerated reasons "not more than one year after the judgment." Thus, an OHIO R. CIV. P. 60(B) motion filed within thirty days of the entry of judgment could be considered by the court. However, the litigant is in a classic dilemma because the filing of a OHIO R. CIV. P. 60(B) motion will not suspend the running of the thirty day statutory appeal period pursuant to OHIO R. APP. P. 4(A). *See infra* note 88 and accompanying text. The court is not likely to rule on the motion prior to the expiration of the thirty day statutory appeal period. In addition, when a party's contentions challenge the correctness of the trial court's decision on the merits and could have been raised on direct appeal, OHIO R. CIV. P. 60(B) cannot be used as an alternative device through which to challenge the legal merits of a judgment. *See* Blasco v. Mislik, 69 Ohio St. 2d 684, 686, 433 N.E.2d 612, 614 (1983); Dahl v. Kelling, 34 Ohio App. 3d 258, 259, 518 N.E.2d 582, 583 (1986); Town & Country Drive-In Shopping Centers v. Abraham, 46 Ohio App. 2d 262, 266, 348 N.E.2d 741, 744 (1975); Bosco v. City of Euclid, 38 Ohio App. 2d 40, 43, 311 N.E.2d 870, 873 (1974).

10. OHIO R. CIV. P. 59(B) requires that a motion for new trial be filed "not later than fourteen days after the entry of the judgment."

11. *See supra* note 7.

12. In some very limited instances, a final judgment may be reopened on motion pursuant to OHIO R. CIV. P. 60. Relief from final judgment could be granted for clerical mistakes pursuant to OHIO R. CIV. P. 60(A) or for any of the enumerated reasons set out in OHIO R. CIV. P. 60(B), none of which would provide grounds for the trial court to review the substantive correctness of the judgment. *See infra*, note 20.

Both Rule 59 and Rule 60 provide post-judgment relief to litigants in a wide variety of circumstances spelled out in the text of both rules[13] and in case law interpreting their scope.[14] This article, though, addresses a more narrow problem which is associated with both of these rules: Can the trial court grant post-judgment relief for substantial judicial error in non-trial adjudications?[15] On their face, both Rule 59 and Rule 60 appear to provide a post-judgment remedy to address judicial error in the trial court.[16] In fact, they seem to overlap since both are theoretically available to a litigant during the fourteen day period immediately following the entry of final judgment.[17] However, unlike the filing of the Rule 59 motion for a new trial,[18] the filing of the Rule 60 motion to amend or vacate judgment does not suspend the running of the thirty day statutory appeal period.[19] More importantly, though, Rule 60 has generally been held not to provide a remedy in the trial court to cure substantive judicial error.[20] As a result, the only post-

13. *See supra* note 4 for the text of OHIO R. CIV. P. 60(B); *supra* note 5 for the text of OHIO R. CIV. P. 59.

14. A discussion of the broad coverage of both OHIO R. CIV. P. 59 and OHIO R. CIV. P. 60 is well beyond the scope of this article. For a detailed discussion of the grounds of these rules, see generally 2 KLEIN, OHIO CIVIL PRACTICE 67, 100 (1988); 63 OHIO JUR. 3D, *supra* note 1, *Judgments* §§ 586–611 (1985); 40 OHIO JUR. 2D *New Trial* §§ 1–105 (1967).

15. For a discussion and definition of substantial judicial error, see *infra* note 125 and accompanying text.

16. OHIO R. CIV. P. 59(A)(9) specifically provides that a new trial can be ordered because of "error of law occurring at the trial," and OHIO R. CIV. P. 60(B) specifies five grounds which justify relief from judgment. *See supra* note 4. On its face OHIO R. CIV. P. 60(B) seems broad enough to encompass relief from judgment for judicial error. However, Ohio case law suggests otherwise. *See infra* notes 126 and 127 and accompanying text.

17. *See supra* notes 9 and 10.

18. The filing of a motion for new trial pursuant to OHIO R. CIV. P. 59 suspends the running of the thirty day statutory appeal period established by OHIO R. APP. P. 4(A). *See infra* note 133.

19. *See infra* note 133 and accompanying text.

20. Under pre-rule practice, it was generally held that judicial error was to be addressed on appeal and was not a basis to vacate the judgment pursuant to OHIO REV. CODE ANN. § 2325.01 (Anderson 1981), *repealed by* OHIO R. CIV. P. 60(B); *see also* Bartlett v. Bartlett, 176 Ohio St. 299, 301, 199 N.E.2d 586, 588 (1964).

Of course, historically a trial court had absolute discretion to effect its own judgments for any reason during term. *See infra* note 36 and accompanying text. Current OHIO R. CIV. P. 60(B) has generally been interpreted not to be a substitute for appeal. Thus, a OHIO R. CIV. P. 60(B) motion must set forth one of the grounds enumerated in the Rule and not grounds that should have been the basis for an appeal. Waspe v. Ohio State Dental Bd., 27 Ohio App. 3d 13, 17, 499 N.E.2d 337, 341 (1985); Ruper v. Smith, 12 Ohio App. 3d 44, 46, 465 N.E.2d 927, 929 (1983); *see also infra* note 126. There is, however, case law to the contrary. *See* Madison v. Curry, 323 N.E.2d 719, 720 (Ohio Ct. App. 1975); Buckman v. Goldblatt, 39 Ohio App. 2d 1, 2, 314 N.E.2d 188, 189 (1974); Blank v. Snyder, 33 Ohio Misc. 67, 70 (Franklin County Mun. Ct. 1972). In addition, one appellate court has interpreted subsection five of OHIO R. CIV. P. 60(B) as granting power as broad as that held by trial courts at common law to vacate or amend judgments during term. Matson v. Marks, 32 Ohio App. 2d 319, 322, 291 N.E.2d 491, 494 (1972). Under the federal practice, the issue is not altogether clear. The circuits have taken various approaches concerning whether judicial error can be corrected under analogous FED. R. CIV. P. 60(B). *See infra* note 127.

judgment remedy immediately available to a litigant in the trial court to correct substantial judicial error is the Rule 59 motion for a new trial.

Despite its limitations, the importance of the Rule 60(B) motion should not be minimized. The Rule 60(B) motion provides the only remedy in the trial court for the litigant seeking relief from a final judgment after the expiration of the thirty day statutory appeal period.[21] While the grounds for vacating a judgment pursuant to Rule 60(B) are varied,[22] the primary purpose of the rule is clear. By providing a remedy to vacate final judgments, the Rule attempts to insure fundamental fairness to litigants while simultaneously protecting the principle of the finality of judgments.[23]

Significantly, for purposes of this article, neither Rule 60 itself nor judicial interpretation of the Rule condition its application to judgments entered as a result of a particular manner of adjudication. The Rule makes no distinction among the various methods of adjudication that precede the final entry of judgment pursuant to Rule 58.[24] Instead, a litigant's right to relief from judgment pursuant to Rule 60(B) depends solely on his ability to show that the requirements of Rule 60 have been met.

Litigants seeking post-trial relief pursuant to Rule 59 face more stringent requirements. The motion for new trial seeks to reopen the

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21. The motion for a new trial must be filed within fourteen days from the entry of final judgment. OHIO R. CIV. P. 59(B). In the absence of the availability of collateral attack, *see supra* note 1, a litigant's only recourse is the OHIO R. CIV. P. 60(B) motion.

22. *See supra* note 4 for the text of OHIO R. CIV. P. 60.

23. *See* Mount Olive Baptist Church v. Pipkins Paint & Home Improvement Center, 64 Ohio App. 2d 285, 287, 413 N.E.2d 850, 853–54 (1979); Advance Mortgage Corp. v. Novak, 53 Ohio App. 2d 289, 292, 373 N.E.2d 400, 402 (1977).

24. Generally the nature or character of a judgment does not affect a court's power to vacate a judgment. OHIO R. CIV. P. 60(B) requires only that the relief sought be from a "final judgment, order or proceeding." *See generally* Browne, *The Finality of an Order Granting a Rule 60(B) Motion for Relief from Judgment: Some Footnotes to* GTE Automatic Electric, Inc. v. ARC Industries, Inc., 26 CLEV. ST. L. REV. 13, 88 (1977). Thus, a litigant could seek OHIO R. CIV. P. 60(B) relief from a final judgment entered by defendant pursuant to OHIO R. CIV. P. 55. *See, e.g.*, Rafalski v. Oates, 17 Ohio App. 3d 65, 67, 477 N.E.2d 1212, 1214–15 (1984); General Motors Acceptance Corp. v. Deskins, 16 Ohio App. 3d 132, 134, 474 N.E.2d 1207, 1210 (1984); Antonopolous v. Eisner, 30 Ohio App. 2d 187, 190, 284 N.E.2d 194, 196 (1972). Also a litigant could seek OHIO R. CIV. P. 60(B) relief from a confessed judgment. *See, e.g.*, Knox County Bank v. Doty, 9 Ohio St. 505, 506 (1859); Walcutt v. City of Columbus, 1 Ohio N.P. (n.s.) 225 (Franklin County C.P. 1903). Similarly, a litigant could seek relief from judgment entered following an adversary hearing, judgment after trial, judgment entered pursuant to summary judgment and judgment entered pursuant to other case dispositive motions. *See, e.g.*, Peterson v. Teodosio, 34 Ohio St. 2d 161, 164, 297 N.E.2d 113, 114 (1973); Mid-Continent Refrigerator Co. v. Witterson, 32 Ohio App. 2d 227, 228, 289 N.E.2d 379, 381 (1972). *See generally* Browne, *supra*, at 24–132 (discussing in detail the various procedural contexts in which the OHIO R. CIV. P. 60(B) motion may be invoked).

factual or legal issues in a case so that those issues can be retried or reconsidered by the court which initially rendered the decision and entered final judgment.[25] Whether initiated *sua sponte* by the trial court or by motion of a party,[26] the grant of a new trial allows the trial court to correct any significant procedural or substantive errors which may have occurred during the course of its original adjudication.[27] Recent judicial interpretations of Rule 59 have clearly settled that in Ohio a motion for new trial will lie only after an actual trial of the factual issues in a case.[28] Unlike the Rule 60 motion, the new trial device is only available to a party (and the court) following a trial on the merits, after a judgment is entered on a directed verdict pursuant to Rule 50(A) or, provisionally, after a court has entered a judgment notwithstanding the verdict pursuant to Rule 50(B).[29]

Although the purpose underlying the Rule 59 motion for a new trial also suggests the need for an equivalent procedural mechanism allowing the trial court to self-correct error in any judgment it has rendered,[30] that is not currently the case in Ohio as it is under the Federal Rules of Civil Procedure.[31] By narrowly limiting the scope of the new trial motion and by refusing to recognize the existence of a motion for reconsideration,[32] Ohio courts have interpreted the Ohio Rules in a manner that creates a significant gap in the Rules' coverage. While a litigant (and a court) can resort to the new trial device to remedy substantial judicial error in judgments rendered as a result of trial,[33] no analogous device is available to a party (or the court) to remedy substantial judicial errors in final judgments rendered in non-trial adjudications.[34] Specifically, under the current Ohio practice, judicial adjudicatory error which results in the entry of judgment pursuant to Rule 12 or Rule 56 cannot be corrected by the trial court once the decision is considered final pursuant to Rule 58. In that circumstance, the litigant has no remedy other than to appeal within the thirty day statutory ap-

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25. The theory which underlies the rule is that the second adjudication will take place in an environment more conducive to a just determination. *See* Rippel v. Rippel, 328 N.E.2d 816, 820 (Ohio Ct. App. 1974).

26. OHIO R. CIV. P. 59(D) provides that "not later than fourteen days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have been granted on motion of a party." OHIO R. CIV. P. 59(A) provides that "[a] new trial may be granted for all or any of the parties . . . ."

27. *See supra* notes 13–14 and accompanying text.

28. *See infra* notes 157–64 and accompanying text.

29. *Id.*

30. *See infra* notes 178–211 and accompanying text.

31. *See infra* notes 216–19 and accompanying text.

32. *See infra* notes 83–92 and accompanying text.

33. *See infra* notes 130–36 and accompanying text.

34. *See infra* notes 140–48 and accompanying text.

peal period. Unfortunately, this result flies in the face of a number of policies underlying our modern system of procedure.[35]

This article addresses the current gap in Ohio's procedural landscape. It begins with a brief general review of the common law and pre-rules practice concerning a trial court's review of its own final judgments. It then examines the judicial decisions interpreting the Ohio Rules in a manner that effectively eliminates the trial court's opportunity to review its own final judgments in any adjudicatory context except trial. Finally, it considers a modest proposal to eliminate this gap in the current Rules.

II. THE TRIAL COURT'S GENERAL COMMON LAW POWER TO VACATE OR MODIFY ITS OWN FINAL JUDGMENTS

A. Early Ohio Practice

At common law in Ohio, after the entry of a final judgment, a trial judge had extremely broad plenary powers to modify his own final judgments at any time during the same term in which they were entered.[36] Historically, the in-term/out-of-term distinction[37] was extremely significant with respect to the court's ability to affect its own judgments and was highlighted as early as 1854:

> The Court of Common Pleas has ample control over its own orders and judgments during the term at which they were rendered, and the power to vacate or modify them in its discretion. But this discretion ends with the term, and no such discretion exists at a subsequent term of court.[38]

In term, a trial court's power was virtually unlimited, subject only to review for an abuse of its discretion.[39] Pursuant to that power, a trial court could correct or amend a judgment due to clerical errors or omis-

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35. *See infra* notes 212–19 and accompanying text.

36. Huntington & McIntyre v. W. M. Finch & Co., 3 Ohio St. 445, 447 (1854); *see also* First Nat'l Bank v. Smith, 102 Ohio St. 120, 122, 130 N.E. 502, 503 (1921); Huber Mfg. Co. v. Sweny, 57 Ohio St. 169, 174, 48 N.E. 879, 881 (1897); Knox County Bank v. Doty, 9 Ohio St. 505, 507 (1859); State *ex rel* Marzluf v. Beightler, 57 N.E.2d 180, 180 (Ohio Ct. App. 1980); Harbine v. Davis, 57 N.E.2d 421, 421 (Ohio Ct. App. 1944); Thompson v. Stonom, 57 N.E.2d 788, 788 (Ohio Ct. App. 1943); Davis v. Teachner, 53 N.E.2d 208, 209 (Ohio Ct. App. 1943); Rabb v. Board of Comm'rs of Cuyahoga County, 36 Ohio App. 481, 482, 173 N.E. 255, 256 (1930); Horwitz v. Murri, 24 Ohio App. 109, 110, 156 N.E. 420, 420 (1927); Willy v. Lewis, 6 Ohio Dec. 242, 243 (Hamilton County C.P. 1897). *See generally* 63–64 OHIO JUR. 3D, *supra* note 1, *Judgments* §§ 548–730 (1985).

37. "Term" is defined as the space of time during which a court holds a session. Sometimes the term is monthly, and other times it is a quarterly period. BLACK'S LAW DICTIONARY 1318 (5th ed. 1979). In this context, a court term extends until the beginning of the succeeding term at least in the absence of an earlier adjournment. Miglierero v. State, 9 Ohio L. Abs. 44, 46 (Ct. App. 1930).

38. Huntington & McIntyre v. W. M. Finch & Co., 3 Ohio St. 445, 448 (1854).

39. *See, e.g.*, cases cited *supra* note 36.

sions.[40] It could also vacate a default judgment or judgment by confession to allow a defendant to mount a defense.[41] This discretionary power was so broad that a trial court could vacate a judgment for no reason at all so long as no abuse of discretion was evident on the face of the record.[42] Significantly, though, this power was not limited to correcting clerical errors or omissions[43] or to vacating default or confessed judgments.[44] The power of a trial court over its own judgments during term also extended to its ability to modify and correct erroneous decisions made in the course of its adjudication.[45]

In the development of Ohio jurisprudence, a trial court's broad and relatively unfettered powers to affect its own judgments in term did not go unchallenged. Early Ohio statutes specifically limited a trial court's power to affect its own judgments outside of term.[46] The precursor statutes to the current Rule 60 spelled out with particularity which powers a trial court retained over its own judgments after the expiration of term.[47] Although applicable on their face only to the amend-

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40. Pursuant to the trial court's inherent power over its own judgments in term, see cases cited *supra* note 36, a court can correct its own records during term. *See generally* 80 OHIO JUR. 3D, *supra* note 1, *Records* § 36.

