RECENT DEVELOPMENTS UNDER RULE 179 OF THE IOWA RULES OF CIVIL PROCEDURE: WHAT DOES THE RULE MEAN—NOW?*

Clyde D. Stoltenberg†

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The Iowa Rules of Civil Procedure give us a broad range of pre-trial and post-trial devices for purposes of disposing of, narrowing or otherwise clarifying the issues for trial or on appeal.[1] The explication of these various motions and procedures has been the object of a number of surveys and articles

* The author wishes to thank Richard McMahon, of the firm of Betty, Neuman, McMahon, Hellstrom & Bittner in Davenport, Iowa, for his very helpful suggestions and ideas during all stages of the planning and preparation of this article, as well as for his wise counsel, advice and guidance over the years.

† B.A. 1969 University of Iowa; J.D. 1972 Harvard University. Assistant Professor, University of Kansas School of Business. Member of the Bars of Iowa and Illinois.

1. Pre-trial motions and procedures expressly provided for in the Iowa rules include motions to strike, for a more specific statement, and to dismiss under rules 111-13; motions regarding party joinder under rules 22-28, consolidation and separate trials under rules 185-86, jurisdiction under rule 66, and venue under rules 167-75; applications for separate adjudication of law points under rule 105; motions for judgment on the pleadings under rule 222; and motions for summary judgment under rules 237-40. Motions and procedures following entry of judgment include bills of exceptions under rule 241, motions for judgment notwithstanding the verdict under rule 243, motions for new trial under Rule 244 and motions to enlarge or amend findings and conclusions under rule 179(b).

appearing at various times since the adoption of the rules in 1943.[2] It is the purpose of this article to focus on the application of one of the post-judgment procedures available under the Iowa rules—the motion to enlarge or amend findings and conclusions under rule 179(b)—in an attempt to answer the following questions: What is the purpose of the procedure? How does it differ from what a litigant might hope to accomplish with other post-judgment motions? What are the requirements for pursuing such a procedure, and what are the limitations, if any, on its effectiveness?

I. Purpose of the Rule

Rule 179(b) of the Iowa Rules of Civil Procedure presently provides as follows:

> On motion joined with or filed within the time allowed for a motion for new trial, the findings *and conclusions* may be enlarged or amended and the judgment *or decree* modified accordingly *or a different judgment or decree substituted.* But a party, on appeal, may challenge the sufficiency of the evidence to sustain any finding without having objected to it by such motion or otherwise.[3]

This procedure follows on the heels of the requirement that "the Court trying an issue of fact without a jury, whether by equitable or ordinary proceedings, shall find the facts in writing, separately stating its conclusions of law; and direct an appropriate judgment."[4] The Iowa Supreme Court has reasoned that one of the primary purposes of this requirement is "to advise counsel and the appellate court of the basis of the trial court's decision in order that counsel may direct his attack upon specific adverse findings or rulings in the event of an appeal."[5]

The utility of a rule 179(b) motion should be examined in light of this underlying purpose for requiring a trial court to separately state its findings of fact and conclusions of law. The text of rule 179(b) itself expressly relieves an unsuccessful litigant from any obligation to assert such a motion

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2. Blackburn, *Thirty Years of Motion Practice Under the Iowa Rules*, 21 Drake L. Rev. 447 (1972); Loth, *Pleadings and Motions*, 29 Iowa L. Rev. 23 (1943); Simmons & Pryor, *Minimum Standards of Judicial Administration*, 36 Iowa L. Rev. 436 (1951); Vestal, *A Decade of Practice under the Iowa Rules of Civil Procedure*, 38 Iowa L. Rev. 439 (1953).

3. Iowa R. Civ. P. 179(b). The underscored portions of the present text of rule 179(b) were added in 1973. 1973 Iowa Acts.

4. Iowa R. Civ. P. 179(a). "The former statute required findings of fact only if a party requested them, which was seldom. This rule, like federal rule 52, requires them *in all nonjury trials* whether at law or in equity, without request." 2 Iowa Rules of Civil Procedure Annotated 504 (3d ed. 1970) (comment to rule 179) (emphasis supplied) [hereinafter cited as Iowa R. Civ. P. Ann.]. It is significant, for purposes of later analysis in this article, to note at this point the similarities between rule 179(a) and rule 118 which requires that "[a] motion, or other matter involving separate grounds or parts, shall be disposed of by separate ruling on each and not sustained generally." Iowa R. Civ. P. 118.

5. Berger v. Amana Society, 254 Iowa 1036, 1040, 120 N.W.2d 465, 467 (1963).

where an adverse finding which has been made is not supported by adequate evidence.[6] The underlying purpose of rule 179(a) eliminates the need for any motion in such an instance because the mere existence of the finding in the record provides sufficient clarity for purposes of framing the issue on appeal.[7] Similarly, a court on appeal is perfectly capable of determining whether a conclusion of law is correct on the basis of findings which have been made and are part of the record on appeal[8] without the intervention of a rule 179(b) motion after entry of judgment. However, where a conclusion of law sought by an unsuccessful litigant depends upon a finding which the court has not made, but for which the litigant feels there is evidence, a rule 179(b) motion to enlarge the findings is in order to enable the appellate court to review the trial court's conclusions of law based on the lower court's fulfillment of its primary function as a finder of fact.

