Winter 1968


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Plaintiffs filed a personal injury suit on October 10, 1963 against General Motors Corporation, who had manufactured the 1961 Corvair automobile in which they were riding when injured, and McBroom Motor Company, for injuries sustained in an accident allegedly caused by a defective tie rod in the automobile. General Motors was charged with being negligent in both the design and manufacture of the car and as having breached its various warranties of general fitness for purpose. McBroom Motor Company was charged with being careless and negligent in selling plaintiffs an automobile when it was in a dangerous condition for use and in failing to make a reasonable inspection to determine the condition of the Corvair. McBroom was also charged with breach of various warranties, both express and implied.¹

In the ensuing year, interrogatories were answered by the defendants, certain records were produced and other discovery was sought and obtained by all the parties. In January 1965, plaintiff filed an amended complaint containing the original allegations concerning the tie rod and warranties, and, in addition, allegations further challenging the propriety and safety of the Corvair’s design.²

After receiving answers to interrogatories posed to the plaintiffs, General Motors filed its answer denying the allegations of negligence and the existence of any warranties or breach thereof. Plaintiffs then initiated discovery on their amended complaint by serving a notice on April 23, 1965, for the taking of the evidence depositions, on May 10, of 12 engineers and executives of General Motors. Contemporaneously, the plaintiffs sought an order directing General Motors to produce at the same time and place, certain records, documents, and drawings for inspection by representatives of the plaintiffs. On April 27 the trial judge entered an order for production of all the material sought by plaintiffs. The order provided that the material was

¹ This note concerns only General Motors’ role in the litigation. Any reference to the “defendant” appearing in the text relates only to General Motors, unless otherwise indicated.

² The specific contention was that “the automobile’s swing action rear suspension system and its rear engine placement and consequent center of gravity made the car highly unstable and likely to go out of control in normal use.” Brief for respondent Bua at 6, People ex rel. General Motors Corp. v. Bua, 37 Ill.2d 180, 226 N.E.2d 6 (1967).
to be produced by defendants on May 10, 1965, at defendant's place of business in Detroit. 3

On May 10, however, the order was modified to require the production on the following day of the same material that was already being prepared for discovery in a pending Florida suit against defendant. There was considerable fencing between plaintiffs' and defendant's counsel in Detroit as to whether plaintiffs' counsel had the authority to examine the documents

3 Brief for respondent Bus at Appendix A. The order required:
[T]hat the defendant General Motors Corporation and its officers and agents produce at the offices of the said defendant in the General Motors Building in Detroit, Michigan, on Monday, May 10, 1965, at 9:30 A.M., each and all of the following records, documents, and drawings and that said defendant then and there permit the representatives of the plaintiffs in this action to inspect and copy the said records and documents at said time and place. It further ordered that the said defendant have, each and all of the said records present and available for use by counsel for the parties hereto at the place of and during the taking of depositions of employees of the said General Motors Corporation in the above entitled cause in Detroit, Michigan, commencing on Monday, May 10, 1965, at 9:30 A.M. The said records, which the defendant is hereby ordered to produce, include all engineering plans, specifications, blueprints, memoranda, written reports, reports of laboratory and proving ground tests, and all other records, papers, moving pictures and documents which show as to model years of the Corvair 1960 through 1965:

1. The preliminary work, studies, and tests in the designing, development and manufacture of the Corvair automobile.
2. The blueprints of the Corvair automobile showing the wheels, axles, drive shaft and steering control apparatus, and the suspension system of said car.
3. The weight and weight distribution of said car, the location of the engine with relation to the rear axle, the amount of weight on the rear wheels of said automobile, the amount of weight on the front wheels of said automobile, and on each wheel and tire of said Corvair, and the center of gravity of said cars.
4. The amount of camber in the rear axle and the rear wheels of said automobile, caster, and slip angle characteristics, and the amount of toe-in oversteer and understeer of said car under various conditions, the type of suspension system in use on said car, the amount of movement and rebound of the body of said car on its suspension system at the rear and front end of said car, and the PPI in the front and rear springs of said Corvair cars.
5. All tests made by test drivers for General Motors Corporation on said Corvair automobile prior to the occurrence in question, in which the plaintiffs were injured, showing the function and performance of the said automobile, its roadability, its stability, its road holding ability, and other characteristics of the operation and function of said car under various road and weather conditions.
6. The specifications of the tires used on said Corvair automobile, the performance of said tires on said car under various road conditions, the amount of air pressure to be carried or used in the tires of the said automobile, hot and cold, and the reasons for such pressures.
7. The wind tests, whether simulated or actual, conducted on said Corvair automobiles, and the center of wind pressure on said cars.
8. All tests to determine the type of front and rear suspension systems for said Corvair automobiles.
9. All bulletins, notices, pamphlets and other written material disseminated by General Motors Corporation to its dealers, service stations, and to the public regarding the maintenance and servicing of the Corvair automobiles.
Subsequently, at a hearing on May 13, there were charges and countercharges concerning what had transpired in Detroit on May 11. General Motors filed an affidavit by one of its staff attorneys showing that it would take several months to collect and produce all the records called for in the original order of April 27. Plaintiff filed two motions, the first requesting the production of some additional data, and the second requesting a default judgment against General Motors, or alternatively, that defendant, because of its conduct on that day, pay the costs of the trip to Detroit on May 11 and attorney's fees. The plaintiffs' motion to default General Motors was continued and set for a later hearing. However, over the objection of the defendant that it would be impossible to collect the requested documents since their descriptions were too vague and nebulous, the court at this time did grant the plaintiffs' motion for the production of additional data on May 17.