41. *See* Knox County Bank v. Doty, 9 Ohio St. 506, 511 (1859); *Huntington*, 3 Ohio St. 445 at 448.

42. *See, e.g.*, Davis v. Teachnor, 53 N.E.2d 208, 209 (Ohio Ct. App. 1943).

43. *See supra* note 40.

44. *See supra* note 41.

45. *See* Huntington & McIntyre v. W. M. Finch & Co., 3 Ohio St. 445, 448 (1854).

46. The earliest such statute was REVISED LAWS OF OHIO § 5354 (O. Aldrich 1884), which provided how and on what grounds an order could be vacated after term. *See* Thatcher v. Dickinson, 2 Ohio Cir. Dec. 82, 84–5 (1888). Section 5354 was the precursor to OHIO GEN. CODE § 11631 (Anderson 1938) which, like § 5354, limited a court's power to vacate and amend its judgments after term to those grounds set out in the body of the statute.

47. OHIO GEN. CODE § 11631 authorized a trial court to vacate or modify a judgment or order after term for the following reasons:

(1) By granting a new trial of the cause, within the time and in the manner provided in § 11580.

(2) By a new trial granted in proceedings against defendants constructively summoned as provided in § 11296.

(3) For mistake, neglect or omission of the clerk, or irregularity in obtaining a judgment or order.

(4) For fraud practiced by the successful party in obtaining a judgment or order.

(5) For erroneous proceedings against an infant or person of unsound mind, when the condition of such defendant does not appear in the record, nor the error in the proceedings.

(6) For the death of one of the parties before the judgment in the action.

(7) For unavoidable casualty or misfortune, preventing the party from prosecuting or defending.

(8) For errors in a judgment, shown by an infant within twelve months after arriving at full age as prescribed in § 11603.

(9) For taking judgments upon warrants of attorney for more than was due the plaintiff, when the defendant was not summoned or otherwise legally notified of the time and place of taking such judgment.

ment or alteration of judgments outside of term, a number of Ohio appellate courts interpreted the adoption of these statutes as evidence of a legislative intent to limit a trial court's power to affect its judgments in term.[48]

For example, in *City of Cincinnati v. Archiable,*[49] the Court of Appeals for Hamilton County found that the provisions of section 11637 of the General Code,[50] which prohibited a trial court from vacating a judgment in the absence of a valid defense on the merits, also operated as a significant limitation on a trial court's power in term.[51] The court went on to hold that a trial court had no discretion to set aside a default judgment in the term in which it was entered, without first requiring the defendant to show the existence of a valid defense as specified by section 11637.[52]

Faced with conflicting appellate court decisions concerning the meaning and effect of these early statutes,[53] the Ohio Supreme Court addressed the issue squarely in 1921 in *First National Bank v. Smith.*[54] In that case, the supreme court held that an Ohio trial court of general jurisdiction had control over its own orders and judgments during the same term in which they were rendered, limited only by the exercise of sound discretion. In reaching this decision, the supreme court charac-

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(10) When such judgment or order was obtained, in whole or in a material part, by false testimony on the part of the successful party, or any witness in his behalf, which ordinary prudence could not have anticipated or guarded against, and the guilty party has been convicted.

48. *See, e.g.,* Cincinnati v. Archiable, 4 Ohio App. 218, 227 (1915); Metzger v. Zeissler, 13 Ohio N.P. (n.s.) 49, 52 (Wood County C.P. 1912); Smead Foundry Co. v. Chesbrough, 18 Ohio C.C. 783, 785–86 (1895).

49. 4 Ohio App. 218 (1915).

50. OHIO GEN. CODE § 11637 provided that "A judgment shall not be vacated on motion or petition until it is adjudged that there is a valid defense to the action in which the judgment was rendered . . . ."

51. The *Archiable* court observed:

Now it is undoubtedly the law of the state that a court, during the term at which a judgment or decree is rendered, has inherent power and authority, regardless of the statutes, under the rules of the common law, to set aside or modify its judgments and decrees. Nowhere under our code is this wholesome rule abrogated but the rule has been qualified by § 11637, Gen. Code (formerly § 5360, Revised Statutes), and to the extent that a limitation or qualification is provided under the code we are of the opinion that the courts are bound by the qualification to the rule.

Archiable, 4 Ohio App. at 218.

52. *Id.* at 226. The *Archiable* court also noted:

Now we see no good reason why the limitation upon the court setting aside its judgment during the term should not apply under Section 11637 to the same extent as to actions to set them aside after the term, so far as requiring the defendant to show a valid defense.

Id.

53. First Nat'l Bank v. Smith, 102 Ohio St. 120, 130 N.E. 502 (1921), was certified to the Ohio Supreme Court as being in direct conflict with *Archiable,* 4 Ohio App. at 218. *Id.* at 120, 130 N.E. 502 (1921).

terized a trial court's power to affect its own judgments as an "inherent power" founded in the common law.[55] In addition, the supreme court noted that a trial court's power over its own judgments in term was broader than the statutory power to affect judgments out of term.[56] In the absence of a specific rule of court to the contrary, the supreme court specifically declined to limit a trial court's power to affect its own judgments in term to the powers outlined in section 11631.[57]

The supreme court's decision in *First National Bank* eliminated all doubts concerning the continued power of a trial court to affect its own judgments in term. As long as the action was taken in term, a trial court had the inherent common law power to suspend or alter a judgment for any of the statutory grounds contained in section 11631 and for "any other reason within the exercise of sound discretion."[58] The effect of this decision is noteworthy: Even after the adoption of legislation specifically delineating the scope of a trial court's power to modify or vacate its own judgments after term, a trial court's common law power to affect its own judgments in term remained unchecked except in cases of clear abuse of discretion.[59]

The breadth of a trial court's inherent common law power to control its own judgments in term is exemplified by an 1897 decision by the Ohio Supreme Court in *Huber Manufacturing Co. v. Sweny*.[60] The

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55. *Id.* at 122, 130 N.E. at 503 (citing Huntington & McIntyre v. W. M. Finch & Co., 3 Ohio St. 445 (1854)); *see also* Huber Mfg. Co. v. Sweny, 57 Ohio St. 169, 173–75, 48 N.E. 879, 880–81 (1897); Knox County Bank v. Doty, 9 Ohio St. 505, 508–09 (1859).

56. The court in *First National* stated:

> There appears to be no limitation or restriction to the rule except that the power must be exercised with sound discretion—limited only to cases in which there is an abuse of discretion. It follows, therefore, that the court, in the instant case, had the power to suspend the judgment upon any ground enumerated in Section 11631 General Code, *or for any other reason within the exercise of sound discretion.*

First Nat'l Bank, 102 Ohio St. at 122–23, 130 N.E. at 503 (emphasis added).

57. The *First National* court also indicated:

> [W]e are constrained to hold that in the face of such a rule the court may not be limited or concluded to the grounds enumerated in Section 11631, General Code; and in the absence of such a rule of court, the court may not be limited or concluded by the method of procedure outlined in Chapter 6.

Id. at 123, 130 N.E. at 503.

58. *Id.*

59. *See supra* note 56. It is important to note that historically, a trial court's common law power to control its own judgments in term was related to but distinct from its power to grant a new trial. Ohio courts had inherent power to set aside a verdict during term to grant a new trial in the interest of justice. *See, e.g.*, Grosser v. Armett Alloys, Inc., 70 Ohio L. Abs. 161, 164 (Ct. App. 1953); Maimone v. Maimone, 55 Ohio L. Abs. 566, 572–73 (Ct. App. 1949). However, a denial of a properly filed new trial motion did not preclude the trial court from exercising its inherent power to vacate or amend its judgment during term including the power to reconsider and amend its denial of the new trial motion. Huber Mfg. Co. v. Sweny, 57 Ohio St. 169, 171–72, 48 N.E. 879, 880–81 (1897).

60. 57 Ohio St. 169, 48 N.E. 879 (1897).

case was originally initiated in probate court by Frank Brandon, as assignee for the benefit of the creditors of James Sweny, asking for an order fixing the priority of liens and distributing the proceeds of sales made by him of certain assigned chattels. The action was then tried in the Common Pleas Court of Warren County at its October Term, 1884 and final judgment was entered for the defendant, Huber, adjudging its claim as the first lien and ordering distribution accordingly. Clara Sweny, who objected to the court's finding concerning the priority of liens, filed a motion for new trial within three days of the entry of final judgment, but her motion was promptly overruled by the trial court. Subsequent to the denial of the new trial motion but still during the October term, Clara Sweny filed a motion to vacate and set aside the final judgment. This time the trial court granted the relief that she requested. It vacated its original judgment and simultaneously entered judgment in favor of Clara Sweny. Having determined that Clara Sweny had the first lien and that Huber had only second priority, the court changed the order of distribution. Huber excepted and filed a writ of error, but the circuit court affirmed the decision in Clara Sweny's favor. Huber then sought a reversal of both judgments in the Ohio Supreme Court.

In upholding the lower court decisions, the supreme court found that the trial court had the inherent power to vacate and modify its own judgments in term.[61] The supreme court did not treat the motion to vacate and amend the final judgment as a motion for a new trial. Instead, it viewed the motion as an application for a rehearing of the original motion for a new trial and for a rehearing of the merits of the action:

> [T]aking the entry as a whole, it shows that there was an application by counsel for Mrs. Sweny, at the October Term, after the entry of judgment against her and the overruling of her motion for a new trial, to set aside the order overruling the motion, for a vacation of the entry of judgment, and a rehearing of the cause itself, and that this application was entertained; and it is fully apparent that the prayer for an order setting aside the entry overruling the motion was then granted, and the cause fully argued by counsel and submitted . . . and the effect of the subsequent order . . . was to sustain the motion and grant a new trial, or at

61. *Id.* at 173–74, 48 N.E. at 880–81. The *Huber* court observed:

> That the court had power to do this is, we think, without question. It is stated in the opinion in Harrington v. Finch, 3 Ohio St. 445 that: "The court of common pleas has ample control over its own order and judgment during the term at which they are rendered, and the power to vacate or modify them in its discretion. . . . Whether or not there might be exceptions to it we need not inquire, for it is enough to say that the facts of this case do not disclose any ground for such exception."

least a rehearing, for it was a question of law, and not of fact, which was involved.[62]

This ruling was significant for a number of reasons. First, it lengthened to the end of a term the court's power to grant a new trial, since, assuming the timely filing of a new trial motion, the trial court retained the inherent power to reconsider and rehear the new trial question until the end of term.[63] In addition, and perhaps more significantly, although the motion was titled as a motion to vacate the original judgment, the supreme court treated the post-judgment request for relief in the trial court as a motion asking the trial court to reconsider its prior denial of the new trial motion. In so doing, the supreme court distinguished between the initial motion for a new trial and the subsequent motion asking for a reconsideration or rehearing of the trial court's disposition of the initial new trial request.[64] The language of the opinion further distinguishes between a reconsideration of the denial of a post-judgment motion and a reconsideration and rehearing of the "cause itself."[65]

The effect of the decision was clear. The supreme court not only recognized a distinction between the motion for a new trial and the motion to reconsider, but also specifically condoned the use of the motion to reconsider as part of the inherent power of a trial court over its own judgments in term.[66] Although the decision contains no discussion of the grounds necessary to vacate and reconsider the final judgment itself or to deny the new trial motion, the omission seems appropriate in light of the broad discretion inherent in the trial court to vacate or amend its own judgments in term.[67]

B. Current Practice Under the Ohio Rules of Civil Procedure

Though not apparent at first blush, the passage of the Ohio Rules of Civil Procedure in 1970 proved to have a significant impact on the manner in which a trial court controlled its own judgments at common

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62. *Id.*

63. At the time of the court's decision, the application for a new trial motion had to be made "within three days after the verdict or decision is rendered." OHIO GEN. CODE § 11578. The ruling gave litigants successive bites at the same apple until the end of the term in which judgment was rendered.

64. The *Huber* court also noted:

> The application was not a motion for a new trial; that motion had already been passed upon. It was an application for a re-hearing of the motion for a new trial. That is, the court was asked to vacate the order overruling that motion, and to rehear the case . . . .

Huber, 57 Ohio St. at 173, 48 N.E. at 880–81.

65. *See supra* note 62 and accompanying text.

66. *See supra* note 61.

67. *See supra* notes 58 & 60 and accompanying text.

law[68] and under the pre-rules statutes.[69] The Rules specifically provide for relief from final judgment in three ways: (1) a Rule 59 motion requesting a new trial;[70] (2) a Rule 60(B) motion which seeks relief from final judgment;[71] and (3) a motion for judgment notwithstanding the verdict pursuant to Rule 50(B).[72] Shortly after the adoption of the Rules in 1970, two related issues emerged concerning the manner in which parties could obtain post-judgment relief in the trial court. The first concerned whether the procedural devices available to a litigant seeking relief from final judgment are limited only to those enumerated in the text of the newly adopted procedural rules. The second focused on the effect, if any, that the adoption of the Rules had on a trial court's inherent common law power over its own judgments in term.[73]

1. The Rules' Limiting Effect—The Motion for Reconsideration

The first of these two procedural issues facing the Ohio courts subsequent to the adoption of the Rules was whether a litigant could seek relief from final judgment in a manner other than that specifically enumerated in the Rules. Ohio courts answered the question with a resounding no.[74] As a result, litigants seeking relief from a final judgment are currently limited solely to the procedural mechanisms set out in the body of the Rules.[75]

Litigants raised the issue in Ohio appellate courts in two related circumstances. After the passage of the Rules in 1970, some litigants seeking relief from final judgment seemed confused over the *manner* in which they could proceed. As a result of this confusion, some of those aggrieved parties sought relief from adverse final judgments by requesting merely that courts "reconsider" their prior final judgments.[76] These

68. *See supra* notes 36–45 and accompanying text.

69. *See supra* notes 46–57 and accompanying text.

70. *See supra* note 5 for text of OHIO R. CIV. P. 59.

71. *See supra* note 4 for text of OHIO R. CIV. P. 60.

72. Like the new trial motion, the motion requesting judgment notwithstanding the verdict must be filed within fourteen days after the entry of judgment. OHIO R. CIV. P. 50 (B).

73. For a discussion of a trial court's inherent common law power over its own judgments, see *supra* notes 36–45 and accompanying text.

74. *See infra* notes 78–97 and accompanying text.

75. The Ohio Rules of Civil Procedure identify three procedural devices by which a litigant can seek relief from final judgment—the motion for new trial pursuant to OHIO R. CIV. P. 59, motions to alter, amend or vacate a judgment pursuant to OHIO R. CIV. P. 60, and a motion for judgment notwithstanding the verdict pursuant to OHIO R. CIV. P. 50(B).

76. It is important to distinguish the context in which the "motion for reconsideration" is used. This article is concerned with the reconsideration motion as a procedural mechanism to request relief from final judgment. The motions for rehearing or reconsideration are not authorized by the current Rules nor were they authorized by the earlier procedural statutes. However, historically these motions were used successfully by litigants who sought relief from final judgment by appeal to a trial court's inherent power over its own judgments in term. *See infra* note 97.

litigants often resorted to a procedural device known as a "motion for reconsideration,"[77] a motion notably absent from mention in the newly adopted Rules. In these cases, the courts of Ohio were called upon to determine the efficacy of this common law motion for reconsideration.

Though it was raised in a slightly different context after the passage of the Rules in 1970, the motion for reconsideration was not a new problem for the Ohio courts. Both before and after the passage of the Rules, the courts of Ohio grappled with the legitimacy of the motion for reconsideration filed by litigants seeking relief from an adverse final judgment.[78] With some exceptions,[79] after the adoption of the Rules in

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After the adoption of the Rules in 1970, Ohio courts have generally not been receptive to the motion. *See infra* note 78 and accompanying text.