II. Distinctions Between Motions Under Rule 179 and Motions for Judgment Notwithstanding the Verdict or for New Trial

As has already been noted,[9] rule 179 is designed "to advise counsel and the appellate court of the basis of the trial court's decision in order that counsel may direct his attack upon specific adverse findings or rulings in the event of an appeal."[10] The language of rule 179(b) suggests that it was expressly designed for the purpose of allowing a litigant to secure a finding from the trial court which the court did not make, but for which the litigant feels there is evidence and upon which a conclusion of law sought by the

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6. The adequacy of the evidence in trials of law cases to the court, of course, is based on the rule that the appellate court in such cases is bound by factual findings having "substantial evidentiary support." *E.g.*, Hamilton v. Town of Palo, 244 N.W.2d 329, 331 (Iowa 1976). In determining whether the evidentiary support for a finding has been substantial, the court on appeal is not to weigh the evidence; rather, it is to decide only whether there was "a proper basis upon which the trial court *could* find as it did." Arbie Mineral Feed Co. v. Nissen, 179 N.W.2d 593, 595 (Iowa 1970). In this regard the Iowa Rules of Appellate Procedure further provide that "findings of fact in jury-waived cases shall have the effect of a special verdict." Iowa R. App. P. 4. Review in equity cases is *de novo*, of course, while in all other cases the appellate courts are to constitute courts "for correction of errors at law." *Id.*

7. This interpretation of the last sentence of rule 179(b) was upheld very early after the adoption of the Iowa rules in *Beardsley v. Hobbs*, 239 Iowa 1332, 1335, 34 N.W.2d 916, 917-18 (1948); *see also* 2 Iowa R. Civ. P. Ann. *supra* note 4, at 504 (comment to rule 179). The court in *Beardsley* went even further and eroded the exactitude which rule 179(a) seemed to require in the form of findings by remarking that the trial court's findings of fact and conclusions of law, while not separately designated, were "sufficiently separated." Beardsley v. Hobbs, 239 Iowa at 1335, 34 N.W.2d at 917. The court in *Beardsley*, however, expressly declined to decide whether the appellant could have challenged the sufficiency of the evidence to sustain the result in the absence of findings, as that term was defined in *Beardsley*. *Id.* at 1335, 34 N.W.2d at 918.

8. The court can even make such a determination on the basis of facts which "may fairly be inferred" from facts expressly found. *See* Rank v. Kuhn, 236 Iowa 854, 20 N.W.2d 72, 74 (1945).

9. *See* note 5 *supra*.

10. Berger v. Amana Society, 254 Iowa 1036, 1040, 120 N.W.2d 465, 467 (1963).

litigant would have to depend.[11] Although the modification of a judgment contemplated by rule 179(b) could conceivably dispose of issues in such a manner as to render appeal by the movant unnecessary, the more likely result would probably be an addition or clarification enhancing the legal arguments which the movant would be making on appeal. If the results at the trial level were to be totally undone, it would more likely be the result of a motion for new trial (in conjunction with which a rule 179 motion is permitted to be filed) or a motion for judgment notwithstanding the verdict in the event of a case tried to a jury.

The provisions of rule 179 for the enlargement or amendment of findings can have no possible application to a case tried to a jury, because the trial court simply has no authority to make adjustments of such a nature to a jury's findings. The court can, of course, decide that judgment should not be entered in accordance with the jury's verdict; the motion for judgment notwithstanding the verdict under Iowa Rule of Civil Procedure 243 or motion for new trial under Iowa Rule of Civil Procedure 244 clearly constitute the remedies in such a case. A motion for judgment notwithstanding the verdict is directed toward either the failure of the opposing party's pleadings to aver some material fact or facts necessary to constitute a complete cause of action or defense[12] or the movant's entitlement to a verdict in his favor at the close of all the evidence, following motion therefor on the proper ground(s) and the jury's failure to return such a verdict.[13] A pleading deficiency of the nature described in rule 243, if not cured by a rule 88 amendment, will normally be fatal and result in judgment against the pleader. This situation raises no questions involving the findings themselves and is, thus, totally outside the province of rule 179.

The second situation to which rule 243 is directed bears a closer relationship to the mechanics of rule 179, but is nonetheless clearly distinguishable. Allowing the court to enter judgment contrary to the jury's verdict bears some similarity to the procedure a court would pursue in deciding to enlarge or amend its findings and conclusions, on the basis of which it might then decide to modify its judgment or substitute a different one. The rule 179 procedure, however, is clearly directed toward a court's review of *its own* findings and conclusions, while the rule 243 procedure is concerned with judicial review of *the jury's* findings as embodied in its verdict. Moreover, the conditions precedent to the filing of a motion for judgment notwithstanding

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11. *See* note 5 *supra*.