In the days following the May 13 hearing, the charges and countercharges of misconduct by respective counsel at the Detroit proceedings were reiterated and further orders were entered by the court, all of which culminated in a June 10 hearing on plaintiffs' second motion to enter a ruling against defendant to show cause why its answer should not be stricken, and why defendant should not be defaulted for its wilful refusal to comply with the discovery orders. At the next hearing on June 29, the trial court entered an order adjudicating General Motors to be in contempt of court, and granted the relief sought by the plaintiffs' motion. On the preceding day, June 28, the defendant had filed a motion in the Illinois Supreme Court asking leave to file a petition for an extraordinary writ of mandamus or prohibition directed to the orders of April 27 and May 13. Thus, in its adjudication of contempt, on June 29, the court, while entering a default order which struck the defendant's answer and found for the plaintiff on the issue of liability, deferred

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4 On May 28 an order was entered for the taking of depositions by the plaintiff and the production of the documents called for in prior orders of the court. An order entered on June 2 requiring General Motors to turn over to the plaintiffs three copies of each document required by the May 28 order with certain exceptions, or alternatively, the originals of those documents for copying by the plaintiff. This order of June 2 also required defendant to have certain employees available for interrogation under oath concerning the documents. On June 10, an order was entered directing the plaintiffs to retain possession of any documents already furnished by the defendant and directing the defendants to turn over to plaintiffs all documents previously requested in triplicate, or alternatively, the originals for copying. This June 10 order further provided for the production of proving ground tests and for the taking of depositions concerning these tests immediately and disallowed defendant's motion to postpone evidentiary depositions until plaintiffs' representatives had examined all the records.
trial on the issue of damages until the final disposition of the defendant's petition for the extraordinary writ. The defendant thereupon filed its appeal from the trial court's contempt and default adjudication of June 29. Subsequently, the supreme court consolidated the two cases arising from the proceedings below, granted a writ of mandamus, and struck the discovery orders entered by the trial judge as being too broad and therefore constituting an abuse of discretion.

INTRODUCTION

The Illinois Supreme Court here retained jurisdiction and reviewed the pretrial discovery order even though the court admitted that in neither of the two causes was there any traditional basis for invoking its jurisdiction. The contempt order, while appearing to be a reviewable order, did not meet the requirement of finality to be appealable and was accordingly dismissed. The court agreed that mandamus is normally not an appropriate means to review or regulate discovery in the trial court. However, in its view, the questions presented by this appeal were of such “extraordinary importance” to warrant an exception and

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6 People ex rel. General Motors Corp. v. Bua, 37 Ill.2d 180, 184, 191, 226 N.E.2d 6, 9, 13 (1967).
7 Id. at 191, 226 N.E.2d at 13. The court concludes that the order was not final and appealable “since it determines liability in the principal case without a determination of damages.” Id. In support of this proposition the court cited Davis v. Childers, 33 Ill.2d 297, 211 N.E.2d 364 (1965). The Davis case, however, did not actually involve an interpretation of Rule 19-12(3) — currently Ill. Sup. Ct. R. 219, Ill. Rev. Stat. ch. 110A, §219 (1967) but rather, a construction of §50(2) of the Civil Practice Act, Ill. Rev. Stat. ch. 110, §50(2) (1965) — currently Ill. Sup. Ct. R. 304, Ill. Rev. Stat. ch. 110A, §304 (1967). It appears that the Davis case merely supports this proposition inferentially. However, the law is well settled and is supported by substantial case authority, e.g., Village of Niles v. Szczesny, 13 Ill.2d 45, 147 N.E.2d 371 (1958), which sets forth the criteria for a final judgment:

To be final and appealable, a judgment or order must terminate the litigation between the parties on the merits of the cause, so that, if affirmed, the trial court has only to proceed with the execution of judgment. ... While the order need not dispose of all the issues presented by the pleadings, it must be final in the sense that it disposes of the rights of the parties, either upon the entire controversy or upon some definite and separate part thereof.

Id. at 48, 147 N.E.2d at 372. See also Peach v. Peach, 73 Ill. App. 2d 72, 218 N.E.2d 504 (1966).

7 The court exercised its discretion under former rule 28-1(E), to hear this case as one of “extraordinary importance where immediate decision is necessary.” Ill. Rev. Stat. ch. 110, §101.28-1(E) (1965). Ill. Sup. Ct. R. 302(d), Ill. Rev. Stat. ch. 110A, §302(d) (1967) replaced (former) Rule 28-1(E). In support of this decision, the court cited the case of Berk v. Will, 34 Ill.2d 588, 218 N.E.2d 98 (1966). That case involved the housing facilities of local government in a populous city and had to be decided before those officials were literally “put out on the street.” It is evident that this would be a case of “extraordinary importance.” It is interesting to note that Rule 28-1(E) appears to deal solely with appeals which are originally docketed in the appellate court, and the Bua case was never in the appellate court. Further, Rule 28-1(E) would appear not to apply in a mandamus action such as Bua. Thus, it might be concluded that where a case is of “extraordinary importance,” the court will not concern itself with formal requirements, but rather will seek to hear the case on the merits.
thus the court, exercising its supervisory powers over trial courts, granted the writ.