However, a trial court does have the inherent power to reconsider its own interlocutory orders. LaBarbera v. Batsch, 117 Ohio App. 273, 275–76, 182 N.E.2d 632, 634 (1962). The motion for reconsideration is the proper vehicle to invoke that power even though the motion is not specifically authorized by the Civil Rules. *See* Pitts v. Ohio Dep't of Transp., 67 Ohio St. 2d 378, 379 n.1, 423 N.E.2d 1105, 1106 n.1 (1981) (motion for reconsideration is the proper procedural device to obtain relief from an interlocutory order); Browne, *Local Rules of Court*, 13 AKRON L. REV. 277, 313 n.136 (1979) [hereinafter *Local Rules*]; Browne, *The Fatal Pause—Summary Judgment and the Motion for Reconsideration*, 44 CLEV. B.J. 7, 7 (1972) [hereinafter *Fatal Pause*]; *see also* LaBarbera v. Batsch, 117 Ohio App. 273, 275–76, 182 N.E.2d 632, 634 (1974). In *LaBarbera*, a pre-rules case in which the court specified the proper use of the motion for reconsideration, the court stated:

> There is no provision in the procedural statutes of Ohio (dealing with trial courts), providing for a "rehearing" or "reconsideration" or an order, judgment or decree of a trial court . . . . A practice has grown up whereby these terms have been applied to requests for reconsideration of interlocutory orders which may be entertained at the discretion of the court, but such motions are not provided for by statute or otherwise, except in some instances, perhaps by rule of court, where such a motion is filed, which because of the entry to which it is directed, is not a judgment decree or appealable order.

Id.

Of course, this same principle applies to judicial decisions any time up to their journalization. Williams v. Bolding, 6 Ohio App. 3d 48, 49, 452 N.E.2d 1346, 1348 (1982). *See generally* 2 KLEIN, *supra* note 14, at 17.

77. The so-called "motion for reconsideration" is not in technical sense, the same as the motion for rehearing. Neither is authorized by the Rules nor were they specifically referenced in the pre-rules statutes governing the procedures of Ohio courts. While the two are frequently used interchangeably, *see Local Rules*, *supra* note 76, at 313 n.136, they do have distinct functions. The motion for rehearing (functionally analogous to the motion for new trial) seeks a new hearing on the matter in dispute while a request for reconsideration asks for judicial reconsideration without a rehearing of the matter. *Id*; *see also* 2 KLEIN, *supra* note 14, at 13.

78. *See, e.g.*, Pitts v. Ohio Dep't of Transp., 67 Ohio St. 2d 378, 381, 423 N.E.2d 1105, 1107 (1981) (motion for reconsideration of a final judgment in the trial court is a nullity); Bond v. Airway Dev. Corp., 54 Ohio St. 2d 363, 365, 377 N.E.2d 988, 989 (1978); State *ex rel* Pajetska v. Faulhaber, 50 Ohio St. 2d 41, 42, 362 N.E.2d 263, 263–64 (1977); Kauder v. Kauder, 38 Ohio St. 2d 265, 267, 313 N.E.2d 797, 798 (1974) (motion for reconsideration does not toll the time pursuant to OHIO R. APP. P. 4(A) within which to file an appeal from a final judgment); Suttle v. Webster, No. 371, slip op. at 3 (Meigs County Ct. App. June 30, 1986) (motion for reconsideration can be treated in substance as a new trial motion); Sakian v. Taylor, 18 Ohio App. 3d 62, 63, 480 N.E.2d 822, 824 (1984) (motion for reconsideration a nullity); Ditmars v. Ditmars, 16 Ohio App. 3d 174, 175, 475 N.E.2d 484, 485 (1984); Taylor v. Dixon, 8 Ohio App. 3d 161, 164, 456

1970, Ohio courts have not been receptive to the use of the motion primarily because it creates difficult problems in relation to Rule 4(A) of the Ohio Rules of Appellate Procedure and the running of the thirty day statutory period within which to file a notice of appeal from a final judgment, and because it is not specifically authorized by the Ohio Civil Rules.[80]

While some appellate courts in Ohio strained to equate the motion for reconsideration with another of the authorized post-judgment motions to preserve a litigant's appeal rights,[81] most Ohio courts flatly refused to recognize the motion for reconsideration as an appropriate procedural device to seek relief from final judgment.[82] The issue was finally addressed by the Ohio Supreme Court in 1981 in the case of *Pitts v. Ohio Department of Transportation.*[83]

The supreme court began its analysis in *Pitts* by noting the limiting language of Rule 60(B), which states that the "procedure for ob-

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N.E.2d 558, 562 (1982) (motion for reconsideration is a nullity), *cert. denied,* 464 U.S. 848 (1983); Taray v. Sadoff, 331 N.E.2d 448, 449 (Ohio Ct. App. 1974); North Royalton Educ. Ass'n v. North Royalton Bd. of Educ., 41 Ohio App. 2d 209, 211, 325 N.E.2d 901, 904 (1974) (motion for reconsideration treated in substance as a motion for judgment notwithstanding the verdict or new trial motion); Vavrina v. Greczanik, 40 Ohio App. 2d 129, 133, 318 N.E.2d 408, 412 (1974) (motion for reconsideration will not toll the time for filing an appeal pursuant to OHIO R. APP. P. 4(A)); LaBarbera v. Batsch, 117 Ohio App. 273, 275, 182 N.E.2d 632, 634 (1962) (pre-rules case which specifies the proper use of the motion for reconsideration); Sarchet v. Bunn, 161 N.E.2d 56, 59 (Ohio Ct. App. 1957) (a motion to reconsider an order refusing to vacate a cognovit judgment was a motion for a new trial). A few commentators have also addressed this broad issue. *See generally* 2 KLEIN, *supra* note 14, at 13; Browne, *Contribution Among Tortfeasors: A Comment on Amended House Bill 531,* 25 CLEV. ST. L. REV. 151, 198 n.182 (1976); *Fatal Pause, supra* note 76, at 7; *Local Rules, supra* note 76, at 313 n.136; Kent, *Odds and Ends,* 49 CLEV. B.J. 280, 280 (1978).

79. *See infra* note 81.

80. *See, e.g.,* cases cited *supra* note 78.

81. *See, e.g.,* Suttle v. Webster, No. 371, slip op. at 3 (Meigs County Ct. App. June 30, 1986); North Royalton Educ. Ass'n v. North Royalton Bd. of Educ., 41 Ohio App. 2d 209, 211–12, 325 N.E.2d 901, 904 (1974); Vavrina v. Greczanik, 40 Ohio App. 2d 129, 131, 318 N.E.2d 408, 412 (1974); LaBarbera v. Batsch, 117 Ohio App. 273, 276, 182 N.E.2d 632, 634 (1962) (pre-rules case); Sarchet v. Bunn, 161 N.E.2d 56, 58 (Ohio Ct. App. 1957). Professors Klein and Browne have described these attempts to treat substance over form as the "conversion exception." 2 KLEIN, *supra* note 14, at 19. As they correctly point out, the "exception" seems to have little real viability in light of the supreme court's decision in Pitts v. Ohio Dep't of Transp., 67 Ohio St. 2d 378, 423 N.E.2d 1105 (1981).

82. *See, e.g.,* Pitts v. Ohio Dep't of Transp., 67 Ohio St. 2d 378, 379–80, 423 N.E.2d 1105, 1106–07 (1981); Taylor v. Dixon, 8 Ohio App. 3d 161, 164, 456 N.E.2d 558, 561 (1982), *cert. denied,* 464 U.S. 848 (1983).

83. 67 Ohio St. 2d 378, 423 N.E.2d 1105 (1981). As suggested in the text, the decision in *Pitts* seems to lay the issue to rest. However, Caruso-Ciresi, Inc. v. Lohman, 5 Ohio St. 3d 64, 448 N.E.2d 1365 (1983), seems to signal a retreat from the principle announced in *Pitts.* Still, as professors Klein and Browne suggest, "it is doubtful that the Supreme Court in any way intended to overrule Pitts. More likely, it simply failed to grasp the problem with which it was dealing." 2 KLEIN, *supra* note 14, at 15-16 n.13.

taining any relief from a judgment shall be by motion as prescribed in these rules."[84] The Rules specifically allow for relief from judgment in three ways: (1) the motion for judgment notwithstanding the verdict pursuant to Rule 50(B); (2) the motion for a new trial pursuant to Rule 59; and (3) the motion for relief from judgment pursuant to Rule 60(B). Considering the fact that the Rules conspicuously fail to refer to the motion for reconsideration, the supreme court refused to sanction its continued use and concluded that the motion was now a "nullity."[85]

In addition to this analysis, the supreme court also focused on the impact which the request for post-judgment relief might have upon the tolling of the thirty day statutory appeal period. Rule 4(A) of the Ohio Rules of Appellate Procedure provides a thirty day period from the date of the entry of final judgment during which a notice of appeal must be filed in order to invoke the jurisdiction of the appellate court.[86] This thirty day appeal period is mandatory and not subject to extension, except for the instances noted in the rule.[87] Rule 4(A) of the Ohio Rules of Appellate Procedure specifically provides that the filing of a motion pursuant to Rule 50(B) or pursuant to Rule 59 suspends the time for filing a notice of appeal until the trial court has considered the merits of the motion.[88] However, it makes no reference to or exception for a motion for reconsideration. Therefore, given the clear language of Rule 4(A) of the Ohio Rules of Appellate Procedure, the court declined to read that rule so as to implicitly include the filing of a motion for reconsideration as a means of tolling the running of the thirty day statutory appeal period.[89]

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84. *Pitts*, 67 Ohio St. 2d at 380, 423 N.E.2d at 1107 (citing OHIO R. CIV. P. 60(B)).

85. *Id.*

86. *See infra* note 88.

87. Bond v. Airway Dev. Corp., 54 Ohio St. 2d 363, 365, 377 N.E.2d 988; 989 (1978); State *ex rel.* Kotch v. DeGrab, 168 Ohio St. 506, 507, 156 N.E.2d 465, 466 (1959); *see also* Bosco v. Euclid, 38 Ohio App. 2d 40, 43, 311 N.E.2d 870, 872–73 (1974).

88. OHIO R. APP. P. 4(A) provides that:

> 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 the subdivision commences to run and is to be computed from the entry of the last of any of the following orders made upon a timely motion under such rules granting or denying a motion (1) for judgment under Rule 50(B); (2) for a new trial under Rule 59 . . . .

In addition, OHIO R. APP. P. 4(A) provides that a motion to vacate or modify a judgment by objections to a referee's report under OHIO R. CIV. P. 53(E)(7) or OHIO JUV. R. 40(D)(7) also tolls the running of the statutory appeal period.

89. The court described its unwillingness to infer the inclusion of the motion for reconsideration as part of the OHIO R. APP. P. 4(A) scheme as consistent with prior expression of policy. *Pitts*, 67 Ohio St. 2d at 380, 423 N.E.2d at 1107 (citing Bond v. Airway Dev. Corp., 54 Ohio St. 2d 363, 377 N.E.2d 988 (1978) and Kauder v. Kauder, 38 Ohio St. 2d 265, 313 N.E.2d 797 (1974)).

The Ohio Supreme Court continued its analysis of the problem in *Pitts* by noting that its decision not to recognize the motion for reconsideration was mandated and supported by what it termed "practical considerations."[90] The court recognized the "procedural quagmire" which faces courts when they try to elevate the motion for reconsideration to the status of a Rule 59 motion for a new trial or a Rule 50(A) motion for judgment notwithstanding the verdict.[91] Concerned with the financial and manpower cost incurred by appellate courts trying to decipher form over substance, the court found that the complications surrounding motions for reconsideration "can and should be avoided" and concluded that the motion for reconsideration after final judgment is a nullity and no more than a "legal fiction created by counsel."[92]

The Ohio Supreme Court's decision in *Pitts* appears to rest most significantly on its concern over the apparent confusion created when litigants resort to the use of common law procedural devices not specifically authorized by the Rules. However, the court's focus on this problem seems somewhat misplaced. The real problem does not lie, as the opinion suggests, in the elevation of substance over form, since that is one of the primary policies underlying our modern rules of procedure.[93] Nor are trial or appellate courts unfamiliar with or incapable of resolv-

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90. *Pitts*, 67 Ohio St. at 381, 423 N.E.2d at 1107 ("Practical considerations also mandate and support our determination herein.").

91. *Id.* The *Pitts* court noted:

> Once again, this court as well as the lower courts are left in a procedural quagmire of trying to elevate a motion for reconsideration after a final judgment to the status of a motion for a new trial or as a motion for a directed verdict or the like. The courts have had the arduous task of trying to inspect each and every motion for reconsideration which is filed in the trial court after a final judgment, and try to decipher form over substance. This is a costly procedure, both financially and in manual labor, which as in the present case, results in a procedural morass which clouds the merits. Complications concerning the timeliness of appeal and whether the Court of Appeals is vested with jurisdiction when a motion for reconsideration is filed after a final judgment can and should be avoided.

Id. (citations omitted). It is precisely this reasoning that suggests that those courts which have read *Pitts* as leaving the door open to elevate substance over form, *see, e.g.*, Suttle v. Webster, No. 371, slip op. at 3 (Meigs County Ct. App. June 30, 1986), have misinterpreted the intent of the *Pitts* decision.

92. *Pitts*, 67 Ohio St. 2d at 381, 423 N.E.2d at 1107.

93. OHIO R. CIV. P. 1(B) states that the Rules "shall be construed and applied to effect just results by eliminating delay, unnecessary expense and all other impediments to the expeditious administration of justice." In discussing the importance of OHIO R. CIV. P. 1(B), the staff notes highlight that "emphasis is placed upon liberal construction rather than technical interpretation." Rules Advisory Committee Staff Notes, OHIO REV. CODE ANN., OHIO R. CIV. P. Supplement 5 (Anderson 1981). A number of recent Ohio Supreme Court cases have emphasized the general policy consideration which underlies OHIO R. CIV. P. 1(B). *See, e.g.*, Huffman v. Hair Surgeon, Inc., 19 Ohio St. 3d 83, 86, 482 N.E.2d 1248, 1251 (1985); Baker v. McKnight, 4 Ohio St. 3d 125, 129, 447 N.E.2d 104, 107 (1983); Peterson v. Teodosio, 34 Ohio St. 2d 161, 175, 297 N.E.2d 113, 122 (1973).

ing issues that require the elevation of substance over form.[94]

Of the court's various concerns, the problem of whether and when the motion for reconsideration tolls the running of the statutory appeals period seems most compelling. Viewed solely from this perspective, the court's decision not to recognize the motion for reconsideration is defensible because it does inject consistency into a procedural area historically fraught with difficulty. But it does so without concern for or reference to the legitimate historical function of the motion for reconsideration.[95] If, as the court suggests, the motion for reconsideration was no more than a legal fiction created by counsel,[96] it was nevertheless a fiction previously condoned and sanctioned by Ohio courts. Regardless of how the right was invoked, historically Ohio courts had recognized a trial court's inherent power to remedy legal errors by vacating and modifying its judgments during term.[97] Unfortunately, in its zeal to simplify post-judgment procedure after the adoption of the Rules of Civil Procedure in 1970, the Ohio Supreme Court failed to consider whether the post-judgment motion for reconsideration serves a legitimate function in the overall adjudicatory scheme. The remainder of this article will consider this question in some detail.

2. Residual Common Law Power

After the adoption of the Civil Rules in 1970, a second group of litigants encountered problems in their attempt to obtain post-judgment relief. Although these litigants used the procedural devices set out in the Rules, they did so incorrectly. Having failed to invoke properly the procedural remedies outlined in the Rules, these litigants then asked the courts of Ohio to grant post-judgment relief pursuant to their in-

94. *See* cases cited *supra* note 81. The practice in the federal courts has been to look to form over substance when dealing with post-trial motions that could implicate FED. R. CIV. P. 59. *See* cases cited *infra* note 210.

95. *See infra* note 97.

96. *Pitts*, 67 Ohio St. 2d at 381, 423 N.E.2d at 1107. The *Pitts* court observed that "[t]he application for a motion for reconsideration after a final judgment is simply a legal fiction created by counsel, which has transcended into a confusing, clumsy and 'informal local practice.'" *Id.* (citations omitted).