12. Iowa R. Civ. P. 243(a). Although rule 243(a) does not expressly so provide, such a pleading omission may not be fatal if the fact omitted in the pleading is supplied by proof and there is an amendment under Iowa Rule of Civil Procedure 88 to conform to the proof. *See* Loth, *supra* note 2, at 35.

13. Iowa R. Civ. P. 243(b). The court may then either grant a new trial or enter judgment as though it had directed a verdict for the movant. *Id.*

the verdict under rule 243(b),[14] judicial statements of its purpose,[15] and court-developed rules as to the proper construction to be given the evidence in considering an appeal from the ruling on such a motion[16] all involve considerations not germane to rule 179 motion procedure.

Rule 179(b) clearly contemplates a relationship between it and a motion for new trial under rule 244 by providing that a rule 179 motion may be "joined with or filed within the time allowed" for a motion for new trial.[17] However, this very provision is also indicative of a distinction between the two motion procedures. Rule 244 sets forth nine specific grounds upon which a new trial may be granted "if they materially affected [the aggrieved party's] substantial rights."[18] The result of the favorable disposition of a rule 244 motion is, however, the vacating of an adverse verdict, decision or report or some portion thereof, and not merely the enlargement, amendment or modification to findings and conclusions contemplated by rule 179(b). Although the preconditions to application for relief under rule 244 are not nearly as detailed as in the case of rule 243, the courts have clearly concluded that a party cannot sit by and not avail himself of legal procedures to secure a fair trial and later raise lack of the same procedure as grounds for a new trial.[19] On some occasions the courts have gone so far as to say that the

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14. The filing of a motion for directed verdict is a condition precedent to moving for judgment *non obstante verdicto* (notwithstanding the verdict or n.o.v.), *and* the grounds of the motion for judgment n.o.v. must have first been urged in the earlier motion by the movant for directed verdict. *E.g.*, Meeker v. City of Clinton, 259 N.W.2d 822, 827 (Iowa 1977); Dutcher v. Lewis, 221 N.W.2d 755, 759-60 (Iowa 1974). The effect of these dual requirements is that a successful movant can have a judgment in his favor sustained on appeal in spite of the fact that the judgment n.o.v. was entered on the wrong grounds. Strom v. Des Moines & Cent. Iowa Ry. Co., 248 Iowa 1052, 1071-72, 82 N.W.2d 781, 788 (1957); Lewis v. Minnesota Mut. Life Ins. Co., 240 Iowa 1249, 1256, 37 N.W.2d 316, 321 (1949). The appropriate grounds for sustaining the judgment, however, must have been argued in both the directed verdict and judgment n.o.v. motions. Meeker v. City of Clinton, 259 N.W.2d 822, 828, (Iowa 1977); Bokhoven v. Hull, 247 Iowa 604, 606, 75 N.W.2d 225, 226 (1956). Where the motion for judgment n.o.v. is based upon a proposition not raised in the motion for directed verdict, the situation will be the same as though there had been no motion for directed verdict, and the movant will be without a rule 243 remedy. *E.g.*, Friedman v. Colonial Oil Co., 236 Iowa 140, 145, 18 N.W.2d 196, 199 (1945).

15. "The purpose . . . is to afford the trial court an opportunity to correct its error in failing to sustain a motion for directed verdict where the movant was entitled to a directed verdict at the close of all evidence and moved therefor and the jury did not return such verdict." Meeker v. City of Clinton, 259 N.W.2d 822, 827 (Iowa 1977).

16. If a defendant's motion for judgment n.o.v. is granted, the evidence must be viewed in the light most favorable to plaintiff. Pound v. Brown, 258 Iowa 994, 995, 140 N.W.2d 183, 184 (1966). If a defendant's motion for judgment n.o.v. is denied, the evidence must still be viewed in the light most favorable to plaintiff. Hovden v. City of Decorah, 155 N.W.2d 534, 536 (Iowa 1968). If the motions for directed verdict and judgment n.o.v. have both been denied, the evidence is to be considered in the light most favorable to the verdict. Moyers v. Sears-Roebuck & Co., 242 Iowa 1038, 1041, 48 N.W.2d 881, 883-84 (1951).