**USE OF MANDAMUS TO REVIEW INTERLOCUTORY ORDERS**

By granting a writ of mandamus in this case, apparently the court has accepted the theory that a court should allow a form of interlocutory appeal where irreparable injury would otherwise occur.9

The use of the extraordinary remedy of mandamus as a method to review interlocutory orders has left the courts in general disagreement as to when such a writ should properly issue.9 The Illinois Constitution grants the supreme court the authority to exercise original jurisdiction in cases relating to mandamus.10 This grant of power, however, has not been construed to confer general jurisdiction, but is limited to cases where the rights, interests or franchises of the state are involved or to emergency cases involving local public interests or private rights.11 Whether the facts of a particular case are sufficient to bring it within the original mandamus jurisdiction of the supreme court is a matter within the discretionary power of the court itself. The Illinois Supreme Court has consistently held that mandamus would not lie to review or modify an order where the trial court had acted within its powers.12 No matter how manifest the error, the proper remedy was always by way of appeal.13 Furthermore, the

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9 Some courts have held that mandamus does not lie to review a decision of a lower court, whether the decision is interlocutory or final, where that decision is subject to review on appeal, e.g., Maryland v. Soper, 270 U.S. 9 (1926); Cohen v. Beneficial Loan Corp., 337 U.S. 541 (1949). This is so even though resort to appellate procedure is clearly inadequate. *Ex parte Fahey*, 332 U.S. 238 (1947). Also, some courts feel that the writ's issuance should never be justified solely on the ground that review of erroneous interlocutory orders on appeal from a final judgment causes unnecessary delay, e.g., Roche v. Evaporated Milk Association, 319 U.S. 21 (1943). However, the recent trend is away from these traditional limitations. The traditional view that mandamus would not lie to control discretion of the inferior courts, 35 AM. JUR. Mandamus §268 (1941), is not as rigidly followed today. See *Developments in the Law — Discovery*, 74 HARV. L. REV. 940, 996 (1961) which notes:

Many state courts have permitted the use of the alternative writs of mandamus and prohibition to secure interlocutory review of discovery orders, generally on the ground that the discretionary writs will lie if the remedy by appeal would be ineffective to protect the petitioner from the trial court's abuse of discretion.


10 ILL. CONST. art. 6, §5 (1870).


13 Id. at 520, 147 N.E.2d at 93.
Illinois policy against piecemeal appeals,\textsuperscript{14} except where expressly provided by statute,\textsuperscript{15} would seem to reinforce the proposition that mandamus should not lie to review interlocutory discovery orders.\textsuperscript{16}

The prevailing judicial climate in Illinois is illustrated by \textit{People ex rel. Atchison, Topeka and Santa Fe Ry. v. Clark},\textsuperscript{17} which held that mandamus would not lie to review a ruling by the trial court on a motion to dismiss on the ground of \textit{forum non conveniens}.\textsuperscript{18} In this case, the court said:

[I]t is not the office of the writ of mandamus to review the orders, judgments, or decrees of courts for error in their rendition or to correct, direct, or control the action of a judge in any matter which he has jurisdiction to decide. For mere error, however gross or manifest, the remedy is an appeal or writ of error, and the writ of mandamus will not lie for its correction if the court has jurisdiction of the subject matter and the parties.\textsuperscript{19}


\textsuperscript{15} ILL. REV. STAT. ch. 110, §78(1) (1963) was the former interlocutory appeal statute. This statute was replaced by Rule 31 of the Illinois Supreme Court, ILL. REV. STAT. ch. 110, §101.31 — currently ILL. SUP. CT. R. 307, 308, ILL. REV. STAT. ch. 110A, §§307, 308 (1967). Paragraph (1) states the classes of interlocutory orders which are appealable but nowhere are pre-trial discovery orders included.

\textsuperscript{16} But see \textit{People ex rel. Noren v. Dempsey}, 10 Ill.2d 288, 139 N.E.2d 780 (1957); \textit{People ex rel. Terry v. Fisher}, 12 Ill.2d 231, 145 N.E.2d 588 (1957). These two cases, cited by the \textit{Bua} court, were cases in which the appellant sought to have a trial judge's discovery order reviewed by means of mandamus. In the \textit{Noren} case, the judge had entered an order for the plaintiff to submit to a physical examination in a personal injury action, and the supreme court, while denying the writ, did not discuss the question of whether mandamus was the proper method to gain review of this pre-trial discovery order. In the \textit{Terry} case the defendant sought to have the trial judge compelled to expunge from the record certain orders requiring the defendant to answer discovery interrogatories concerning the existence and amount of his liability insurance. The supreme court again denied the writ and again did not discuss its propriety.

The \textit{Bua} court also cites the case of \textit{People ex rel. Prince v. Graber}, 397 Ill. 522, 74 N.E.2d 865 (1947) as a case falling within this area. The court there did grant a writ of mandamus to compel a trial judge to expunge from the record certain orders relating to the taking of an oral deposition of an out-of-state plaintiff who had filed suit in Illinois. While mandamus was not discussed as such and the writ was awarded to expunge the order, it should be noted that the supreme court considered the order to have exceeded the trial court's jurisdiction, stating:

\begin{quote}
Jurisdiction of the person of relator was not for the purpose of forcing him to do anything, and the attempt to force him to give his pretrial deposition before a notary public in Chicago, by an erroneous order which was beyond the power of the court to enter, exceeded the jurisdiction of the court.
\end{quote}

\textit{Id.} at 528, 74 N.E.2d at 866.

\textsuperscript{17} 12 Ill.2d 515, 147 N.E.2d 89 (1958).


\textsuperscript{19} People \textit{ex rel. Atchison, Topeka & Santa Fe Ry. v. Clark}, 12 Ill.2d 515, 520, 147 N.E.2d 89, 93 (1958). \textit{Accord, People ex rel. Dolan v. Dusher}, 411 Ill. 535, 104 N.E.2d 775 (1952) where the court clearly states:

Mandamus can be invoked to expunge a judgment only when the judgment complained of is void for want of jurisdiction either of the subject matter, of the parties, or to enter the order complained of . . . .