97. A review of the early case law concerning a trial court's inherent power over its own judgments in term does not reveal a concern for the manner in which the post-judgment relief was styled. Like its counterpart the "motion for rehearing," the "motion for reconsideration" was not specifically authorized by the Ohio pre-rules statutes governing the procedures of Ohio courts. *See supra* note 77. However, the motion for rehearing was an acceptable mechanism to invoke a trial court's inherent power. *See, e.g., Huber*, 57 Ohio St. at 173–75, 48 N.E. at 880–81. Given the breadth of a trial court's power to vacate or modify its own judgments in term, *see supra* notes 36–67 and accompanying text, the post-judgment motion for reconsideration would seem to have been perfectly appropriate. In addition, it is important to note that the motion for reconsideration is still appropriately used in seeking reconsideration of interlocutory orders. *See supra* note 76.

herent common law power over judgments rendered during term.[98]

The specific question of whether, following the adoption of the Rules in 1970, a court retained any residual common law power over its own judgments during term was first addressed in 1982 by the Wayne County Court of Appeals. In the oft cited case of *Cale Products, Inc. v. Orrville Bronze and Aluminum Co.*,[99] the court concluded that the procedures set forth in the Rules provide the exclusive means by which a trial court may vacate or modify a final judgment. The court of appeals rejected the argument that a trial court's inherent common law power to modify or vacate its own judgments during term had survived the adoption of the Rules.[100]

The appellate court began its analysis by noting that the Ohio Supreme Court had—by adopting the Rules—eliminated the in-term/out-of-term distinction that was so important in the common law and pre-rules procedural scheme. Rule 6(C) specifically mandates that the "existence or expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action consistent with these rules."[101] According to the court of appeals, the Rules were meant to provide a unified and comprehensive procedural scheme "irrespective of the term of court."[102] Since the procedure for obtaining any post-judgment relief must be by motion as prescribed in the rules, the court was particularly concerned that if it were to recognize the continued existence of a trial court's common law power over its own judgments in term there might then be a resulting expansion of the trial court's power beyond the end of the term: "It would be anomalous to hold that an inherent discretionary power, no longer limited in duration by the expiration of the term of court, remains viable outside of this procedural framework."[103]

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98. *See, e.g.*, Sperry v. Hlutke 19 Ohio App. 3d 156, 158, 483 N.E.2d 870, 872 (1984); Cale Prods., Inc. v. Orrville Bronze & Aluminum Co., 8 Ohio App. 3d 375, 377–79, 457 N.E.2d 854, 856–58 (1982); Lakco Mortgage Co. v. Pihlblad, 1 Ohio App. 3d 67, 67, 439 N.E.2d 455, 455 (1981).

99. 8 Ohio App. 3d 375, 457 N.E.2d 854 (1982).

100. *Id.* at 377, 457 N.E.2d at 857.

101. OHIO R. CIV. P. 6(c).

102. *Cale Prods.*, 8 Ohio App. 3d at 377, 457 N.E.2d at 856.

103. *Id.* It is interesting to note that the Federal Rules of Civil Procedure also eliminated the common law in-term/out-of-term distinction. FED. R. CIV. P. 6(C) provided that the term of court had no effect on the five limits set out in the Federal Rules. The 1946 amendment to FED. R. CIV. P. 6(C) provided that the continued existence of the term of court gave no additional powers to federal trial courts. FED. R. CIV. P. 6(C) was repealed when the Act of October 16, 1963, Pub. L. No. 88-139, § 1, 77 Stat. 248, 248, 1963 U.S. CODE CONG. & ADMIN. NEWS. 273, 273, amended 28 U.S.C. § 138 (1982), to eliminate terms of court in federal courts. However, the elimination of terms of court did not result in a reduction of a trial court's power to reconsider its judgments in non-trial adjudication. *See infra* note 217.

In reaching its decision, the Wayne County Court of Appeals also relied heavily on the Ohio Supreme Court's decision in *First National Bank*.[104] There, the supreme court refused to limit the inherent common law power of a trial court over its own judgment during term, despite the existence of pre-rules statutes which limited a trial court's post-term power to vacate or modify its judgments to the grounds set out in the statutes.[105] The supreme court's refusal to limit a trial court's common law power in term was based in part upon the absence of any clear legislative enactment governing a trial court's power in term.[106] However, the supreme court indicated its willingness to alter the common law rule in the face of clearly applicable legislation.[107] In deciding the *Cale Prods.* case the Wayne County Court of Appeals evidently considered the newly adopted Rules to be the kind of clear legislative pronouncement that the supreme court had deemed absent at the time of the *First National Bank* decision. The court of appeals concluded that the only available procedural avenues open to a litigant seeking relief from final judgment are those specifically enumerated in the Rules.[108]

Although the Ohio Supreme Court has not addressed the narrow issue raised in *Cale Prods.*, its reasoning in *First National Bank*[109] and its holding in *Pitts*[110] strongly suggest that it would similarly limit the availability of relief from final judgment to those procedural devices specifically set out in the Rules. The current state of the law in Ohio now seems crystal clear. A litigant who seeks relief from judgment

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104. *See supra* notes 53–55 and accompanying text.

105. *See supra* note 56 and accompanying text.

106. *Id.*

107. In *First National* the court stated that "[i]n the absence of legislative enactment the common law rule must apply, for it would be a strange anomaly indeed that a court given the power to vacate its judgment after the term should have no power to vacate a judgment within or at the same term." *First Nat'l*, 102 Ohio St. at 122, 130 N.E. at 503.

108. In *Cale Prods.* the court observed:

> We cannot subscribe to the view that this inherent discretionary power, formerly recognized only during the term of court, has been extended ad infinitum by Civ. R. 6(e). An assumption underlying these pre-rules opinions is that a unified statutory scheme governing all modification of judgments would abrogate a court's power to vacate or modify its judgment without observing procedural formalities.

Cale Prods., 8 Ohio App. 3d at 378, 457 N.E.2d at 857. The court also went on to note that OHIO R. CIV. P. 60(B) "provides 'the exclusive grounds . . . and the procedure which must be followed for a court to vacate its own judgment.'" *Cale Prods.*, 8 Ohio App. 3d at 378, 457 N.E.2d at 857–58 (quoting McCue v. Insurance Co., 61 Ohio App. 2d 101, 399 N.E.2d 127 (1979)); *see also* Matson v. Marks, 32 Ohio App. 2d 319, 321–22, 291 N.E.2d 491, 494 (1972); Antonopoulos v. Eisner, 30 Ohio App. 2d 187, 190, 284 N.E.2d 194, 196 (1972). The defendant in *Cale Prods.* did not seek relief pursuant to OHIO R. CIV. P. 60(B) nor was a new trial sought pursuant to OHIO R. CIV. P. 59(A). *Cale Prods.*, 8 Ohio App. 3d at 378–79, 457 N.E.2d at 857–58.

109. *See supra* notes 53–55 and accompanying text.

110. *See supra* notes 83 and accompanying text.

must do so pursuant to the procedural devices set out in the Rules and cannot seek relief from judgment pursuant to a trial court's inherent common law power to control its own judgments in term.[111] In Ohio courts may no longer elevate substance over form when they are confronted with a motion for post-judgment relief—at least in so far as any such motion implicates Rule 4(A) of the Ohio Rules of Appellate Procedure and affects the thirty day time period for filing a notice of appeal from the entry of final judgment.[112]

III. Relief from Final Judgments for Judicial Error Under the Ohio Rules of Civil Procedure

A. Generally

The prior section focused briefly on the remedies generally available to a litigant seeking relief from final judgment in the Ohio courts. Yet, as previously noted, parties can and do seek relief from final judgment for various reasons under a variety of circumstances.[113] The primary focus of this article is not on these broad and expansive sets of circumstances. Rather, this article is concerned primarily with a relatively narrow issue—the availability of relief from final judgment for judicial error in cases of non-trial adjudication.[114] Before examining this issue in more detail, though, we will first take a brief look at the remedies generally available to those who seek relief from judgment for judicial error.

1. Judicial Oversight or Omission

Rule 60(A) allows a court to correct clerical mistakes in judgments or other errors arising from a court's oversight or omission.[115] The errors correctable pursuant to Rule 60(A) are referred to in the remainder of this article as judicial "clerical" error.[116] The power to

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111. Ohio R. Civ. P. 59 and Ohio R. Civ. P. 60(A) and (B) provide the exclusive means by which a litigant may seek post-judgment relief. Of course, as noted previously a trial court is always free to alter, amend or vacate an interlocutory order. *See supra* note 76.

112. *See supra* notes 81–89 and accompanying text.

113. *See supra* notes 13–14 and accompanying text.

114. In this article, the reference to "non-trial adjudication" means the entry of a final judgment pursuant to either Ohio R. Civ. P. 12(b)(6) or Ohio R. Civ. P. 12(c) or Ohio R. Civ. P. 56.

115. Ohio R. Civ. P. 60(A) provides:

> Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time on its own initiative or on motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

116. Rule 60(A) is generally applied only to inadvertent clerical error. These

correct these judicial clerical errors in a judgment are broad and can be invoked upon motion of a party or by the court any time on its own initiative.[117] The purpose underlying Rule 60(A) is clear. A court should have relatively unrestricted power to correct clerical errors in its own judgment in the interests of justice to insure that the judgment entered and journalized actually reflects the true intent of the trial court in finding in favor of one party over another.[118]

It is equally clear, however, that judicial errors of a more substantial or serious nature are not included within the scope of Rule 60(A)[119] and are not as easily remedied.[120] When the final journalized judgment accurately reflects the intent of the trial court, even if it is otherwise an erroneous judgment, relief will not lie pursuant to Rule 60(A).[121]

As briefly mentioned in the introduction to this article, the text of Rule 60(A) makes no distinction between mistakes made in trial adjudications as opposed to those made in non-trial adjudications.[122] Cleri-

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errors are usually mechanical in nature and apparent on the face of the record. Dentsply Int'l, Inc. v. Kostas, 26 Ohio App. 3d 116, 118, 498 N.E.2d 1079, 1081 (1985). In addition, OHIO R. CIV. P. 60(A) does not authorize the modification of an erroneous judgment but rather is intended to remedy errors of a clerical nature which prohibit the record from reflecting the actual intent of the court. *Dentsply*, 26 Ohio App. 3d at 118, 498 N.E.2d at 1081. *See generally* 62 OHIO JUR. 3D, *supra* note 1, *Judgments* § 77 (1985). Prior to the enactment of the Rules in 1970, Ohio courts similarly limited their common law power to correct their own records to clerical error and omissions which subverted the actual intent of the trial courts. While a court had the power to correct error to insure that the judgment actually reflected the intent of the court, there was no power to change a judgment to reflect a decision different from that which the court actually intended. *In re* Farkash, 8 Ohio N.P. (n.s.) 137, 141–43 (1909); *see also* 62 OHIO JUR. 3D, *supra* note 1, *Judgments* § 75 (1985).

117. *See supra* note 115.

118. *See supra* note 116.

119. OHIO R. CIV. P. 60(A) is meant to apply to clerical errors only and cannot be used to change that which was deliberately done. Dentsply Int'l, Inc. v. Kostas, 26 Ohio App. 3d 116, 118, 498 N.E.2d 1079, 1081 (1985). Clerical errors involve only those errors which are mechanical in nature and involve no judgment or decision. *Id.* Likewise, errors of law made by a court in the course of an adjudication are not remediable pursuant to FED. R. CIV. P. 60(A). *See* Elias v. Ford Motor Co., 743 F.2d 463, 466 (1st Cir. 1984); Holcomb v. United States, 622 F.2d 937, 943–44 (7th Cir. 1980); Safeway Stores, Inc. v. Coe, 136 F.2d 771, 773–74 (D.C. Cir. 1943). *See generally* 6a J. MOORE, J. LUCAS & G. GROTHEER, MOORE'S FEDERAL PRACTICE ¶ 60.06[4] (2d ed. 1988).

120. Errors of a more substantial nature do not fall within the scope of OHIO R. CIV. P. 60(A), *see supra* note 119, and instead must be corrected by appeal, an OHIO R. CIV. P. 59 motion for a new trial, or an OHIO R. CIV. P. 60(B) motion, if appropriate, *see infra* note 127.

121. *See supra* note 119. When the court's oversight or omission affects the substantial rights of the parties, the judicial error is also beyond the reach of FED. R. CIV. P. 60(A). *See* Mechanical Technology Inc. v. Ryder Truck Lines, Inc., 776 F.2d 1085, 1089 (2d Cir. 1985); *In re* Galiardi, 745 F.2d 335, 337 (5th Cir. 1984); Mullins v. Nickel Plate Mining Co., 691 F.2d 971, 973–74 (11th Cir. 1982).

122. Neither the language of the Rule itself nor court decision limits the reach of OHIO R. CIV. P. 60(A) to mistakes or errors in judgments following trial. *See supra* note 115 for text of

cal mistakes, errors of oversight, or omissions made in judgments entered after trial also fall within the scope of the Rule as well as those that are made in the entry of judgment or final orders following non-trial adjudications.[123] The rule is intended to insure that the final judgment or order accurately reflects the intent of the trial court *regardless* of the manner in which the matter was originally adjudicated or decided.[124] It will be demonstrated, however, that this is not the case with respect to those substantial judicial errors that fall outside the scope of Rule 60(A). The nature of the judicial error is a significant factor in determining whether and in what manner a trial court can self-correct that error.

2. Substantial Judicial Error

In Ohio it is well settled that a litigant who seeks to obtain relief from a final judgment due to substantial judicial error[125] cannot do so pursuant to subsection (A) of Rule 60.[126] Although there is some support for the notion that subsection (B) of that rule may be used to remedy substantial judicial error in very narrow circumstances,[127] there

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OHIO R. CIV. P. 60(A). Federal courts have not limited the application of FED. R. CIV. P. 60(A) relief to judgments entered subsequent to trial. *See, e.g., In re* Jee, 799 F.2d 532, 533–34 (9th Cir. 1986) (Rule 60(A) motion properly used to correct a final order dismissing a cross claim), *cert. denied*, 481 U.S. 1015 (1987); Panama Processes v. Cities Serv. Co., 789 F.2d 991, 993–94 (2d Cir. 1986) (Rule 60(A) motion granted to clarify the meaning of a consent judgment); United States v. Stewart, 392 F.2d 60, 62 (3d Cir. 1968) (Rule 60(A) used to amend judgment by confession); National Equip. Rental, Ltd. v. Figurine Salon of Cal., Inc., 19 Fed. R. Serv. 2d (Callaghan) 1426, 1427 (E.D.N.Y. 1975) (Rule 60(A) relief granted to vacate a default judgment).

123. *See* cases cited *supra* note 122.

124. *See supra* notes 116 and 122.

125. When the term "substantial" judicial error is used in this article it refers to those errors which are prejudicial and involve substantial error of law from which an appeal would normally lie.

126. *See supra* note 119. However, FED. R. CIV. P. 60(A) relief has been granted in a few cases described by Professor Moore in his treatise as "questionable." 6a J. MOORE, J. LUCAS & G. GROTHEER, MOORE'S FEDERAL PRACTICE, *supra* note 119, ¶ 60.06[4]; *see* Blaine v. Peters, 194 F.2d 887, 887 (D.C. Cir. 1952); *Ex parte* Wright, 8 F.R.D. 358, 358 (N.D. Cal. 1948); *In re* Harbor Stores Corp., 33 F. Supp. 360, 361 (S.D.N.Y. 1940).

127. OHIO R. CIV. P. 60(B)(1) authorizes relief from judgment or order for "mistake, inadvertence, surprise or excusable neglect." There has been some question concerning whether judicial error that results in the entry of an erroneous judgment falls within the language of OHIO R. CIV. P. 60(B)(1) as a "mistake." While Ohio case law suggests that it does not, *see supra* note 20, the analogous Federal Rule has been interpreted by some federal circuit courts to include judicial error as a "mistake" within the meaning of FED. R. CIV. P. 60(B)(1). *See* Page v. Schweiker, 786 F.2d 150, 155 (3d Cir. 1986); Liberty Mutual Ins. Co. v. EEOC, 691 F.2d 438, 441 (9th Cir. 1982). However, other circuits refuse to include judicial error within the scope of FED. R. CIV. P. 60(B)(1). *See* Elias v. Ford Motor Co., 734 F.2d 463, 467 (1st Cir. 1984); McKnight v. United States Steel Corp., 726 F.2d 333, 338 (7th Cir. 1984). This split in the circuits is discussed generally at 7 J. MOORE, J. LUCAS & G. GROTHEER, MOORE'S FEDERAL PRACTICE, *supra* note 119, ¶ 60.22[3].