17. Iowa R. Civ. P. 244.

18. *Id.*

19. State v. Johnson, 243 N.W.2d 598, 606 (Iowa 1976); State v. Jewett, 219 N.W.2d 559,

grounds of a motion for new trial must stand or fall on exceptions taken at trial.[20] Pursuing a rule 179 motion, on the other hand, does not appear to require adherence to any such preconditions; indeed, the rule expressly provides that "no request for findings is necessary for purposes of review."[21]

The distinctions noted above reflect the unique qualities and purpose of rule 179, as compared with the other most common vehicles for post-judgment relief which can be asserted at the trial level. Obviously, the underlying purpose of any procedural rules, and their application, should always serve the ends of substantive justice; therefore, courts should not go out of their way to deprive litigants of remedies for failure to adhere to every conceivable procedural nicety. Nevertheless litigants, through their counsel, should at least make every effort to understand the distinctions between the various forms in which post-judgment relief may be sought and proceed as appropriately as possible within that context.

III. Application of Rule 179(b)

A. *Decisional Limitations on Application of the Rule*

A number of recent Iowa Supreme Court decisions have attempted to answer several further questions about the proper application of rule 179(b) left open (or at least not definitively disposed of) by the language of the rule itself. Those cases held rule 179(b) motions inappropriate following the granting of summary judgment[22] and judicial review of the decision of an administrative board[23] but proper for purposes of challenging a court's decision sustaining a special appearance.[24] An examination of the cases in some detail should help to clarify the court's outlook on the proper application of rule 179(b) prior to the recent changes in certain other of the Iowa Rules of Civil Procedure bearing on rule 179(b) motions.

1. *Summary Judgment*

Prior to the issuance of the Iowa Supreme Court's decision in *City of Eldridge v. Caterpillar Tractor Co.*,[25] the most direction given by the court as to the propriety of a rule 179 motion following a summary judgment disposition lay in its expression of doubt in *Petit v. Ervin Clark Construction Co.*[26] whether rule 179 was at all applicable in a summary judgment con-

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560 (Iowa 1974).

20. *E.g.*, Dutcher v. Lewis, 221 N.W.2d 755, 758 (Iowa 1974).

21. Iowa R. Civ. P. 179(a).

22. City of Eldridge v. Caterpillar Tractor Co., 270 N.W.2d 637, 640 (Iowa 1978); *see* Orr v. Iowa Public Service Co., 277 N.W.2d 899, 901 (Iowa 1979).

23. Budde v. City Development Board, 276 N.W.2d 846, 849-50 (Iowa 1979).

24. Kagin's Numismatic Auctions v. Criswell, 284 N.W.2d 224, 226 (Iowa 1979).

25. 270 N.W.2d 637 (Iowa 1978).

26. 243 Iowa 118, 127-28, 49 N.W.2d 508, 513 (1951).

text.[27] In *City of Eldridge*, however, the court resolved the issue by holding rule 179 "inapplicable" in a summary judgment proceeding.[28] The chronology of the events leading to this resolution consisted of the granting of defendant's motion for summary judgment on May 23, 1977, the filing by plaintiff of a rule 179(b) motion the following June 2, the district court's denial of plaintiff's rule 179(b) motion on June 24, and the filing of plaintiff's notice of appeal (from the district court's orders of both May 23 and June 24) on July 21.[29] Defendant's motion to dismiss the appeal as untimely was ordered submitted with the appeal and ultimately provided the basis for the court's decision sustaining the district court's outcome in favor of the defendants.[30]

The court commenced its discussion of the procedural issue involved by noting that if the "plaintiff's motion under rule 179(b), R.C.P., was filed in a timely manner" and if it had been a "proper" rule 179(b) motion, it "would have served to toll the running of the 30-day period for appeal as provided for in rule 5 of the Rules of Appellate Procedure."[31] Conversely, "if plaintiff's 179(b) motion was not proper, then the appeal was not taken within the 30-day period following the order of the trial court sustaining the motion for summary judgment," and dismissal of the appeal would be required.[32] The court's analysis involved (a) a review of the express terms of rules 179 and 237 of the Iowa Rules of Civil Procedure, (b) inferences to be drawn from prior opinions, (c) the purpose behind rule 179, and (d) a review of the analogous rule 52 of the Federal Rules of Civil Procedure.[33]

a. *Express Language of Applicable Rules.* The court in *City of Eldridge*, interpreted rule 179 as an integrated whole by concluding that the motion procedure established by rule 179(b)[34] was applicable only to the types of proceedings described in rule 179(a).[35] Having concluded that a rule 179(b) motion is applicable "only when the court is 'trying an issue of fact

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27. *Petit* involved an action for funds claimed due based on alleged services and use of equipment in the performance of roadwork. The court rendered a summary judgment for plaintiff without making written findings of law and fact, which the defendants claimed were required by Iowa Rule of Civil Procedure 179. *Id.* at 513.

28. City of Eldridge v. Caterpillar Tractor Co., 270 N.W.2d at 641.

29. *Id.* at 639.

30. *Id.* at 640.

31. *Id.*

32. *Id.*

33. *Id.* at 640-41.

34. Iowa Rule of Civil Procedure 179(b) provides: "(b) On motion joined with or filed within the time allowed for a motion for new trial, the findings and conclusions may be enlarged or amended and the judgment or decree modified accordingly or a different judgment or decree substituted. . . ." IOWA R. CIV. P. 179(b).