Moreover, although mandamus will lie to compel the performance of ministerial acts of courts, . . . mandamus will not lie to direct or modify the exercise of judicial discretion by a judge.

\textit{Id.} at 538, 104 N.E.2d at 777.
Although the Illinois Supreme Court had previously followed this policy regarding mandamus, apparently it has now adopted the view that Illinois courts should allow review of interlocutory orders under this writ where an appeal is not an adequate remedy. The proponents of this argument contend that litigants would suffer if they were limited to an appeal only after all the issues and rights of the parties had been determined, and after punitive actions had been taken. It has been argued:

[When] discovery is erroneously ordered over a valid objection... if the improperly discovered information is actually introduced at trial and is prejudicial, this error can be urged on appeal from the final judgment and the evidence excluded if a new trial is ordered. In many cases, however, the value of discovery is not the direct production of admissible [sic] evidence but the acquisition of information which may lead to evidence from other sources. Thus, the discovered information will frequently not be introduced at the trial. Since the information cannot be erased from the discovering party's mind, compliance with the discovery order renders the question of its correctness moot. Incapable of providing any reasonable remedy for the error, an appellate court would deny review from the final judgment. In such a case, only an interlocutory appeal can provide an effective review of an order compelling discovery.2

Significantly, the federal courts, although having a policy against piecemeal appeals and a final judgment rule,21 have allowed mandamus to review interlocutory orders of the trial court.22 In LaBuy v. Howes Leather Co.,23 the United States Supreme Court recognized such an exception to the traditional limitations upon the use of mandamus. In LaBuy, a trial judge improperly referred two non-jury, anti-trust cases to a master for the determination of the issues of liability and damage as well as the issue of the propriety of injunctive relief. The court of appeals issued a writ of mandamus, requiring the district judge to vacate his order of reference as an abuse of discretion.24 The United States Supreme Court approved the issuance of the writ. The Supreme Court apparently regarded correction of the trial court's order a proper use of mandamus to avoid the necessity of retrial after an eventual reversal of the final judgment on appeal.25 By so doing, it would seem that the Supreme Court recognized the importance of granting interlocutory relief in cases of genuine necessity.

24 Id. at 251.
25 Id. at 260.
The *Bua* case appears to be analogous to those cases considered under the federal mandate approach. If General Motors did comply with the trial court's orders and tested their validity through normal channels of appeal, this would offer the defendant a "pyrrhic victory" at best. If the Illinois Supreme Court in *Bua* had refused to exercise its mandate jurisdiction, General Motors not only would have been put to a great deal of expense, suffering business disruption and possible violation of its trade secrets in an effort to comply with the trial court orders of April 27 and May 10, but also, if General Motors chose to disobey the orders, it would have been exposed to the risk of losing its right to defend on the merits, as the subsequent contempt order of June 29 demonstrates. Further, the order of May 10, which measured the discovery permitted the *Bua* plaintiffs by that granted to the plaintiffs in the Florida litigation, raised the possibility that the Illinois action was being controlled in part by the court of another state. Thus, the nature of the peculiar circumstances supported, and, in fact, compelled the issuance of the writ.

However, it is important to note that in granting mandate the court pointed out that, "[i]n so doing we wish to give no encouragement to the litigant who would have us review normal pretrial discovery procedure by original mandate." It is apparent from this language that while the court chose to hear this particular case, its jurisdiction would not always be available to a litigant who feels that he might be injured by a pretrial discovery order.

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27 See notes 22 and 26 supra.
28 Defendant's Petition for Rehearing at 21-2, People ex rel. General Motors v. Bua, 37 Ill.2d 180, 226 N.E.2d 6 (1967).
29 See text at notes 4-5 supra.
30 See text following note 3 supra.
31 Part of the discovery orders attacked in this case provided that discovery be permitted to the same extent as that being sought by other plaintiffs in a pending Florida case involving a 1961 Corvair automobile. *Bua* at 187, 226 N.E.2d at 11. The *Bua* court struck down that part of the order on the ground that it raised the "possibility that an Illinois action could be in part controlled by the court of another State." *Id.* at 193, 226 N.E.2d at 14. In support of this position, the court cited James v. Grand Trunk Western R.R., 14 Ill.2d 356, 152 N.E.2d 858 (1958). The *James* case held, *inter alia*, that a venue statute of the state of Michigan cannot be invoked to control the prosecution of a wrongful death action in Illinois where the Illinois court rightfully acquires jurisdiction of the case as being a transitory action. However, the *Bua* court stated: We do not say that defendant could not have waived our rules of discovery and privilege by stipulating or agreeing that the same matter would be produced in both the Illinois and Florida cases. What we say is that such a procedure cannot be thrust upon the defendant as it was in this case. *Bua* at 193, 226 N.E.2d at 15.
32 *Bua* at 194, 226 N.E.2d at 14.
33 On January 1, 1967 the new supreme court rules became effective. 110A, §308 (1967) is a new rule.
Finding that this was a proper case over which to exercise jurisdiction, the court next proceeded to examine the trial court's discovery orders.

**PRODUCTION OF COMPLETE RECORDS — RELEVANCY AND MATERIALITY**

The Illinois Supreme Court, in *Bua*, found the discovery orders, which required the production of the complete records of General Motors covering an extended period of time, without a preliminary showing of relevancy and materiality to be an abuse of the trial court's discretion. In arriving at this conclusion, the court seems to emphasize the fact that plaintiff sought post-accident records whose relevancy were not established. However, examination of the record and briefs of counsel shows that the plaintiffs in fact did establish at the trial level the relevancy of the post-accident records. It also appears from these briefs that the defendant objected more to the all-inclusive nature of the language of the order than to the nature of the records being sought.