Id. Other courts, support for the proposition that OHIO R. CIV. P. 60(B)(5) could provide

are insurmountable practical problems that limit its usefulness.[128] An aggrieved party is always free to pursue an appeal to correct substantial judicial error but that alternative is both lengthy and costly. As a result, the most viable remedy available to a litigant who seeks immediate relief from a final order or judgment for judicial error in the trial court is the motion for a new trial pursuant to Rule 59.[129]

Rule 59 provides that a new trial can be granted to all or any of the parties to an action on all or part of the issues previously heard either upon the motion of a party or upon the initiative of the court.[130] In addition, the Rule provides that a new trial motion is not limited to actions tried to a jury. Subsection (A) specifically authorizes a court to entertain a motion for a new trial in an action tried without a jury and further allows a "court [to] 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."[131] The motion can be filed at any time within fourteen days of the entry of final judgment[132] and pursuant to Rule 4(A) of the Ohio Rules of Appellate Procedure, the filing of the motion for a new trial suspends the running of the thirty day statutory appeal period until the trial court disposes of the new trial motion.[133]

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a post-judgment procedural mechanism to cure judicial error. *See* Matson v. Marks, 32 Ohio App. 2d 319, 327, 291 N.E.2d 491, 497 (1972) (Rule 60(B)(5) gives a court power as broad as that at common law to vacate a judgment during term). Despite the possible applicability of OHIO R. CIV. P. 60(B) to cure judicial error, the prudent practitioner should avoid the use of OHIO R. CIV. P. 60(B) to remedy judicial error. *See infra* note 143 and accompanying text; *see also supra* note 20.

128. *See infra* note 143 and accompanying text.

129. *Id.*

130. The text of OHIO R. CIV. P. 59 sets out nine grounds for the grant of a new trial. *See supra* note 5 for the text of OHIO R. CIV. P. 59. In addition to the nine enumerated grounds, Rule 59 specifically authorizes the grant of a new trial "in the sound discretion of the court for good cause shown." OHIO R. CIV. P. 59.

131. OHIO R. CIV. P. 59(A) provides that "[o]n 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." (emphasis added).

132. OHIO R. CIV. P. 59(B) provides that "[a] motion for a new trial shall be served not later than fourteen days after the entry of 'judgment.' " This fourteen day period is mandatory and not subject to extension. Town & Country Drive-In Shopping Centers, Inc. v. Abraham, 46 Ohio App. 2d 262, 348 N.E.2d 741 (1975); *see also* Gribble v. Harris, 625 F.2d 1173, 1174 (5th Cir. 1980); Tobriner v. Chefer, 335 F.2d 281, 282 (D.C. Cir. 1964).

133. OHIO R. APP. P. 4(A) provides that "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 the sentence . . . (2) for a new trial under Ohio R. Civ. P. 59 . . . ." *See, e.g.*, Bond & Assocs. v. Airway Dev. Corp., 54 Ohio St. 2d 363, 364, 377 N.E.2d 988, 989 (1978) (statutory appeal period of OHIO R. APP. P. 4(A) tolled by filing a motion for a new trial pursuant to Rule 59). However, filing an OHIO R. CIV. P. 60(B) motion does not toll the time for filing a notice of appeal. Colley v. Bazell, 64 Ohio St. 2d 243, 244, 416 N.E.2d 605, 607 (1980) (Rule 60(B) motion will not toll the statutory appeal period).

The primary object of the new trial device is to provide a rehearing in the trial court of questions previously heard by that court but which were improperly decided.[134] For the litigant who feels that a court has committed an error of law in its adjudicative deliberations, the Rule 59 motion provides a procedural remedy that enables that litigant to have a trial court review the issue without the added time and expense of filing an appeal.[135] The new trial device is the appropriate mechanism by which a trial court can correct egregious error brought to its attention subsequent to the entry of final judgment. In addition, the device also allows a court, in the absence of a motion, to self-correct previous decisions which the court in its own judgment determines were erroneous.[136]

B. The Procedural Scheme—The Dilemma

For any litigant seeking to have a trial court correct judicial clerical error, oversight or omission, the choice is simple—the Rule 60(A) motion.[137] As previously noted, there is no time limitation on when a court can correct this type of error, except, of course, when an appeal has been taken and is pending.[138] Nor is a litigant's ability to obtain this relief related to the manner in which the court concluded its adjudication.[139] In contrast, the litigant who seeks relief from final judgment for substantial judicial error faces a number of procedural pitfalls depending on the nature of the adjudication which preceded the entry of final judgment.

For the litigant who seeks relief from judgment for substantial judicial error after there has been a full trial on the merits, the choice is not problematic. The Rule 59 motion requesting a new trial is the appropriate vehicle to seek relief from a final judgment where there has been substantial judicial error during the course of the trial.[140] Regardless of the ultimate disposition of the motion, the litigant is without risk for having filed the motion because the statutory appeal period is tolled

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134. *See* Rippel v. Rippel, 69 Ohio Op. 2d 503, 504 (Ct. App. 1974); Manchester v. Cleveland Trust Co., 95 Ohio App. 201, 208, 114 N.E.2d 242, 249 (1953).

135. *See* Sanders v. Mount Sinai Hosp., 21 Ohio App. 3d 249, 252, 487 N.E.2d 588, 590 (1985) (court may grant a new trial when it determines that it committed an error of law during the course of the original trial).

136. OHIO R. CIV. P. 59(D) provides that within the fourteen day period immediately following the entry of judgment, the court "of its own initiative may order a new trial for any reasons for which it might have granted a new trial on motion of a party . . . ." *See, e.g.*, Musca v. Village of Chagrin Falls, 3 Ohio App. 3d 192, 195, 444 N.E.2d 475, 478 (1981).

137. *See supra* note 115 and accompanying text.

138. *See supra* note 115.

139. *See supra* note 122 and accompanying text.

140. *See supra* note 88 and accompanying text.

during the pendency of the motion.[141] However, if no motion for a new trial is filed, then the only realistic alternative to correct substantial judicial error lies in an appeal to the appellate courts. While there is some support for the proposition that Rule 60 can, in certain circumstances, be used to correct substantial judicial error,[142] the filing of a Rule 60 motion will not suspend the running of the statutory appeal period following the entry of a final judgment.[143] As a practical matter, it is not likely that a trial court could consider and rule on a Rule 60 motion before the expiration of the thirty day statutory appeal period. As a result, the Rule 60(B) motion is a futile gesture since an appeal which will divest the trial court of jurisdiction to consider the motion[144] will have to be filed before the end of the thirty day appeal period.[145]

It is important to note that while the Rule 59 time limits have been strictly construed[146] and while the interplay of Rules 59 and 60 can at times be problematic,[147] the Rules specifically provide a procedural mechanism for a trial court to correct substantial judicial errors made during the trial process. However, there is currently no similar procedural device that allows a trial court to correct substantial judicial error following a judgment entered as a result of a non-trial adjudication. Thus, for example, following an entry of a judgment as a result of a court's ruling on a successful motion for summary judgment, neither the litigants nor the court can address substantial judicial error which occurred during the course of the adjudication. No matter how clear or how egregious, the only remedy lies in appellate court review. This anomaly is the result of the Ohio Supreme Court's decision in *Pitts v.*

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141. *See supra* note 133.

142. *See supra* note 125.

143. OHIO R. APP. P. 4(A) provides that the statutory appeal period is tolled by the filing of an OHIO R. CIV. P. 59 motion for a new trial, an OHIO R. CIV. P. 50(A) motion requesting judgment notwithstanding the verdict, or a motion to vacate or modify a judgment by objection to a referee's report under OHIO R. CIV. P. 53(E)(7) or OHIO R. JUV. P. 40(D)(7). *See* Kauder v. Kauder, 38 Ohio St. 2d 265, 267, 313 N.E.2d 797, 798 (1974); McCue v. Buckeye Union Ins. Co., 61 Ohio App. 2d 101, 106, 399 N.E.2d 127, 130 (1979); Town and Country Drive-In Shopping Centers v. Abraham, 46 Ohio App. 2d 262, 267–68, 348 N.E.2d 741, 745 (1975); Bosco v. City of Euclid, 38 Ohio App. 2d 40, 43–44, 311 N.E.2d 870, 872 (1974).

144. Vavrina v. Greczanik, 40 Ohio App. 2d 129, 132, 318 N.E.2d 408, 412 (1974) (trial court has no jurisdiction to act on an OHIO R. CIV. P. 60(B) motion for relief from judgment while an appeal is pending).

145. OHIO R. APP. P. 14(B) provides that a court may not enlarge or reduce the time for filing a notice of appeal. When read in light of the Ohio Supreme Court's strict interpretation of OHIO R. APP. P. 4(A) in *Kauder v. Kauder*, 38 Ohio St. 2d 265, 313 N.E.2d 797 (1974), it would appear that the statutory appeal period is not subject to expansion. *See* Metler, *Kauder v. Kauder: Strict Interpretation of Appellate Rule 4(A) and the Requirement for Suspending the Time for Filing a Notice of Appeal*, 2 OHIO N.U.L. REV. 387 (1974).

146. *See supra* note 132.

147. The difficulty stems from the possible overlap between OHIO R. CIV. P. 59 and OHIO R. CIV. P. 60(B). *See supra* notes 12 and 127 and accompanying text.

Ohio Department of Transportation,[148] eliminating the viability of the motion for reconsideration coupled with a series of decisions narrowly interpreting the scope of the new trial device.

C. *The Procedural Scheme—The Cases*

Even before the adoption of the Ohio Rules of Civil Procedure in 1970, the issue of whether the new trial motion applied to non-trial adjudications was addressed by the Ohio appellate courts. In 1962, some eight years prior to the adoption of the Rules, the Ohio Court of Appeals for Cuyahoga County in *LaBarbera v. Batsch*[149] considered the question of whether a "motion for rehearing" filed after a grant of summary judgment and well within the statutory period for filing a motion for new trial should be considered by the trial court as a motion for new trial pursuant to Ohio Revised Code § 2321.17, the precursor statute to Rule 59.[150] In that case the plaintiff-appellant took issue with the decision of the trial court granting defendant-appellee's motion to dismiss and the resulting judgment dismissing plaintiff's action. In finding that the "motion for rehearing" was the functional equivalent of a motion for new trial, the appellate court approached the problem by focusing on the nature of the relief requested in the motion and refused to resolve the matter by elevating form over substance. The court stated:

> [W]here a motion incorrectly designated as a motion for "rehearing" or "reconsideration" in fact seeks relief within the purview of what, in substance, is a motion for new trial, as defined by statute, the court will disregard such designation and consider such motion as if it had been captioned as a motion for new trial.[151]

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148. 67 Ohio St. 2d 378, 423 N.E.2d 1105 (1981); *see also supra* note 83 and accompanying text.

149. 117 Ohio App. 273, 182 N.E.2d 632 (1962).

150. *Id.* at 275, 182 N.E.2d at 634. The characterization of the motion was crucial to the outcome of the case. Plaintiff's "motion for rehearing" was denied by the trial court and plaintiff then filed an appeal approximately forty three days after the entry of the original order dismissing plaintiff's action. At that time, OHIO REV. CODE § 2505.07 (the precursor statute to OHIO R. CIV. P. 4(A)), required that a notice of appeal be filed within twenty days after the entry of the final order or judgment except that "when a motion for new trial . . . is filed by either party within the time provided . . . then the time of perfecting the appeal does not begin to run, and an appeal shall not be taken until the entry of the order overruling or sustaining . . . the motion for new trial . . . ." If plaintiff's "motion for rehearing" was considered as a new trial motion within the meaning of § 2505.07, then plaintiff's appeal was timely. Otherwise it was not and plaintiff had no further recourse.

151. *LaBarbera*, 117 Ohio App. at 276, 182 N.E.2d at 634. In focusing on substance over form, the appeals court relied in part on the Ohio Supreme Court's decision in State, *ex rel.* Smith v. Young, 137 Ohio St. 319, 29 N.E.2d 564 (1940), *cert. denied*, 312 U.S. 701 (1941) in which the court treated a motion to strike as a demurrer. In that case, the supreme court recognized "the rule that ordinarily a motion to strike from a petition should not be treated as a demurrer." *Id.* at

The appellate court in *LaBarbera* concluded that the motion for "rehearing" should have been considered as a motion for a new trial since it sought a redetermination of certain issues of law as those legal issues were reflected in the trial court's final judgment.[152]

Shortly after the adoption of the Rules, *LaBarbera* was followed by the Cuyahoga County Court of Appeals' decision in *North Royalton Education Association v. North Royalton Board of Education.*[153] In *North Royalton,* the appeals court again looked to the substance of the appellant's motion for reconsideration to determine if it should be treated as the equivalent of the motion for a new trial for the purpose of suspending the running of the appeal period after the entry of final judgment.[154] While the reasoning of these two cases is consistent with the underlying policy of the Rules[155] and with the approach adopted by the federal courts in addressing the same issue with respect to Rule 59

320, 29 N.E.2d at 565. However, the Ohio Supreme Court has not always adhered strictly to that rule. Zajachuck v. Willard Storage Battery Co., 106 Ohio St. 538, 140 N.E. 405 (1922); Robinson v. Fitch, 26 Ohio St. 659 (1875); Finch v. Finch, 10 Ohio St. 501 (1860).

152. The defendant in *LaBarbera* argued that the "motion for rehearing" should not be considered as a new trial motion since the new trial device was restricted to redetermination of factual issue only. As the court noted, the new trial device had historically been limited to redetermination of factual question by OHIO GEN. CODE § 11575 (Anderson 1938) which defined a new trial as a "re-examination in the same court, of an issue of fact." However, in 1945 OHIO GEN. CODE § 11575 (the precursor to OHIO REV. CODE ANN. 2321.17 (Anderson 1981)) was amended to read "a re-examination in the same court, of the issue after a final order, judgment, or decree by the Court." In addition, the *LaBarbera* court relied on OHIO REV. CODE § 2321.17(F) which authorizes the grant of a new trial when the final order or judgment "is not sustained by sufficient evidence, or is contrary to law." *LaBarbera,* 117 Ohio App. at 276, 182 N.E.2d at 634. Thus, the supreme court thought it perfectly evident that plaintiff was seeking a new trial of the issue of law previously determined as specifically authorized by OHIO REV. CODE § 2321.17(F). *Id.*

153. 41 Ohio App. 2d 209, 325 N.E.2d 901 (1974).

154. The Cuyahoga County Appeals Court was mindful of the Ohio Supreme Court's opinion in Kauder v. Kauder, 38 Ohio St. 2d 265, 313 N.E.2d 797 (1974), which established the principle that a motion for reconsideration is not the equivalent of a motion for new trial or a motion for judgment notwithstanding the verdict and does not, therefore, toll the thirty day statutory appeal period pursuant to OHIO R. APP. P. 4(A). Though bound by *Kauder,* the appeals court did not read the supreme court's decision as precluding them from elevating substance over form:

> We do not read either the Rules or Kauder as requiring the elevation of form over substance. Consequently, it is necessary to examine appellant's post-trial motion to determine whether its substance requires that it be treated as a motion for reconsideration or as a motion for new trial . . . . In our view appellant's "Application for Reconsideration" must be treated as a motion for new trial under Civ. R. 59(A)7).

North Royalton, 41 Ohio App. 2d at 211, 325 N.E.2d at 904.

155. OHIO R. CIV. P. 1(B) requires that the rules "be construed and applied to effect just results by eliminating delay, unnecessary expense and all other impediments to the expeditious administration of justice." As the staff notes make more explicit, emphasis in interpretation of the rules is placed upon "liberal construction rather than upon technical interpretation." Rules Advisory Committee Staff Notes, OHIO REV. CODE ANN., OHIO R. CIV. P. Supplement 5 (Anderson 1981). The spirit of the Rules requires the resolution of cases on their merits, not upon technical pleading deficiencies. Peterson v. Teodosio, 34 Ohio St. 2d 161, 162, 297 N.E.2d 113, 114 (1973).

of the Federal Rules of Civil Procedure,[156] neither case was subsequently followed in any other Ohio decision.