35. Iowa Rule of Civil Procedure 179(a) provides: "(a) The court trying an issue of fact without a jury, whether by equitable or ordinary proceedings, shall find the facts in writing, separately stating its conclusions of law; and direct an appropriate judgment. . . ." IOWA R. CIV. P. 179(a).

without a jury,' " the court's next step was to determine "whether a summary judgment proceeding constitutes the trying of 'an issue of fact without a jury.' "[36] Again, the court commenced its next step of analysis by looking to the express language of the rule governing summary judgment procedure.[37] On the basis of the rule's language, the court characterized a summary judgment proceeding as involving "a determination that the moving party, not upon a factual resolution of an issue, but as a matter of law, is entitled to judgment."[38] Accordingly, the court concluded that a trial court passing on a motion for summary judgment was not "trying an issue of fact without a jury,"[39] (and therefore was not engaged in the type of proceeding to which rule 179(a) was directed) but was instead "determining whether there were issues of material fact for submission to a trier-of-fact."[40]

b. *Prior Judicial Rulings.* Having concluded on the basis of the express language of the applicable procedural rules that a trial court's ruling on a motion for summary judgment does not constitute a trial of an issue of fact without a jury, the court in *City of Eldridge* then searched for existing precedent consistent with such a result.[41] Little existed. The court noted, however, that although it had never directly addressed the issue, it had (as has already been noted) expressed doubt whether rule 179 was applicable in a summary judgment context.[42] Thus, at least an inference could be drawn from prior judicial actions that a rule 179(b) motion was inapposite following summary judgment.

c. *Purpose of Rule 179.* In *City of Eldridge,* the court buttressed its

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36. City of Eldridge v. Caterpillar Tractor Co., 270 N.W.2d at 640.

37. Iowa Rule of Civil Procedure 237(c) provides in pertinent part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . .

IOWA R. CIV. P. 237(c).

38. City of Eldridge v. Caterpillar Tractor Co., 270 N.W.2d at 640.

39. *Id.*

40. *Id.*; *see also* Union Trust & Savings Bank v. Stanwood Feed & Grain, Inc., 158 N.W.2d 1, 3 (Iowa 1968) (the court was also concerned with the distinction between a trial and a proceeding on a motion for purposes of determining the propriety of a post-judgment motion). In *Union Trust,* the plaintiff had been granted a summary judgment and caused a general execution to be issued. *Id.* at 2. Thereafter, however, an intervenor's motion to dissolve the writ of execution was granted. *Id.* The plaintiff then moved for a new trial, followed by an attempted appeal. The court held that the plaintiff's motion for new trial was improper and therefore could not enlarge or extend the statutory period for taking an appeal from the order dissolving the writ of execution. *Id.* The plaintiff's motion was held improper because the trial court's determination of the matters raised by the intervenor's motion to dismiss was not a trial, "since a trial is limited to issues raised by pleadings and Rule 109 specifically points out a motion is not a pleading." *Id.* at 3; *accord* Dragstra v. Northwestern State Bank, 192 N.W.2d 786, 792 (Iowa 1971).

41. City of Eldridge v. Caterpillar Tractor Co., 270 N.W.2d at 640.

42. *Id. See* notes 26, 27 *supra.*

conclusions with a consideration of the purpose behind rule 179.[43] The court repeated its observation articulated in an earlier case that one of the primary purposes of a rule 179(b) motion is "to advise counsel and the appellate court of the basis of the trial court's decision in order that counsel may direct his attack upon specific adverse findings or rulings in the event of an appeal."[44] Revealing its consciousness of the fact that accomplishment of this purpose should be no less valuable following summary judgment than in any other procedural context on appeal, however, the court noted that rule 118 (requiring specific rulings on each separate ground of a motion) guaranteed "the clarification of the legal grounds for either sustaining or overruling a motion."[45] This result follows from the fact that sustaining a motion for summary judgment is "nothing more nor less than a determination that there are no issues of material fact, and that the moving party is entitled to judgment as a matter of law, *both of which elements must be specifically alleged by the moving party.*"[46] Thus, where the trial court's disposition of a motion for summary judgment complies with rule 118,[47] "the basis of the

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43. City of Eldridge v. Caterpillar Tractor Co., 270 N.W.2d at 641.