Nevertheless, the court did hold that where the records sought are voluminous and there is a question as to their relevancy modeled after 28 U.S.C. §1292(b) (1964) as adopted in 1958. In paragraph (a), Rule 308 states that:

> When the trial court, in making an interlocutory order not otherwise appealable, finds that the order involves a question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, the court shall so state in writing, identifying the question of law involved. Such a statement may be made at the time of the entry of the order or thereafter on the court's own motion or on the motion of any party. The Appellate Court may thereupon in its discretion allow an appeal from the order.

At first glance, this rule appears to solve the problem presented in the principal case. However, it is worthy to note that in order to achieve an appeal under this rule, both the trial court and the appellate court must agree that an appeal will expedite the disposition of the litigation, and also that there is a substantial question of law to be decided. See Committee Comments on Rule 308, ILL. ANN. STAT. ch. 110A, §98 (Smith-Hurd Supp. 1967).

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54 See note 3 supra.

55 *Bua* at 195, 226 N.E.2d at 14 (1967).

56 Specifically, Plaintiff's Petition for Rehearing at 15-19, *People ex rel. General Motors Corp. v. Bua*, 37 Ill.2d 180, 226 N.E.2d 6 (1967). In Plaintiffs' Petition for Rehearing, id. at 15, the plaintiffs set out an affidavit, filed early in the proceeding, which explained the relevancy of the post-accident documents. The plaintiffs' argument on this point was based on the fact that there is a long "lead time" from the time when models are being designed until those models go into production. The drawings for the 1965 Corvair sought to be discovered by the plaintiffs had been started as early as 1962. Thus, plaintiffs reasoned, the tests on the 1965 Corvair might have revealed the cause of the defect complained of through General Motors' attempt to correct it in later model Corvairs.


58 *Bua* at 195, 226 N.E.2d at 14 (1967).
vancy, the trial court should require "some preliminary showing of materiality and relevancy." Its finding, however, is not inconsistent with the new Illinois Supreme Court Rule 214 which provides that a party may be ordered to produce specified documents "relevant to the subject matter of the action." As noted by the Supreme Court Rules Committee, "[t]he words 'relevant to the subject matter of the action' are substituted for the language [found in former Rule 17, under which the Bua case was decided] 'relating to the merits of the matter in litigation' and 'relative to the merits of the said matter.'" The latter two clauses were thought to limit the scope of discovery only to evidence itself and not to material "reasonably calculated to lead to the discovery of admissible evidence," as outlined in Federal Rule 26. However, since the language has not been construed in this restrictive fashion by the courts, the committee substituted the words "relevant to the subject matter of the action" to conform to the case law. Thus, the Bua case is not to be distinguished by its holding as to the required standard of relevancy and materiality. These requirements were already embodied in existing case law and unchallenged by Bua. The case is noteworthy because it requires a preliminary showing of relevancy and materiality where the relevance of the material sought to be discovered is not evident on the face of the pleadings.

The method suggested by the court to determine the relevancy and materiality of the documents is through the "judicious use of interrogatories," which is within the discretion of the trial judge. The court is not here reinstating the use of interrogatories, generally, under the practice abolished by Monier v. Chamberlain, but is suggesting a plausible method of dealing with a problem presented by the rule of that case. In other words, in Monier, the court emphasized that "resort to interrogatories and discovery depositions is not a necessary condition precedent to a motion for discovery of material. . . ." In Bua, the court reiterated its statement in Monier, but stated that interrogatories "may be required by the trial judge in the exercise of his discretion where, as here, such prior use will substan-

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40 Id.
44 Bua at 195, 226 N.E.2d at 14.
46 Id. at 355, 221 N.E.2d at 414.
People ex rel. General Motors v. Bua

...tionally expedite identification of relevant material." Thus, while the court leaves the manner of determining the relevancy of material sought to be discovered to the discretion of the trial judge, where such material is not relevant on its face, a preliminary showing will be required before the granting of a production order.

With a "preliminary showing of "relevance" thus established as a condition precedent to the discovery of voluminous records whose relevancy was not apparent on the face of the pleadings, the court next considered the contempt order.

The Contempt Order Under Rule 19-12(3)

In reviewing the contempt order of the trial court, the Illinois Supreme Court held that an order that authorizes the

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47 Bua at 195, 226 N.E.2d at 14. A recent article, Harte, A Response to Comment on People ex rel. General Motors v. Nicholas J. Bua, Judge, 48 Chi. B. Rec. 214 (1967), points out that:

Obviously in the vast majority of cases, . . . no showing other than the motion itself will be necessary. In other, more complex cases, requiring the production of voluminous documents of a varied nature on a much greater scale (e.g., the typical anti-trust or trade infringement case), where business interruption or trade secrets are involved, other discovery techniques may be necessary preliminarily to accommodate the broad requirements of reasonable specificity and relevancy. General Motors expressly leaves the utilization of this technique to the discretion of the trial judge.

48 Before proceeding, it must be noted that the contempt order issued in this case was not of the traditional variety. The court in Bua stated:

We must concede that the June 29 order is cast in terms of a contempt proceeding, and that ordinarily such an adjudication is a final and appealable order, and an appropriate method of testing pretrial discovery orders.