In 1979, the Ohio Court of Appeals for Montgomery County addressed the same issue in a slightly different manner in the case of *Shearson, Hayden & Stone, Inc. v. Steiner.*[157] In that case, the trial court entered summary judgment in favor of the plaintiff on November 22, 1978. There was little question that the entry of judgment was a final appealable order within the meaning of the Civil Rules.[158] However, instead of filing an appeal, the defendant filed a motion for a "new trial, new hearing, in accordance with Civil Rule 59 and for reconsideration of the Court's Decision."[159] Though generally sympathetic to the substance over form argument advanced in both *LaBarbera* and *North Royalton,* the appellate court found the reasoning of its sister courts applicable only to a mislabeled motion after trial:

> We agree that the substance rather than the label controls the nature of a request to the court. Thus, after a trial is conducted a motion mistakenly labeled may be considered a motion for a new trial. Here, the nature of the request when there was no trial does not support such consideration.[160]

The absence of a trial and entry of final judgment pursuant to a Rule 56 motion for summary judgment was obviously a significant factor which influenced the court in its refusal to treat the motion for reconsideration as a motion for new trial. The court's opinion notes that

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156. In the federal courts, the characterization of post-judgment motions has also been a problem. However, the solution has been different from that adopted by the Ohio courts. Not unlike the Ohio courts, some federal courts have chided counsel for not being clearer in their characterization of post-judgment relief. *See, e.g.,* Bank of Calif. v. Arthur Anderson & Co., 709 F.2d 1174, 1176 (7th Cir. 1983). In the face of continued ambiguity, many circuit courts have taken a liberal approach to post-judgment motions and have adopted a rule that all substantive motions challenging the correctness of a judgment that are served within ten days after the entry of judgment (the time required for filing a motion pursuant to FED. R. CIV. P. 59) will be treated as a FED. R. CIV. P. 59 motion, and will, therefore, toll the statutory time for filing an appeal. *See, e.g.,* Harcon Barge Co. v. D & G Boat Rentals, Inc., 784 F.2d 665, 667 (5th Cir.) (en banc), *cert. denied,* 479 U.S. 930 (1986); Rankin v. Heckler, 761 F.2d 936, 942 (3d Cir. 1985); Venable v. Haislip, 721 F.2d 297, 299 (10th Cir. 1983). Other circuits, without adopting a *per se* rule, look to the substance of the motion and not to how the motion is labeled. *See, e.g.,* Lyell Theatre Corp. v. Loews Corp., 682 F.2d 37, 40 (2d Cir. 1982); Dove v. Codesco, 569 F.2d 807, 809 (4th Cir. 1978); Sea Ranch Ass'n v. California Coastal Zone Conservation Comm'ns, 537 F.2d 1058, 1061 (9th Cir. 1976), *vacated,* 454 U.S. 1070 (1981).

157. 66 Ohio App. 2d 10, 418 N.E.2d 1389 (1979).

158. The last paragraph of the trial court's judgment reads: "This order is intended as a Final Order from which an appeal may be taken." *Id.* at 10, 418 N.E.2d at 1389.

159. *Id.*

160. *Id.* at 13, 418 N.E.2d at 1391. The quote is originally from *Carpenter v. Lipker,* No. 6443, slip op. at ___ (Montgomery County Ct. App. Aug. 17, 1979), a case that addressed the same issue as that raised in *Shearson.* The Montgomery County Appeals Court opinion in *Shearson* accordingly adopts its prior decision in *Carpenter* and adopts the reasoning set out there.

Ohio case law has always distinguished between a trial and a hearing on a motion for summary judgment.[161] In the court's view it made little sense to allow a "new trial" when there had been no trial originally. The judges reasoned that to allow a Rule 59 motion for a new trial following the entry of final judgment on a motion for summary judgment would undercut that method of adjudication.[162] Since summary judgment is rendered only in the absence of disputed fact "any motion for relief is for reconsideration of the law and not for a new trial and not for the rehearing of the facts."[163]

The appellate court based its decision on the premise that the motion for a new trial is a mechanism to retry or rehear only the facts of a case and is not intended to serve as a means to reconsider questions of law. Since summary judgment is appropriate only in the absence of disputed fact, the court concluded that to allow a rehearing of the "facts" is both illogical and inappropriate. The flaw in the court's conclusion lies in its premise that the new trial device is not available to remedy errors of law made in the course of the original adjudication. While early Ohio case law limited the availability of the new trial device to cure factual errors only, recent case law makes it clear that the motion can be used to remedy errors of law as well as factual errors.[164]

In 1981 the Ohio Supreme Court finally considered the issue in

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161. In arriving at this conclusion, the appeals court relied on a number of authorities:

> It has been held that inasmuch as a summary judgment proceeding is not a "trial," a summary judgment may not be attacked by motion for a new trial. 73 American Jurisprudence 2d 768, Summary Judgment, § 40.
>
> . . . .
>
> Thus, summary judgment procedure is a method for the proper disposition of actions in which there is no genuine issue as to a material fact. Such procedure is not to be regarded as a trial, but instead as a proceeding for the determination of whether or not there is a genuine issue to be tried. 32 A Ohio Jurisprudence 2d 410, 412, Judgments, § 885.
>
> . . . .
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> The Supreme Court of Ohio has spoken on the question thusly: "It is important to remember that a summary judgment proceeding is not a trial, but a hearing upon a motion." Morris v. First Nat'l Bank & Trust Co., 15 Ohio St. 2d 184, 185, 239 N.E.2d 94, 95 (1968).

Shearson, 66 Ohio App. 2d at 12, 418 N.E.2d at 1390.

162. Quoting from its own opinion in *Carpenter v. Lipker*, No. 6443 (Montgomery County Ct. App. Aug. 17, 1979), the *Shearson* court discussed the importance of the distinction between trial and summary adjudication:

> Here there was no trial and it is a fiction to ask for a new one. The issue in summary judgment is one of law based upon the absence of a disputed fact . . . . If additional facts could be submitted, this would destroy the schedule and procedure for submission under the summary judgment rule. Requests for relief to the trial court from a summary judgment fall within a discretionary area of further review of the law and such requests, however labeled, do not effect the finality of the judgment rendered.

Shearson, 66 Ohio App. 2d at 12, 418 N.E.2d at 1390.

163. *Id.*

164. *See supra* note 137.

L.A. & D., Inc. v. Board of Lake County Commissioners[165] and reached a conclusion similar to that reached by the Montgomery County Court of Appeals, citing the *Shearson*[166] opinion with approval. In *L.A. & D.*, the plaintiff brought suit against the Board of Lake County Commissioners and the Board responded by filing a motion to dismiss or, alternatively, to grant summary judgment. On July 31, 1979, the trial court granted defendant's motion for summary judgment. On August 14, 1979, the plaintiff moved for a new trial within the allowable period for filing new trial motions. The trial court subsequently denied the motion for new trial on October 19, 1979 and plaintiff appealed from the denial of the motion for new trial on October 30, 1979. No appeal was ever taken from the summary judgment entered on July 31, 1979.

The court of appeals *sua sponte* raised the issue concerning whether it had jurisdiction to review the merits of the summary judgment where no appeal from that judgment had been filed. They answered the question in the negative and thereby affirmed the judgment of the trial court. The record was then certified to the supreme court, and that court affirmed the decision of the court of appeals.

Appellant's argument to the Ohio Supreme Court was simple and straightforward. Since the filing of the motion for new trial suspends the statutory thirty day appeal period,[167] the appeal from the denial of the motion for new trial was filed within the applicable time period for filing an appeal from the final entry of summary judgment. However, according to the supreme court, the flaw in appellant's argument was equally simple: "appellant's argument is engulfed in the belief that a summary judgment proceeding is a trial and that the logical procedural flow would allow a motion for a new trial after a summary judgment had been rendered."[168] Since summary judgment was a final determination of the rights between the parties and the motion for new trial was not appropriate, the appellant's notice of appeal had to be filed within thirty days of the entry of that final judgment.[169]

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165. 67 Ohio St. 2d 384, 423 N.E.2d 1109 (1981).

166. *See supra* note 157.

167. OHIO R. APP. P. 4(A), provides that the filing of a motion for new trial suspends the thirty day statutory appeal period until the motion is decided by the trial court. *See supra* note 88.

168. *L.A. & D.*, 67 Ohio St. 2d at 386, 423 N.E.2d at 1111.

169. In *L.A. & D.*, the Ohio Supreme Court stated:

> In the instant cause, the summary judgment as granted was a final determination of the rights of the parties and, therefore, ripe for appeal at that time. Yet, no timely appeal was taken from the summary judgment, in accordance with App. R. 4(A), which states that the notice of appeal shall be filed within 30 days of the date of the entry of judgment or order appealed from.

Id. at 386-87, 423 N.E.2d at 1111.

The supreme court's conclusion was based in part on a narrow definition of what constitutes a trial within the contemplation of Rule 59. Like the Ohio Court of Appeals for Montgomery County, the supreme court narrowly construed the scope of the Rule 59 motion for new trial. According to the supreme court, Ohio case law has always indicated that a summary judgment proceeding is "not a trial but rather is a hearing upon a motion."[170] Because of that distinction, a new trial is appropriate only following a trial and not after a hearing on a motion. The court concluded by holding that the "motion for a new trial which questions the granting of a summary judgment is a nullity and not proper."[171]

Unlike the Ohio Court of Appeals for Cuyahoga County, the supreme court did not treat the issue in *L.A. & D.* as a question of policy under the Rules concerning the elevation of substance over form. Rather, the court addressed the substantive scope of the new trial motion pursuant to Rule 59 and concluded that the propriety of a motion for a new trial after entry of summary judgment followed somewhat logically, though erroneously, from a narrow characterization of the issue.[172]

There is no question that a hearing on a motion for summary judgment is not a trial, at least as we commonly understand the term.[173] The summary judgment hearing, if one is held, is in the nature of an appellate oral argument which addresses two questions—are there genuine issues of material fact, and if not, is judgment for the moving party appropriate as a matter of law.[174] In contrast, the prime focus of

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170. *Id.* at 387, 423 N.E.2d at 1112 (citing Morris v. First Nat'l Bank and Trust Co., 15 Ohio St. 2d 184, 239 N.E.2d 94 (1968) and Trustees v. McClannahan, 53 Ohio St. 403, 42 N.E. 34 (1895)).

171. The *L.A. & D.* court ruled that "[s]ince a summary judgment proceeding is not a trial, a motion for a new trial does not properly lie." *L.A. & D.*, 67 Ohio St. 2d at 387, 423 N.E.2d at 1111.

172. *Id.* Commentators have reached similar results based on similar reasoning. *See, e.g., Fatal Pause, supra* note 76, at 7. In 1982 the supreme court extended its holding in *L.A. & D.*, to include a motion for a reconsideration of dismissal of a petition for post conviction relief. State *ex rel.* Batten v. Reece, 70 Ohio St. 2d 246, 248, 436 N.E.2d 1027, 1028 (1982). The trial/hearing distinction was also the basis for the Montgomery County Court of Appeals decision in the case of *Brown v. Coffman*, 13 Ohio App. 3d 168, 468 N.E.2d 790 (1983). There, the court held that a judgment rendered upon a motion to vacate a judgment pursuant to OHIO R. CIV. P. 60(A) could not be the basis for a motion for new trial since the hearing conducted on the motion was not a trial within the meaning of OHIO R. CIV. P. 59. *Id.* at 170, 468 N.E.2d at 791. The court found that "[a]n examination of the grounds for a new trial under Civ. R. 59(A) suggests that the drafter of the rule contemplated the term 'trial' in its conventional sense . . . ." *Id. See generally* Carroll, *The Meaning of the Term "Trial" Within the Ohio Rules of Civil Procedure*, 25 CLEV. ST. L. REV. 515 (1976).

173. *See supra* note 161.

174. The supreme court's articulation of the distinction in *L.A. & D.*, is correct. A motion for summary judgment pursuant to OHIO R. CIV. P. 56 seeks a "paper" adjudication because there

a trial is the presentation of evidence and the determination and resolution of factual issues.

However, the supreme court's narrow focus on the technical distinction between a hearing on a motion and a trial on the merits misses the more important question, which is whether the motion for a new trial (or its functional equivalent) after a summary judgment serves a legitimate purpose in the overall adjudicatory scheme. The answer to this more fundamental question requires an analysis of the functional similarities between adjudication by trial and adjudication by summary judgment (and other non-trial adjudication) as well as a consideration of the underlying purpose of the new trial device. Unfortunately, the court addressed neither issue and instead relied on a very narrow, mechanical analysis of the definition of the word "trial" within the Rule 59 context.

Before addressing these two issues in more depth, it is important to note that while the holding in *L.A. & D.*, applies only to a motion for a new trial filed after a grant of motion for summary judgment, the reasoning which underlies the decision appears to apply equally to all non-trial adjudication which results in the entry of final judgment. A final disposition of an action after a motion for judgment on the pleadings pursuant to Rule 12(C) is no more a "trial" in a technical sense than is a summary judgment adjudication pursuant to Rule 56.[175] When coupled with the court's decision in *Pitts,* which held the motion for reconsideration a nullity,[176] the *L.A. & D.* decision all but eliminates the possibility of trial court review of its own judicial error following the entry of final judgment except where a trial on the merits precedes the entry of judgment.[177] There is currently no procedural device available to a litigant or to the court to address judicial error after the entry of final judgment in a non-trial adjudication. This judicially created procedural gap is both problematic and undesirable in light of the policy which underlies the motion for new trial.

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is an absence of disputed fact which makes a trial unnecessary. Thus, a "hearing" on a motion for summary judgment, is in the nature of an appellate oral argument and does not involve the affirmative presentation of evidence normally involved in a trial. *See* Brown v. Coffman, 13 Ohio App. 3d 168, 169–70, 468 N.E.2d 790, 790–91 (1983) (discussing the trial/hearing distinction); *see also Fatal Pause, supra* note 76, at 7.

175. *See, e.g.,* Maumee Valley Physical Therapy v. Griffin, No. L-84-167, slip op. at ___ (Lucas County Ct. App. Sept. 21, 1984) (denial of a motion for new trial appropriate following a default judgment because there was no prior trial) (citing Shearson, Hayden & Stone Inc. v. Steiner, 66 Ohio App. 2d 10, 418 N.E.2d 1389 (1979)).

176. *Pitts,* 67 Ohio St. at 381, 423 N.E.2d at 1107.

177. *L.A. & D.*, 67 Ohio St. 2d at 387, 423 N.E.2d at 1111.

D. Substantial Judicial Error as Grounds for a New Trial

Traditionally, the Rule 59 motion for a new trial has been available to cure a variety of errors occurring during the trial of a case. In Ohio for example, new trials have been allowed where there have been irregularities in the court proceeding;[178] misconduct of a party, counsel or juror;[179] improper damages awarded as a result of passion or prejudice;[180] error in the amount of the recovery;[181] or where there has been newly discovered evidence.[182] Similarly, the current Rule specifically authorizes the grant of a new trial in a number of circumstances.[183] While there was a period in the history of Ohio jurisprudence during which new trials were limited to re-examinations of issues of fact,[184] it has been clear for years that a new trial can also lie where

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178. For example, a prejudicial remark by a trial judge in the presence of the jury affords grounds for a new trial. *See, e.g.,* Brace v. Adam Hoffman Co., 29 Ohio L. Rptr. 205, 208 (Ct. App. 1929); Hazen v. Morrison & Snodgrass Co., 14 Ohio C.C. (n.s.) 483, 485 (1911). New trials have been ordered where the judge instructed the jury on a matter of fact in the absence of counsel. *See, e.g.,* Seagrave v. Hall, 10 Ohio C.C. 395, 408 (1895). *See generally* 40 OHIO JUR. 2D, *supra* note 14, *New Trial* § 13–15 (1986).

179. Misconduct of a party was specifically identified in the early Ohio statutes as a grounds for the grant of a new trial. *See, e.g.,* OHIO GEN. CODE § 11576 (Anderson 1938) (repealed 1971); OHIO REV. CODE ANN. § 2321.17(B) (Anderson 1971) (repealed 1971); *see also* Macci v. Aldred, 28 Ohio Op. 390, 392 (Mercer County C.P. 1944); Foreman v. Sandusky D. & C. R.R., 2 Ohio Dec. Reprint 611, 612 (Seneca County C.P. 1862). Misconduct of counsel was not expressly mentioned in the early code provisions but nevertheless has been held to justify the grant of a new trial. *See, e.g.,* Jones v. Macedonia-Northfield Banking Co., 132 Ohio St. 341, 350, 7 N.E.2d 544, 548 (1937); General Convention v. Crocker, 7 Ohio C.C. 327, 337 (1893). The early statutes specifically provided that a new trial shall be granted for irregularities in the proceedings of a jury. OHIO GEN. CODE § 11576; OHIO REV. CODE ANN. § 2321.17(B); *see also* Peart v. Jones, 159 Ohio St. 137, 144, 111 N.E.2d 16, 20 (1953); Philips v. Board of Educ., 21 Ohio App. 194, 207, 153 N.E. 119, 123 (1924).