44. *Id.* *See* note 5 *supra.*

45. City of Eldridge v. Caterpillar Tractor Co., 270 N.W.2d at 641. Iowa Rule of Civil Procedure 118 provides: "A motion, or other matter involving separate grounds or parts, shall be disposed of by separate ruling on each and not sustained generally." IOWA R. CIV. P. 118. It can easily be demonstrated that in *City of Eldridge*, the district court's adherance to the requirements of rule 118 when ruling on the defendant's motion for summary judgment furnished plaintiff with all the detail necessary on which to mount an appeal. The three grounds upon which defendant's motion for summary judgment was sustained were expressly and separately set forth in the district court's May 23, 1977 ruling on the motion, in full compliance with rule 118. The additional matter on which plaintiff sought a finding with its rule 179(b) motion did not concern any ground for defendant's motion for summary judgment on which the district court had failed to rule, but rather involved the purported existence of a confidential relationship between plaintiff and one of the defendants which plaintiff had argued existed in its resistance to the motion for summary judgment. *Id.* at 639. The district court, therefore, quite properly responded to the plaintiff's rule 179(b) motion by noting that the finding sought by plaintiff's motion had been, by implication, decided against plaintiff in the ruling on defendant's summary judgment motion. *Id.* The primary purpose of rule 179(b) had thus already been fulfilled.

46. *Id.* at 641 (emphasis supplied). Both of the requisite elements had been alleged in defendant's motion for summary judgment, along with the specific grounds warranting the grant of summary judgment. *Id.* at 639. As has already been pointed out, *see* note 45 *supra*, the subject of plaintiff's rule 179(b) motion was not any of the grounds asserted in defendant's motion, but rather involved an argument raised by plaintiff in response to that motion. It is significant to note that the theory which plaintiff felt so important in its rule 179(b) motion was not in the petition with which it initiated the suit, *id.* at 638, or in the later amendment to that petition filed to cure some of the pleading deficiencies asserted in one of the defendants' motion to dismiss. *Id.* at 639.

47. A detailed discussion of what is required to comply with Iowa Rule of Civil Procedure 118 is beyond the scope of this article. It may be noted in passing, however, that the Iowa Supreme Court has not always reversed for failure to comply with rule 118. *E.g.*, Melsha v. Tribune Pub. Co., 243 Iowa 350, 51 N.W.2d 425, 428 (1952). One commentator, in discussing *Melsha*, wrote:

ruling is made obvious to the parties involved," there being "no findings of fact which could be amended or enlarged."[48]

d. *Comparison of Rule 179 with Federal Rule of Civil Procedure 52.* Finally, the court in *City of Eldridge* referred to the operation of rule 52[49] of the Federal Rules of Civil Procedure because of its similarities to Iowa Rule of Civil Procedure 179. The emphasis seems wholly appropriate in view of the considerable attention given to the operation of Federal Rule of Civil Procedure 52 in the comment to Iowa rule 179 in Iowa Rules of Civil Procedure Annotated.[50] Although the court in *City of Eldridge* noted the amendment of Federal Rule of Civil Procedure 52 in 1946 which excluded almost all motions (including those for summary judgment) from its operation,[51] it

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> The rationale of the court in not reversing an obvious failure to comply with Rule 118, seems based upon the thought that the party here raising the matter on appeal is not deprived of any right or in any manner prejudiced, and that where the holding is clearly against him on any one of the several grounds assigned for the motion below, it is not necessary to enforce the rule on appeal. From this it may be surmised that if it is not clearly discernible by the appellate court which of the grounds ruled upon by the trial court is sustainable, then it would apply the rule. Of course, Rule 118 would then be unnecessary because the ruling below would have been erroneous and reversal would be proper without the rule. . . . [I]t is submitted that Rule 118 should be strictly enforced by the supreme court in future cases of obvious failure to comply with this rule. But it is submitted also that the party resisting the motion in the trial court should be required immediately to invoke the rule by seeking specific rulings. This would accomplish the purpose of the rule without compromising the over-all objectives of the entire system of procedural rules. Application of the rule ought to be conditioned upon its use in good faith at the trial level, and resort to it on appeal should be allowed only where the appellant has used diligence in appraising the court below of its error or in unsuccessfully requesting more specific rulings.

Comment, *Procedure-Ruling on Motion-Separate Rulings on Each Ground,* 37 IOWA L. REV. 607, 607-08 (1952).

48. City of Eldridge v. Caterpillar Tractor Co., 270 N.W.2d at 641.

49. Rule 52 of the Federal Rules of Civil Procedure provides:

> (a) EFFECT. In all actions tried upon the facts without a jury or without an advisory jury, the court shall find the facts specifically and state separately its conclusions of law thereon. . . . (b) AMENDMENT. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. . . .

FED. R. CIV. P. 52.

50. 2 IOWA R. CIV. P. ANN., *supra* note 4, at 504-06 (comment to rule 179).