37 Ill.2d at 189, 226 N.E.2d at 12. But, the court continued:

[We are not convinced that the dichotomy of discovery sanctions established by Rule 19-12(3) was intended to permit a trial court to render an interlocutory order final and appealable merely by the use of contempt language. The imposition of a fine or imprisonment as a sanction for contempt is final and appealable because it is an original special proceeding, collateral to, and independent of, the case in which the contempt arises. . . . Such a sanction does not, as here, directly affect the outcome of the principal action. Even though the order of June 29 is cast in the language of contempt we conclude that the sanction imposed achieves its validity by virtue of Rule 19-12(3) and since it determines
striking of pleadings may do so only when the stricken pleadings bear some reasonable relationship to the information improperly withheld.49

Historically, the Illinois courts have refused to recognize that a trial court has inherent power to strike pleadings and enter default judgments as a punishment for contempt.50 However, the cases in support of this position also hold that the courts may accede to such power by legislative fiat.51 The Bua court therefore concludes that since the legislature authorized it to make rules governing discovery,52 and since the court adopted (former) Rule 19-12(3)53 which provides for the sanction once prohibited, the sanction imposed by the trial court was permissible.

However, the court then considered whether the sanction imposed in the instant case was proper under the circumstances. The court held that it was not54 on the ground that the trial court struck all General Motors' defenses, and not merely those defenses which were actually affected by the refusal to comply with the discovery orders. In reaching its conclusion the court relied on Caryl Richards Inc. v. Superior Court55 which considered the presumptions that may arise when a party wrongfully withholds discovery of certain material. The California statute pursuant to which Caryl was decided is substantially similar to our supreme court rule.56 The Caryl case distinguished the case of

liability in the principal case without a determination of damages it is not yet final and appealable.

Id. at 191, 226 N.E.2d at 13. On the federal level, a contempt order entered against a person not a party to the litigation (e.g., an attorney) is treated differently than an order entered against a party. The former are considered final and appealable, since the contumacious party could not appeal a final judgment in the case. Bessette v. W. B. Conkey Co., 194 U.S. 324 (1904); Fenton v. Walling, 139 F.2d 608 (9th Cir. 1943), cert. denied. 321 U.S. 798 (1944).

49 Bua at 197, 226 N.E.2d at 16.
50 See Hovey v. Elliott, 167 U.S. 409 (1897). The Hovey Court stated, "The fundamental conception of a court of justice. is condemnation only after hearing." Id. at 414. Thus, as the Bua court states, "a court possessing plenary power to punish for contempt, may not, on the theory of punishing for contempt, summarily deprive a party of all right to defend an action." 37 Ill.2d at 189, 226 N.E.2d at 12.
52 See ILL. REV. STAT. ch. 110, §§ (1967).
53 (Former) ILL. SUP. CT. R. 19-12(3) (ILL. REV. STAT. ch. 110, §101.19-12(3) (1964)).
54 Bua at 197, 226 N.E.2d at 16.
56 CAL. CODE OF CIV. P. §2034(b) (2) §§(I)-(IV) (West 1954). Commenting on this statute the court stated: It provides in substance that if a party refuses to obey an order requiring discovery, such as that made by the court here, ‘the court may make such orders in regard to the refusal as are just’ (emphasis theirs) and it then recites the sanctions that may be imposed. The first sanction specified is an order that the matter or fact concerning which an interroga-
Hammond Packing Co. v. Arkansas\textsuperscript{57} on the ground that the Arkansas statute operative in Hammond compelled that court to strike the defendant's answer and enter judgment by default. The effect of the Arkansas statute in Hammond was to create a presumption that the evidence, if produced, would have proved the plaintiff's cause of action and that the defenses interposed to the complaint were without merit. The Caryl case, however, held that the defendant's refusal to comply merely gave rise to a presumption that the information withheld would prove the element of plaintiff's cause of action for which it was sought, and that it could not be the basis for a presumption that all of the other essential facts alleged in the complaint were true or that allegations by the defendant as to contributory negligence were untrue.\textsuperscript{58}

A test for determining the extent to which a presumption may be created by such statute or rule was set forth by the United States Supreme Court in Tot v. United States,\textsuperscript{59} which held that a statutory presumption cannot be sustained if there is no rational connection in common experience between the fact to be proved and the ultimate fact to be presumed,\textsuperscript{60} stating:

This is not to say that a valid presumption may not be created upon a view of relation broader than that a jury might take in a specific case. But where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them, it is not competent for the legislature to create it as a rule governing the procedure of courts.\textsuperscript{61}

188 Cal. App. 2d at 304, 10 Cal. Rptr. at 380. The Hammond Court distinguished the Hovey case, see note 50 supra, stating:

Hovey v. Elliott involved a denial of all right to defend as a mere punishment. This case (Hammond Packing) presents a failure by the defendant to produce what we must assume was material evidence in its possession and a resulting striking out of an answer and a default. The proceeding here taken may therefore find its sanction in the undoubted right of the lawmaking power to create a presumption of fact as to the bad faith and untruth of an answer begotten from the suppression or failure to produce the proof ordered, when such proof concerned the rightful decision of the cause. In a sense, of course, the striking out of the answer and default was a punishment, but it was only remotely so, as the generating source of the power was the right to create a presumption flowing from the failure to produce.

Hammond at 350.

58 188 Cal. App. 2d at 307, 10 Cal. Rptr. at 382. The Caryl case held that where a defendant manufacturer refused to disclose in discovery the exact formula for a hairdressing which allegedly injured plaintiff's eyes when sprayed on in a beauty salon, the proper sanction should not have been default, but merely an order that the dressing was such as might injure a person's eyes.

59 319 U.S. 463 (1943).