180. Early statutes provided for a new trial where the damages were excessive and were given as the result of passion or prejudice. OHIO GEN. CODE § 11576; OHIO REV. CODE ANN. § 2321.17(D). *See, e.g.,* Chester Park Co. v. Schulte, 120 Ohio St. 273, 278–89, 166 N.E. 186, 188 (1929); Klotz v. Balmat, 34 Ohio App. 490, 494–95, 171 N.E. 409, 411 (1930).

181. The early statutes authorize a new trial when there has been an error in the assessment of the amount of controversy in contract actions and in actions for injury to or detention of property. OHIO GEN. CODE § 11576; OHIO REV. CODE ANN. § 2321.17(E). *See, e.g.,* National Milling Co. v. Craft, 23 Ohio C.C. (n.s.) 515, 517 (1912); Brock v. Becker, 8 Ohio Dec. Rptr. Reprint 263, 264–65 (Hamilton County Dist. Ct. 1881).

182. Newly discovered evidence is a specific enumerated ground contained in the early statutes outlining the grant of a new trial. OHIO GEN. CODE § 11576; OHIO REV. CODE ANN. § 2321.17(G). *See, e.g.,* Martin v. Mohn, 27 Ohio Op. 2d 118, 119 (Ct. App. 1963); Hauer v. French Bros. Bauer Co., 36 Ohio L. Rptr. 51, 56 (Ct. App. 1931).

183. OHIO R. CIV. P. 59 specifies nine grounds for the grant of a new trial. *See supra* note 5 for a list of the enumerated grounds. In addition, the Rule also provides a "catch all" which outlines the grant of a new trial "in the sound discretion of the court for good cause shown."

184. At common law, the term "new trial" was used to mean a complete retrial of a cause on the facts. *See* Wheeling & Lake Erie Ry. v. Richter, 131 Ohio St. 433, 438, 3 N.E.2d 408, 410 (1936); Zaleski v. Clark, 45 Conn. 397, 403 (1877); Dodge v. Bell, 37 Minn. 382, ___, 34 N.W. 739, 740 (1887). The early Ohio statute similarly limited the definition of a new trial. OHIO GEN.

there has been manifest error of law in a judgment.[185] Both the precursor statutes[186] and the current Rule 59[187] contemplate that a motion for a new trial can be employed to correct manifest errors of law.

Not only is the new trial device available to cure a wide variety of judicial and non-judicial errors occurring in the adjudication of a case,

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CODE § 11575 defined a new trial as a "re-examination, in the same court, of an issue of fact, after a verdict by a jury," and the Ohio Supreme Court interpreted OHIO GEN. CODE § 11575 to restrict new trials to a rehearing of the case from the beginning. Dayton & Union R.R. Co. v. Dayton & Muncie Traction Co., 72 Ohio St. 429, 434, 74 N.E. 195, 196 (1904). Thus, for example, one court stated:

> Prior to the amendment of Section 11601, General Code, a Court of Common Pleas lacked power and authority, after verdict and on consideration of motion for a new trial, to enter final judgment for the movant on theory that his motion for a directed verdict during trial had been erroneously denied.

Wheeling & Lake Erie Ry. v. Richter, 131 Ohio St. 433, 440, 3 N.E.2d 408, 411 (1936) (citations omitted). The court was limited to allowance of the motion for a new trial and the resulting new trial. *Id.* at 439, 3 N.E.2d at 411; *see also* Edelstein v. Kidwell, 139 Ohio St. 595, 599, 41 N.E.2d 564, 566 (1942). *Contra* Levin v. Kiska, 54 Ohio App. 408, 412, 7 N.E.2d 666, 667–68 (1937); Lehman v. Harvey, 45 Ohio App. 215, 225, 187 N.E. 28, 32 (1933); Silver v. Thomas, 9 Ohio App. 187, 187 (1918). *See generally* Note, *Rendition of Final Judgments by Trial Courts on Motion for Judgment Notwithstanding the Verdict or on Motion for New Trial,* 9 U. CIN. L. REV. 67, 73 (1935).

OHIO GEN. CODE § 11575 was amended, effective October 11, 1945, to change the definition of a new trial to the "re-examination, in the same court, of all the issues." Act of June 28, 1945, 1945 Ohio Laws 366, 366. After that date, a new trial could be employed for the purpose of re-examining issues of law as well as issues of fact. *See, e.g.,* Manchester v. Cleveland Trust Co., 95 Ohio App. 201, 207, 114 N.E.2d 242, 246 (1953); Rosco v. Kolb, 93 Ohio App. 352, 356, 113 N.E.2d 746, 748 (1952); Ohio Motors Inc. v. Charlesworth, 88 Ohio App. 299, 301, 97 N.E.2d 686, 687 (1950); Duemer v. Duemer, 86 Ohio App. 192, 192, 88 N.E.2d 603, 604 (1949). OHIO REV. CODE ANN. § 2321.17 similarly defined new trials as a re-examination of both facts and law. *See* Rismiller v. Dayton Power & Light Co., 129 N.E.2d 395, 398 (Ohio Ct. App. 1954); Ohio Motors Inc. v. Charlesworth, 88 Ohio App. 299, 300, 97 N.E.2d 686, 688 (1950); Duemer v. Duemer, 86 Ohio App. 192, 192, 88 N.E.2d 603, 604 (1949). Like OHIO REV. CODE ANN. § 2321.17, current OHIO R. CIV. P. 59(A) broadly defines new trial by authorizing a new trial "on all or part of the issues."

185. As early as 1859, new trials were granted in Ohio for error of law occurring during the trial of an action. *See* Kline & Berry v. Wynne, Haynes & Co., 10 Ohio St. 223, 226 (1859).

186. Ohio statutes have provided that a new trial could be granted for an "error of law occurring at the trial." OHIO GEN. CODE § 11576; OHIO REV. CODE ANN. § 2321.17(H); *see, e.g.,* Dayton & Union R.R. Co. v. Dayton & Muncie Traction Co., 72 Ohio St. 429, 435, 74 N.E. 195, 196–97 (1904); Kline & Berry v. Wynne, Haynes & Co., 10 Ohio St. 223, 227 (1859). One such legal error was the improper rejection or admission of evidence. *See, e.g.,* Payne v. Vance, 103 Ohio St. 59, 78, 133 N.E. 85, 90 (1921); Sheree v. Piper, 26 Ohio St. 476, 480 (1875); Blackburn v. Blackburn, 8 Ohio 81, 85 (1837); Industrial Comm'n v. Strassel, 11 Ohio App. 234, 236 (1919). Errors in giving jury instructions were also included under these statutes. *See, e.g.,* Herman v. Teplitz, 113 Ohio St. 164, 168, 148 N.E. 641, 642 (1925); Burt v. Wilcox Silver Plate Co., 41 Ohio St. 204, 205 (1884). Furthermore, refusing to direct a verdict constitutes legal error. *See, e.g.,* Cincinnati Gas & Elec. Co. v. Johnston, 76 Ohio St. 119, 137, 81 N.E. 155, 160 (1907); Monfort v. Ellis, 16 Ohio N.P. (n.s.) 225, 241 (Hamilton County C.P. 1913).

187. OHIO R. CIV. P. 59 by its express language authorizes a new trial where there have been errors of law during the original adjudication. OHIO R. CIV. P. (59)(A)(9). Subsection 9 provides for a new trial where there has been "[e]rror of law occurring at the trial." *See, e.g.,* Sanders v. Mount Sinai Hosp., 21 Ohio App. 3d 249, 252, 487 N.E.2d 588, 592 (1985).

it is also available in both jury and non-jury actions.[188] Rule 59 specifically provides that in actions 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."[189] The applicability of the new trial device to both judge and jury trials is significant with respect to the consequence of the grant of a new trial.

For example, in an action tried to a jury, the grant of a new trial for any of the reasons enumerated in the Rule applicable to jury actions requires that the case actually be retried before a new jury.[190] However, in a bench trial a court has a great deal more flexibility in determining whether a new hearing is actually necessary following a decision to grant a new trial.[191] While this appears somewhat anoma-

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188. OHIO R. CIV. P. 59(A) specifically provides for the grant of a new trial in non-jury cases, "[o]n motion for a new trial in an action tried without a jury."

189. OHIO R. CIV. P. 59(A).

190. For example, where there has been jury misconduct pursuant to OHIO R. CIV. P. 59(A)(2) or where a jury awards excessive damages under the influence of passion or prejudice pursuant to OHIO R. CIV. P. 59(A)(4) there is no question but that the matter must be retried in front of a new jury. In jury trials generally, where there is a grant of a new trial pursuant to OHIO R. CIV. P. 59(A) the case will be retried before a new jury. However, the opening sentence of OHIO R. CIV. P. 59(A) provides that "[a] new trial may be granted to all or any of the parties and on all or part of the issues . . . ." As the commentary to OHIO R. CIV. P. 59 makes clear, this language provides for a partial new trial even in jury actions, although partial new trials are rare in jury actions. Staff notes, OHIO REV. CODE ANN., OHIO R. CIV. P. 59 (Anderson 1981). *See generally* 6a J. MOORE, J. LUCAS & L. GROTHEER, MOORE'S FEDERAL PRACTICE, *supra* note 119, ¶¶ 59.06–.07.

191. While there is no Ohio case law specifically discussing a trial court's power subsequent to a grant of a new trial motion, the clear language of OHIO R. CIV. P. 59(A) does not require that a court rehear the case. Under the provisions of OHIO R. CIV. P. 59(A) the trial court can amend its findings of fact or conclusion of law or make new findings or conclusions and enter a new judgment. OHIO R. CIV. P. 59(A). While the court may take "additional testimony," the intent of the Rule is clear that something less than a new trial is acceptable. FED. R. CIV. P. 59(A), which contains the identical language as that of OHIO R. CIV. P. 59(A), has been consistently interpreted not to require a retrial following the grant of a new trial. Thus, for example when the only issue raised in the new trial motion is a legal question, a new trial may not be necessary. *See* Phelan v. Middle States Oil Corp., 210 F.2d 360, 366–67 (2d Cir. 1954) (holding that a new trial is not necessary when only a legal question is raised and that a court may reverse the original judgment if the evidence taken at the original trial justifies it; however, if new evidence is revealed there should at least be a trial of those facts), *aff'd in part and rev'd in part*, 220 F.2d 593, *cert. denied*, 349 U.S. 929 (1955); Davis v. West, 71 F. Supp. 377, 378 (W.D. Mo. 1947) (judgment can be modified without a new trial if all the evidence had been presented at the original trial); *see also* DuPont v. United States, 385 F.2d 780, 784 (3d Cir. 1967); Bush v. Orleans Parish School Bd., 205 F. Supp. 893, 895 (E.D. La.), *aff'd in part and rev'd in part*, 308 F.2d 491 (1962); Ryans v. Blevins, 159 F. Supp. 234, 235 (D. Del.), *aff'd*, 258 F.2d 945 (3d Cir. 1958). However, when merely taking additional evidence or reviewing the record will not provide substantial justice a new trial may be necessary. *See* Donnelly Garment Co. v. Dubinsky, 47 F. Supp. 65 (W.D. Me. 1942); Folmer Graflex Corp. v. Graphic Photo Serv., 45 F. Supp. 749, 750 (D. Mass. 1942). *See generally* 6a J. MOORE, J. LUCAS & G. GROTHEER, MOORE'S FEDERAL PRACTICE, *supra* note 119, ¶ 59.07; C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §

lous, it is very consistent with the purpose underlying the new trial device when used subsequent to bench trials.[192] There is no question that in some circumstances, a new trial would be necessary to cure the error in the original bench trial. This is the case where, for example, the grant of the new trial is the result of newly discovered evidence.[193]

In other circumstances, though, a new trial is not necessary because the prior judicial error can be remedied by something less time consuming than a new trial. Under Rule 59(A) a court may, in a judge-tried case, take additional testimony, amend findings and conclusions or make new findings or conclusions and enter a new judgment.[194] Although there is neither Ohio case law nor commentary on this particular section of Rule 59, the permissive language in the Rule seems to contemplate that, like its federal counterpart, an Ohio trial court has the freedom to remedy its error by something less than a full retrial of the case.[195] In addition, case law interpreting the analogous provision in Rule 59 of the Federal Rules of Civil Procedure demonstrates that a new trial is not always necessary to effectuate the purpose of the rule.[196] This is the case primarily where the motion for the new trial raises only questions of law.[197]

Pursuant to the analogous Rule 59(a)(2) of the Federal Rules of Civil Procedure, a federal district court can completely reverse a judgment following a bench trial where there has been a manifest error of law and the evidence taken at the first trial supports the new judgment.[198] So, too, where there has been a controlling decision rendered since the entry of judgment, a district court can consider the new decision and reverse itself without a new trial if the new judgment is supported by the evidence presented at the original trial.[199] It is equally clear, however, that whenever the effect of the legal error is such that

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2804 (1973).

192. An underlying purpose of the new trial device is to provide the trial court and litigants with a procedural mechanism to correct error in the trial court without need to resort to the time and expense of an appeal. Manchester v. Cleveland Trust Co., 95 Ohio App. 201, 207, 114 N.E.2d 242, 246 (1953).

193. When newly discovered evidence is the ground for the grant of the new trial, the trial court must rehear that new evidence. Depending on the nature of the evidence, the whole case may be retried or only a partial retrial held. *See* Mast v. Doctor's Hosp. North, 46 Ohio St. 2d 539, 541, 350 N.E.2d 429, 430 (1976); *see also* United States v. 63.04 Acres, 257 F.2d 68, 69 (2d Cir. 1958); Folmer Graflex Corp. v. Graphic Photo Serv., 45 F. Supp. 749, 750 (D. Mass. 1942).

194. OHIO R. CIV. P. 59(A).

195. *See supra* note 191.

196. *Id.*

197. *Id.*

198. Phelan v. Middle States Oil Co., 210 F.2d 360, 366 (2d Cir. 1954), *aff'd in part and rev'd in part*, 220 F.2d 593, *cert. denied*, 349 U.S. 929 (1955).

199. *See, e.g.*, Safeway Stores, Inc. v. Coe, 136 F.2d 771, 772 (D.C. Cir. 1943); *In re* Sloan, 198 F. 928, 929 (1913).

justice is not done by merely reviewing the record in light of the error then there should be a new trial or at least the taking of additional evidence.[200]

This very brief look at the new trial motion as it is used to remedy errors of law following bench trials is significant for a number of reasons. The previously discussed Ohio Supreme Court decision in *L.A. & D.*, is premised on the distinction between a "hearing" and a "trial" for the purpose of the applicability of Rule 59.[201] As noted previously, while there are obvious differences between hearings and trials primarily with respect to the presentation and handling of evidence, both function identically when they result in the entry of final judgment. While the *manner* of adjudication is different, full evidentiary trials on the merits, Rule 56 motions, and Rule 12 motions are all procedural mechanisms that allow a court to fully and finally adjudicate the rights and liabilities of the parties to the litigation. When considered in light of their common adjudicatory function, the Ohio Supreme Court's formalistic distinction—drawn for purposes of the applicability of Rule 59—fades.

Rule 59 is meant to provide a remedy in the trial court to correct adjudicatory error in a variety of circumstances, one of which is to remedy errors of law committed in the course of a trial judge's adjudication.[202] That the substantial judicial error occurred during the course of a full evidentiary trial rather than during the course of an adjudication by motion is of little real significance. Unlike jury error, errors of law are not confined to jury trials. Judges can obviously commit legal error during the course of a jury trial. However, they can commit those same errors of law during bench trials and in their deliberations on other potentially case dispositive motions. While some of those errors are obviously unique to the particular adjudicatory mechanism employed,[203] others are not.[204]

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200. *See supra* note 191.