51. City of Eldridge v. Caterpillar Tractor Co., 270 N.W.2d at 641. "The last sentence of rule 52(a) as amended will remove any doubt that findings and conclusions are unnecessary upon decision of a motion, particularly one under rule 12 [motions directed at pleadings] or rule 56 [motions for summary judgment]. . . ." 28 U.S.C.A. Rule 52 (West 1971) (Notes of Advisory Committee on 1946 Amendment to Rules); *see* 5A J. MOORE, FEDERAL PRACTICE ¶ 52.08 (2d ed. 1980). The amendment of Federal Rule of Civil Procedure 52 which excluded motions from its operation should serve as recognition of the basic inapplicability of this sort of rule's operation to the disposition of a case on motion. "[T]his rule applies not only to causes formerly placed in the equity category but also to cases formerly denominated law cases *tried* without a jury. . . . [The] Rule . . . should be construed to require findings on the *court tried issues* even though part of the issues in an action are *tried* to a jury." 28 U.S.C.A. Rule 52

found judicial interpretation of the rule preceding its amendment "informative."[52] Cases involving application of the pre-1946 Federal Rule of Civil Procedure 52 to both motions to dismiss and motions for summary judgment were cited for the proposition that dispositions pursuant to such motions presupposed that there were no triable issues of fact.[53] Accordingly, the court in *City of Eldridge* concluded that "since there are no factual determinations to be made on a motion for summary judgment, we fail to perceive how the ruling thereon could properly be amended."[54] Therefore, rule 179 was inapplicable and a rule 179(b) motion inappropriate following a summary judgment disposition.

A few months before its decision in *City of Eldridge*, the Iowa Supreme Court in *Qualley v. Chrysler Credit Corp.*,[55] had adopted the position that "a defective post-trial motion does not toll the running of the 30-day period after final judgment within which an appeal must be taken under rule 335, R.C.P. [now rule 5 of the Iowa Rules of Appellate Procedure]."[56] In *Qualley*, the court had also concluded that "a motion to enlarge or amend is not directly aimed at perfecting an appeal" and does not itself "constitute an appeal."[57] In determining whether plaintiff's post-judgment motion was "defective" for purposes of assessing the timeliness of the appeal under rule 5 of the Iowa Rules of Appellate Procedure the court necessarily concluded that the labelling of the motion was not determinative.[58] After concluding that

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(West 1971) (commentaries) (emphasis supplied).

52. City of Eldridge v. Caterpillar Tractor Co., 270 N.W.2d at 641.

53. *Id.* at 641 (citing Lindsey v. Leavy, 149 F.2d 899, 902 (9th Cir. 1945) (motion for summary judgment); Thomas v. Peyser, 118 F.2d 369, 374 (D.C. Cir. 1941) (motion to dismiss)). *See* 5A J. MOORE, FEDERAL PRACTICE ¶ 52.08 (2d ed. 1980).

54. City of Eldridge v. Caterpillar Tractor Co., 270 N.W.2d at 641.

55. Qualley v. Chrysler Credit Corp., 261 N.W.2d 466 (Iowa 1978).

56. *Id.* at 471.

57. *Id.* at 470.

58. *Id.* at 470-71. Plaintiff's motion was captioned "Motion to Enlarge or Amend Findings and Conclusions," and thus was intended to fall squarely within the applicable tolling provision of rule 5 of the Iowa Rules of Appellate Procedure which provides: "Appeals to the Supreme Court must be taken within, and not after, thirty days from the entry of the order, judgment or decree, unless a . . . motion as provided in rule 179(b) . . . is filed, and then within thirty days after the entry of the ruling on such motion." IOWA R. APP. P. 5. The Iowa Supreme Court, however, has repeatedly reviewed the substance of post-trial motions, rather than just looking to see how they were captioned, for purposes of determining their effect upon the timeliness of appeal. In *Home Savings Bank v. Klise*, 205 Iowa 1103, 1107-08, 216 N.W. 109, 110-11 (1927), for example, the court observed that "regardless of what [appellant's post-trial motion] was called, it was so considered by the parties and the court, and has served the purpose of a motion for a rehearing or a new trial." Similarly, in *Lundberg v. Lundberg*, 169 N.W.2d 815, 817 (Iowa 1969), the court, after examining the substance of the post-trial motion involved, stated: "Defendant argues his motion is in essence a motion for judgment notwithstanding the verdict and should be so considered. We cannot equate this motion with a motion for judgment notwithstanding the verdict." In a related observation, the court has noted that the "sufficiency of a judgment shall be gleaned from its substance rather than form." Wolf v. Murrane, 199 N.W.2d 90, 95 (Iowa 1972). Additionally, in *Union Trust & Savings Bank v. Stanwood Feed &*

plaintiff's rule 179(b) motion was "defective" on the four grounds discussed above, the court held that it was without jurisdiction to proceed because the appeal was not timely, more than thirty days having passed since the sustaining of the motion for summary judgment before the appeal was taken.[59]

The above decision was joined in by the Chief Justice and three of the other justices who considered the case. One justice filed a vigorous dissent, asserting that the majority opinion posed a harsh dilemma for unsuccessful counsel. On the one hand, according to the dissent, "if unsuccessful counsel does not move for an enlargement he often waives error on appeal," while, on the other hand, if he "appeals without filing a motion under rule 179(b) he not only waives possible error but also divests the trial court of jurisdiction to further consider the matter."[60] In addition, the dissent continues, "the litigant knows that if he does file the motion to enlarge under rule 179(b), he enjoys at least the hope that the trial court will rule in his favor."[61]