60 Id. at 467.

61 Id. at 468.
The Bua court specifically relied upon the reasoning of the Caryl and Tot cases and accordingly held that, since in a products liability case, the records sought from General Motors could not relate to the issue of contributory negligence or the issue of damages, the defendant's pleadings as to those issues should not have been stricken.

**Products Liability — Contributory Negligence**

In reaching its conclusion that the trial court erred when it struck the defense of contributory negligence pursuant to its application of its contempt sanctions, the court in Bua briefly considered whether contributory negligence remains a meritorious defense in a products liability case under the strict tort liability doctrine enunciated in Suvada v. White Motors. The opinion in Suvada failed to resolve this question, and the Bua opinion raises much speculation as to whether it, by its brief treatment of this issue, intended to fill a gap seemingly left by the Suvada case. Thus far one court has so held.

It is submitted that the intention of the Bua court was not to decide the issue of contributory negligence as applied to products liability cases.

The initial problem arises when one considers whether Suvada failed to resolve the question, and the Bua opinion raises much speculation as to whether it, by its brief treatment of this issue, intended to fill a gap seemingly left by the Suvada case. Thus far one court has so held.

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62 32 Ill.2d 612, 210 N.E.2d 182 (1965). Discussing Suvada, the Bua court stated:

This is a products liability case pleaded in two counts, one alleging negligence, and the other alleging breach of warranty. In Suvada v. White . . . this court adopted the theory which imposes strict tort liability on the manufacturer. Under that theory, negligence need not be proved and a plaintiff has only to prove that his injury or damages resulted from a condition of the product, that the condition was an unusually dangerous one, and that the condition existed at the time the product left the manufacturer's control. However, under both counts it is necessary to prove that the plaintiff was in the exercise of due care for his own safety. It is our view that a proper sanction in such a case would be to strike any defenses of a recalcitrant defendant only on the issues affected by the refusal to comply with discovery orders. (emphasis added).

Bua at 196, 226 N.E.2d at 15.

63 In defining the manufacturer's liability, the Suvada court declared:

The plaintiffs must prove that their injury or damage resulted from a condition of the product, that the condition was an unreasonably dangerous one and that the condition existed at the time it left the manufacturer's control.

32 Ill.2d at 623, 210 N.E.2d at 188. Further, at least one author has contended that Suvada expressly bars contributory negligence as a defense.


64 In Dunham v. Vaughan & Bushnell Mfg. Co., 86 Ill. App. 2d 315, 229 N.E.2d 684 (1967), the court interpreted the language of Bua to state:

[Freedom from contributory negligence is an element to be proven, both in products liability and warranty cases. Contributory negligence in a products liability case may be properly an issue, for while it is said that the plaintiff is not required to discover a defect, or to guard against the possibility of its existence, on the other hand, if he discovers a defect, or if the danger in use is known to him and he proceeds to use it, he may be guilty of contributory negligence.

Id. at 331, 229 N.E.2d at 692.
People ex rel. General Motors v. Bua

Suvada affected a substantive or procedural change in the law. The Illinois Supreme Court in Fanning v. Lamay treated Suvada as the case which created a new tort of strict liability in Illinois. If Suvada is so treated, it can be said that its holding amounts to a change in the substantive law; and if it does change the substantive law, to apply it to the Bua case would involve the retroactive application of substantive law announced in 1965 to a case filed in 1963. It is submitted that to do so is a matter not without difficulty.

The complaint in Franklin v. General Motors, out of which the Bua case arose, was filed in October 1963, while the decision in Suvada v. White Motors was not decided until 1965. Nor was the complaint in the Franklin case amended to include a count based on strict liability.

Thus, to presume that the court in Bua attempted to apply the Suvada doctrine would raise a serious conceptual problem. It would be less precipitous to confine the court's treatment of the contributory negligence question to the pre-Suvada law which would appear to govern the Bua decision.

Moreover it is not entirely clear whether the court was referring only to the negligence count or to both the negligence and breach of warranty counts, when it characterized plaintiff's freedom from contributory negligence as a proper defense, while it would appear that the court was referring to both counts.

Whether contributory negligence remains a valid defense to a breach of warranty action after Suvada has been a subject of controversy, and has resulted in two totally divergent views.

One side argues that combining the public policy upon which the Suvada case was grounded, namely that "public interest in human life and health, the invitations and solicitations to purchase the product and the justice of imposing the loss on the one creating the risk and reaping the profit..." with "impressive authority from foreign jurisdictions which supports the principle..."
that contributory negligence of the consumer or user is not a defense to an action for breach of warranty express or implied.\textsuperscript{71}

militates against holding contributory negligence to be a defense. The argument on the opposite side is represented in such cases as \textit{Brandenberg v. Weaver Mfg. Co.}\textsuperscript{72} wherein the court in allowing contributory negligence as a defense, stated:

If a plaintiff has available to him two different methods . . . and he chooses the method or way which is unknown and unexplored or known to involve certain possible hazards, and he is injured in the process, as he is contributorily negligent as a matter of law. . . .\textsuperscript{73}

With these divergent points of view in mind it is difficult to imagine that the Illinois court would determine the applicability of the concept of contributory negligence to this phase of tort liability without some direct, unequivocal statement to that effect.

Nevertheless, the issue of breach of warranty would appear to have been present in the case from its inception, since the original complaint did contain counts as to negligence and breach of warranty that the automobile was reasonably fit for its intended use.\textsuperscript{74} If the court's words are to be ascribed any meaning whatsoever, this fact, together with the court's use of the language, "both counts,"\textsuperscript{75} appears, at least, to require a plaintiff to plead and prove freedom from contributory negligence in a products liability case based on breach of warranty.