201. *See supra* notes 171–72 and accompanying text.

202. *See supra* note 187.

203. For example, giving improper or refusing to give proper jury instructions is grounds for a new trial. *See* Kline & Berry v. Wynne, Haynes & Co., 10 Ohio St. 223, 230 (1859). However, these grounds are unique to a jury trial context.

204. The erroneous rejection or admission of evidence can be grounds for a new trial. OHIO R. CIV. P. 59(A)(9); *see also* Payne v. Vance, 103 Ohio St. 59, 78, 133 N.E. 85, 90 (1921); Western Union Tel. Co. v. Smith, 64 Ohio St. 106, 117, 59 N.E. 890, 892 (1901); Industrial Comm. of Ohio v. Strassel, 11 Ohio App. 234, 235–36 (1919). In addition, a new trial is authorized where the judgment is contrary to law. OHIO R. CIV. P. 59(A)(7). The "contrary to law" language has been interpreted in a comprehensive manner to include any error of law committed by the trial court. *See* Weaver v. Columbus, S. & H. Valley R.R., 55 Ohio St. 491, 494–95 (1896); Miller v. Miller, 56 Ohio L. Abs. 280, 285 (Ct. App. 1949). Judicial error of law occurs in both jury and non-jury settings, and, if prejudicial, a new trial would be appropriate in either

A closer look at the trial court's adjudicatory function in a bench trial will help illuminate the problem. At the risk of oversimplification, it is commonly understood that in a bench trial a judge performs three basic operations. She sits like a jury and determines the facts after sorting through the evidence. She then determines the applicable law and finally adjudicates the dispute by "applying" the law to the facts as determined. In this bench trial context, a Rule 59 motion is an appropriate procedural mechanism to remedy erroneous interpretations of law and to correct erroneous applications of doctrine. This type of judicial error is not confined to bench trials and can occur as well in the context of a case dispositive motion.[205] In the absence of a particular policy concern,[206] it would appear that a post adjudicatory remedy, similar to that available after trial, should also be available after the entry of judgment following a case dispositive motion.

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context.

205. The federal courts have set out three grounds which generally support reconsideration of a prior decision: (1) a change in the controlling law; (2) the discovery of new evidence; and (3) to remedy manifest injustice. All Haw. Tours, Corp. v. Polynesian Cultural Center, 116 F.R.D. 645, 649 (D. Haw. 1987), *rev'd,* 855 F.2d 860 (1988); Kern-Tulare Water Dist. v. City of Bakersfield, 634 F. Supp. 656, 665–66 (E.D. Cal. 1986), *aff'd in part and rev'd in part,* 828 F.2d 514 (1987), *cert. denied,* 108A S. Ct. 1752 (interim ed. 1988). Motions for reconsideration can be used in the federal courts to remedy judicial error. Liberty Mutual Ins. Co. v. EEOC, 691 F.2d 438 (9th Cir. 1982). However, while the motion for reconsideration is appropriate to remedy judicial error made in the course of a summary judgment adjudication, a litigant cannot merely assert new arguments that should have originally been made in response to or in support of the original motion. Rudell v. Comprehensive Accounting Corp., 802 F.2d 926, 927–28 (7th Cir. 1986), *cert. denied,* 480 U.S. 907, (1987); Publishers Resource, Inc. v. Walker-Davis Publications, Inc., 762 F.2d 557, 560–61 (7th Cir. 1985).

206. The only policy concern remotely identified in the Ohio cases restricting the scope of OHIO R. CIV. P. concerns limiting post-judgment motions in non-trial adjudications because of their frequency. The motion for reconsideration has often been used by litigants in circumstances where an appeal is the proper procedural avenue to follow. In these instances, judicial energy is often wasted in responding to frivolous motions. While this is certainly a legitimate policy concern, the answer lies in developing clear standards which address when a motion for post-judgment relief following a non-trial adjudication is appropriate. For example, in federal court a litigant has no right to have a judgment "reconsidered" pursuant to FED. R. CIV. P. 59(E). *See* F/H Indus., Inc. v. National Union Fire Ins. Co., 116 F.R.D. 224, 226 n.2 (N.D. Ill. 1987) ("We stress that losing parties are not entitled to a reconsideration of every ruling or judgment as a matter of right, but must set forth legitimate reasons for the district court to change its initial ruling."). Generally, courts have articulated three major grounds to justify reconsideration: (1) an intervening change in the controlling law; (2) the availability of new evidence; and (3) the need to correct clear error or prevent manifest injustice. *See* Major v. Benton, 647 F.2d 110, 112 (10th Cir. 1981); All Haw. Tours, Corp. v. Polynesian Cultural Center, 116 F.R.D. 645, 649 (D. Haw. 1987), *rev'd,* 855 F.2d 860 (1988); Kern-Tulare Water Dist. v. City of Bakersfield, 634 F. Supp. 656, 665 (E.D. Cal. 1986), *aff'd in part and rev'd in part,* 828 F.2d 514 (1987), *cert. denied,* 108A S. Ct. 1752 (interim ed. 1988). When a litigant files a motion for reconsideration that is frivolous, the appropriate remedy is sanctions pursuant to OHIO R. CIV. P. 11; *see also All Haw. Tours Corp.,* 116 F.R.D. at 650. Articulating clear standards and sanctioning offending parties who file frivolous motions is a better approach than completely eliminating the availability of post-judgment relief in non-trial adjudications.

A second rationale for the restrictive interpretation of the Rule 59 motion is set out in the *Shearson* decision, cited approvingly by the Ohio Supreme Court in *L.A. & D.* In *Shearson,* the Court of Appeals for Montgomery County refused to extend the coverage of Rule 59 to a summary judgment adjudication. The court indicated that a new trial is not appropriate following a motion for summary judgment, because a motion for relief following a summary judgment seeks a reconsideration of the law and not a rehearing of the facts.[207] The appellate court's analysis implicitly rested on the notion that the new trial device should not be available for reconsideration of errors of law. However, as we have noted previously, the new trial device is and should be available to correct errors of law in trial adjudications.[208] More importantly, there need not be a new trial following a grant of the new trial motion in a bench trial. In some circumstances, a court should be free, following a bench trial, to vacate and reverse its prior judgment without the necessity of a new trial.[209]

It is important to highlight the function of the new trial motion when it is used to correct substantial legal error following a bench trial. Regardless of the title "new trial," when used to correct legal error following a bench trial, the new trial device functions in a manner that is difficult to differentiate from the common law motion for reconsideration.[210] Since a new trial is not required for a court to correct its own legal error following a bench trial, the reference to a "new trial" is somewhat misleading in that context.[211] In some circumstances, the trial court does no more than reconsider its prior judgment in light of the alleged error. When viewed in this light, the limitation imposed by the Ohio Supreme Court concerning the scope of the Rule 59 new trial device is extremely narrow.

E. A Proposal

In the context of bench tried cases, the result of the pre-rules decision in *LaBarbera,* comports with the underlying purpose of the Rules in that it provides some form of post-judgment relief in the trial court

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207. *Shearson,* 66 Ohio App. 2d at 12, 418 N.E.2d at 1390 (1974).

208. *See supra* note 187.

209. *See supra* note 191 and accompanying text.

210. Historically, the practice in the federal courts has been to treat the motion for reconsideration as a motion for new trial within the meaning of FED. R. CIV. P. 59. *See* Jusino v. Morales & Tio, 139 F.2d 946, 948 (1st Cir. 1944); Safeway Stores, Inc. v. Coe, 136 F.2d 771, 773–74 (D.C. Cir. 1943). In 1946, FED. R. CIV. P. 59 was amended to add subsection (E) to clarify the fact that the district court has the power to alter or amend a judgment, provided that the ten day time limit of FED. R. CIV. P. 59 is met. *See generally* 6a J. MOORE, J. LUCAS & G. GROTHEER, MOORE'S FEDERAL PRACTICE, *supra* note 119, ¶ 59.12.

211. *See supra* notes 188–97 and accompanying text.

following a non-trial adjudication.[212] It is important, however, that we do not misperceive the true issue. Certainly the Rules favor interpretations of pleadings that elevate substance over form to insure that substantial justice is done.[213] However, the Ohio Supreme Court's concern with judicial efficiency articulated in *Pitts*,[214] outweighed the general policy of the Rules favoring substance over form. This efficiency concern is certainly not illegitimate, especially in light of the fact that Ohio Rule of Appellate Procedure 4(A) makes no specific reference to the motion for reconsideration.[215] Though harsh, the decision lends consistency and direction to litigants and trial courts in a difficult procedural area. However, when coupled with the court's ruling in *L.A. & D.* the resulting gap in the Rule's coverage creates problems for the participants and from a policy perspective as well.

The current procedural gap makes little sense given the function and purpose of the new trial device, especially when that device is considered in the context of bench tried cases. The distinction between trial and non-trial adjudications with respect to the availability of post-judgment relief in the trial court for substantial judicial error rings hollow. The manner of adjudication should not control the availability of post-judgment relief for substantial judicial error since it has no substantial impact on the nature of the error committed nor on whether that error should be addressed in the trial court. What is of significance, though, is the nature of the judicial error and the timing of the motion for relief filed in the trial court. When a trial court makes an error of law in the course of an adjudication which results in the entry of a final judgment, a litigant should have available a procedural device in the trial court to remedy that error as long as the issue is raised in a timely manner and does not create confusion over the running of the statutory appeal period.

In the federal system, the new trial device has always been interpreted to include relief from final judgments entered subsequent to non-trial adjudications.[216] To clear up any possible confusion concerning the scope and reach of Federal Rule of Civil Procedure 59 in non-trial adjudications, the text and title of the rule was amended in 1946 to specifically include non-trial adjudications within the scope of the

212. *Labarbera*, 117 Ohio App. at 275–77, 182 N.E.2d at 634–35.

213. *See supra* note 155.

214. *See supra* note 83 and accompanying text.

215. *See supra* note 7.

216. *E.g.*, Safeway Stores, Inc. v. Coe, 136 F.2d 771, 773–74 (D.C. Cir. 1943); Jusino v. Morales & Tio, 139 F.2d 946, 948–49 (1st Cir. 1944). *See* 6a J. MOORE, J. LUCAS & G. GROTHEER, MOORE'S FEDERAL PRACTICE, *supra* note 119, ¶ 59.12[1].

rule.[217] Amended Federal Rule of Civil Procedure 59 specifically recognizes the desirability and importance of providing post-judgment relief in non-trial adjudications. Unlike the current Ohio practice, the federal courts make no distinction between trial and non-trial adjudications for the purpose of post-judgment relief pursuant to Rule 59.

A review of the federal practice suggests that allowing relief from final judgments pursuant to Federal Rule of Civil Procedure 59 following non-trial adjudications has not been particularly problematic. Like Ohio courts, the federal courts have also grappled with the confusion created with respect to the running of the statutory appeal period when litigants file post-judgment motions designated as motions for reconsideration or their equivalent. However, the response of the federal courts to this problem has been markedly different from the approach of the Ohio courts. Many federal circuit courts have taken a liberal approach and treat all substantive motions challenging the correctness of a final judgment that are served within ten days of the entry of judgment as motions for new trial pursuant to Rule 59, thus automatically tolling the statutory appeal period.[218] Other federal circuits look to the substance of the motion to determine if it is the equivalent of a motion for a new trial and if so will treat it as such despite its designation as a motion for reconsideration or otherwise.[219] While both approaches do justice to the policy which underlies the Rules, the per se rule is the easiest and most efficient to administer.

The general approach taken by the federal courts is clearly more desirable from a policy perspective than that taken by the Ohio courts. Allowing for post-judgment review for substantial legal error in non-trial adjudications is clearly more efficient and less expensive than allowing only for appellate review. In addition, the approach eliminates

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217. FED. R. CIV. P. 59(E) which was adopted in 1946 specifically authorizes a motion to amend or alter a judgment. The addition of the subsection eliminates any doubt about the applicability of the required 10 day filing period for the FED. R. CIV. P. 59 motion. FED. R. CIV. P. 59(E) was added in 1946 to clarify a problem that developed after the Eighth Circuit's decision in *Boaz v. Mutual Life Ins. Co.*, 146 F.2d 321 (8th Cir. 1944), wherein the appeals court found that the district court had the inherent common law power over its own judgments in term. The appellate court saw no problem in the district court's setting aside a dismissal without prejudice and entry of judgment of dismissal with prejudice. However, soon after the decision statutory changes provided that the continuation of the in-term/out-of-term distinction had no effect on a district court's power over its own judgments. *See supra* note 103; *see also* 6a J. MOORE, J. LUCAS & G. GROTHEER, MOORE'S FEDERAL PRACTICE, *supra* note 119, ¶ 59.12[1], which states that subdivision (e) was subsequently added to FED. R. CIV. P. 59 "to care for a situation such as that arising in [*Boaz*] . . . and makes clear that the district court possesses the power asserted in that case to alter or amend a judgment after its entry." The Committee Note of 1948 added Subdivision (e), Federal Rules of Civil Procedure, United States Code Service, 394 (1987). The title of FED. R. CIV. P. 59 was simultaneously amended to read "New Trials; Amendment of Judgments."

218. *See supra* note 156.

219. *Id.*

the somewhat hollow distinction between trial and non-trial adjudication that is the cornerstone of the Ohio approach. The federal approach is also consistent with that taken under Federal and Ohio Rule 60(A) in regard to the correction of less substantial judicial error.

The adoption of the federal approach in Ohio would not necessarily signal a departure from the strict interpretation taken by the Ohio Supreme Court in its decision in *Pitts*.[220] The motion for reconsideration after the entry of final judgment could remain a nullity under the Ohio Rules. However, it would be specifically replaced by the Rule 59 motion. Thus the supreme court's concern over the interpretation problem inherent in elevating substance over form could be eliminated by clearly including under the Rule 59 umbrella the functional equivalent of the motion for reconsideration. It is clear that under the federal practice a valid Rule 59 motion filed within the prescribed time period will toll the running of the statutory appeal period.[221] Similarly, the adoption in Ohio of an analogous provision to Rule 59(E) of the Federal Rules of Civil Procedure will eliminate the concern underlying the *Pitts* decision with respect to the tolling of the statutory appeal period, since a properly filed Rule 59 motion would specifically toll the running of the statutory appeal period.[222]

IV. CONCLUSION

This article has examined a significant procedural gap in the Rules which leaves courts and litigants with no viable procedural device in the trial court to remedy substantial judicial error in non-trial adjudications. This gap is the result of the Ohio Supreme Court's decision in *Pitts v. Ohio Department of Transportation*[223] which holds that the motion for reconsideration is a nullity, and a series of decisions narrowly interpreting the scope of the new trial device pursuant to Rule 59.[224] Currently, under current Ohio practice, substantial judicial error in the course of a non-trial adjudication cannot be corrected by the trial court once that decision is considered final pursuant to Rule 58. In that circumstance, a litigant has no alternative but to pursue an ap-

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220. *See supra* note 83 and accompanying text.

221. Timely motions filed pursuant to FED. R. CIV. P. 59 suspend the finality of the judgment. FED. R. APP. P. 4(a)(4). However, successive motions do not affect the finality of judgments. *See, e.g.*, American Sec. Bank v. Harrison Realty, Inc., 670 F.2d 317, 320 (D.C. Cir. 1982); Wansor v. George Hantscho Co., 570 F.2d 1202, 1206 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978). A FED. R. CIV. P. 59 motion is timely filed if served within ten days after the entry of judgment. Browder v. Director, Dep't of Corrections, 434 U.S. 257, 259, *reh'g denied*, 434 U.S. 1089 (1978).

222. *See supra* note 88.

223. 67 Ohio St. 2d 378, 423 N.E.2d 1105 (1981).

224. *Id.* at 381, 423 N.E.2d at 1107.

peal—an expensive and time-consuming process.

The article suggests that this procedural gap be eliminated by an amendment to the Rules similar to the 1948 amendment to Federal Rule of Civil Procedure 59. This amendment would expand the scope of the Rule 59 new trial motion to make it clearly applicable following the entry of final decisions and judgments in non-trial adjudications. Such an expansion would fill the current gap in the Rules' coverage and recognize the importance and historical function of the common law motion for reconsideration as it was used in the context of non-trial adjudications.