Even accepting this view, however, it must be remembered that the reference to products liability appears only as support for the principal holding that a trial court does not possess the power to strike pleadings for violation of discovery orders which are unrelated to the information withheld. Further, the question of products liability was never briefed or argued before the court and is wholly collateral to the main issues of the case.\textsuperscript{76} Hence, it is submitted that this result, or a result that would require one to plead and prove freedom from contributory negligence in a strict liability situation, was not contemplated by the \textit{Bua} court.

\textsuperscript{71} Harte, \textit{A Response to Comment on People ex rel. General Motors v. Nicholas J. Bua, Judge}, 48 CHI. B. REC. 214, 217 (1967). \textit{See Restatement (Second) of Torts} §402A (1965). However, note comment n:

On the other hand the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section as in other cases of strict liability.

\textsuperscript{72} \textit{Ibid.} at 374, 222 N.E.2d 348 (1966).

\textsuperscript{73} \textit{Id.} at 378, 222 N.E.2d at 350.

\textsuperscript{74} \textit{See Abstract of Record at 7, People ex rel. General Motors v. Bua, Complaint No. 63 C 22427 (1963). But see Harte, \textit{A Response to Comment on People ex rel. General Motors v. Nicholas J. Bua, Judge}, 48 CHI. B. REC. 214, 217 wherein the author states that breach of warranty was not present in this case from its inception but was later added.}

\textsuperscript{75} \textit{Bua} at 196, 226 N.E.2d at 16.

\textsuperscript{76} Plaintiff's Petition for Rehearing at 23, \textit{People ex rel. General Motors Corp. v. Bua}, 37 Ill.2d 180, 226 N.E.2d 6 (1967), raises this important point.
DUE PROCESS LIMITATIONS

The Bua court appears to have finally disposed of the problem, at least in Illinois, of when a court may strike the pleadings of a recalcitrant party. However, to strike a pleading because of a failure to fully comply with a discovery order may be deemed a denial of due process, where the failure to comply did not involve bad faith. Such a problem is illustrated by Societe Internationale v. Rogers. In that case, the United States Supreme Court was petitioned to consider whether the federal district court properly exercised its powers under Federal Rule 37(b) in dismissing plaintiff's complaint despite a finding that it had acted in good faith and made diligent efforts to execute a production order. The Supreme Court commenting on the Hovey and Hammond Packing cases, stated:

These decisions establish that there are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause.

These two decisions leave open the question whether Fifth Amendment due process is violated by the striking of a complaint because of a plaintiff's inability, despite good-faith efforts, to comply with a pretrial production order.

The Court then concluded:

In view of the findings in this case, [of a good-faith effort to comply] ... and the serious constitutional questions we have noted, we think that Rule 37 should not be construed to authorize dismissal of this complaint because of petitioner's noncompliance with a pretrial production order.

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77 357 U.S. 197 (1958).
78 FED. R. CIV. P. 37(b). This rule is consistent with (former) ILL. S. CT. R. 19-12(2), ILL. REV. STAT. ch. 110, §101.19-12(2) (1955). See Joint Committee Comments, ILL. ANN. STAT. ch. 110, §19-12(3) (Smith-Hurd 1965). Rule 19-12(3) is presently embodied in ILL. SUP. CT. R. 219(c), ILL. REV. STAT. ch. 110A, §219(c) (1967). See Committee Comments on Rule 219(c), ILL. ANN. STAT. ch. 110A, §219(c) (Smith-Hurd Supp. 1967).
79 357 U.S. at 209 wherein the plaintiffs were specifically found not to be in collusion with the Swiss Government to block the production of certain records, inspection of which were prohibited under Swiss law.
80 Hovey v. Elliott, 167 U.S. 409 (1897).
82 357 U.S. at 209-10. (emphasis added).
83 Id. at 212. Although Societe Internationale and the Bua case are strikingly similar, it appears that before the doctrine of Societe Internationale can be invoked, there must be a finding of a good faith attempt to comply. Although the Illinois Supreme Court in Bua did not make an express finding of bad faith, it did concede that the motives behind General Motors' compliance "may be suspect". 37 Ill.2d at 193, 226 N.E.2d at 15. However, the Illinois Supreme Court, on the same day that Bua was adopted, reversed the Appellate Court for the First District in the case of Strickler v. McCarthy, 37 Ill.2d 48, 224 N.E.2d 827 (1967). The appellate court had held that where it appeared that evidence requested by a plaintiff was material and not privileged against discovery and that the defendant's refusal to disclose was contumacious and in bad faith, the trial court did not abuse its discretion by striking defendant's answer and entering judgment against him. In reversing, the supreme court found that the trial court abused its discretion, noting that the parties were at odds as to the scope
Thus, if the court in *Bua* had not found the methods of General Motors' compliance somewhat "suspect," fifth amendment due process might well have prevented the striking of any of their pleadings. While there are, as yet, few other cases in this area, *Societe Internationale* would appear to demand the result indicated.

**CONCLUSION**

The *Bua* case leaves many important questions unanswered. However, the case, from its inception, did not lend itself to precise answers. The problems presented to the court ranged from the good faith of the parties to the great expense and business disruption which could have been caused by one ruling as opposed to another. In arriving at its decision, the court was confronted with the use of mandamus to appeal interlocutory orders, the problems of relevancy and materiality relating to the production of complete records and, to a limited extent, the availability of contributory negligence as a defense in a products liability action. However, while the *Bua* case left unsolved some major problems in the general area of discovery and products liability, it did effectively deal with the inequities presented by a unique factual situation.

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