The language of rule 179 and an examination of the authorities cited by

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Grain, Inc., 158 N.W.2d 1, 3 (Iowa 1968), the court stated that "we should make it clear we place no great importance on the designation of a timely and proper objection by the wrong name." *See also* Kagin's Numismatic Auctions, Inc. v. Criswell, 284 N.W.2d 224, 226 (Iowa 1979); Orr v. Iowa Public Service Co., 277 N.W.2d 899, 901 (Iowa 1979); Sykes v. Iowa Power and Light Co., 263 N.W.2d 551, 553 (Iowa 1978).

59. City of Eldridge v. Caterpillar Tractor Co., 270 N.W.2d at 641-42. On the basis of this resolution of the case, the court did not have to reach the further procedural argument raised by the defendants—that even if plaintiff's motion had been consistent with rule 179 on its face, it would not have been proper based on the issues involved in the district court's ruling granting summary judgment. Brief for Appellee at 16. The plaintiff's petition asserted fraud on the part of the defendants. The purpose of plaintiff's rule 179 motion, after summary judgment had been entered against it, was to seek a specific finding on whether there had been a confidential, trust or fiduciary relationship between plaintiff and one of the defendants. City of Eldridge v. Caterpillar Tractor Co., 270 N.W.2d at 639. The significance of the finding, according to the plaintiff, was that there was a difference in the burden of proof of fraud required if such a relationship were present. Brief for Appellant at 23. Under the case which has established the basic rules for pleading fraud in Iowa, however, "the ultimate facts relied on to constitute the essential elements requisite to maintain an action for fraud must be pleaded in clear and positive terms." *In re* Lorimor's Estate, 216 N.W.2d 349, 353 (Iowa 1974). Defendants argued under this rule that if the presence of a confidential relationship would have given rise to a difference in the burden of proof of fraud, the existence of the relationship should clearly have been pleaded. Brief for Appellee at 17. As the court's opinion points out, the plaintiff failed to plead the existence of a confidential relationship. City of Eldridge v. Caterpillar Tractor Co., 270 N.W.2d at 639. Because the relationship was not among the "issues raised by pleadings," the defendants argued that the reasoning in *Union Trust, see* note 40 *supra*, precluded jurisdiction in the supreme court with respect to the district court's ruling on the *City of Eldridge* defendants' motion for summary judgment. Brief for Appellee at 17. In any event, the district court's conclusion (cited with apparent approval by the supreme court in *City of Eldridge v. Caterpillar Tractor Co.*, 270 N.W.2d at 639) that the absence of any such claimed confidential or fiduciary relationship was implicit in its summary judgment ruling probably represents an adequate response on this issue.

60. City of Eldridge v. Caterpillar Tractor Co., 270 N.W.2d at 642 (dissenting opinion).

61. *Id.*

the dissent in *City of Eldridge*,[62] however, warrant the conclusion that the dilemma is less severe than the dissent suggests. First, as has already been pointed out,[63] rule 179(b) expressly provides that "a party, on appeal may challenge the sufficiency of the evidence to sustain any finding without having objected to it by such motion or otherwise."[64] Thus, in a summary judgment context, if the undisputed facts demonstrate on appeal that the moving party is *not* entitled to judgment as a matter of law, the trial court's order will simply be reversed and remanded for appropriate action. This simply involves the application of the law to the undisputed facts. Nothing is waived by the unsuccessful litigant's failure to file a rule 179 motion in such a case. Moreover, under such circumstances it is difficult to conceive of what could possibly be gained by the filing of a rule 179 motion. The same result should follow where summary judgment was improperly entered because there was a genuine issue as to some material fact.

Second, the case authorities upon which the dissent relies regarding the question of waiver of error on appeal involve procedural contexts which are markedly different from that raised by *City of Eldridge*.[65] In *Fjelland v. Wemhoff*,[66] a plaintiff who was successful on the first of two grounds advanced by a motion did not seek a ruling on the second.[67] The matter was reversed on appeal, and the plaintiff was foreclosed from arguing the second ground of the motion, a waiver having resulted from the failure to secure a ruling on the second ground from the trial court.[68] In *City of Eldridge*, however, it was the plaintiff responding to a motion by defendants who was unsuccessful, resulting in dismissal of plaintiff's petition.[69] The matter on which plaintiff sought a rule 179 ruling was not pleaded.[70] Thus, if any waiver occurred, it resulted not from the operation of rule 179 but rather from plaintiff's original deficiencies in pleading its cause of action. If the purported confidential relationship had been pleaded, the defendants would have had to overcome it in order to secure a summary judgment in the first place. The dissent in *City of Eldridge* also cited the case of *Arnold v. Lang*[71] on the question of waiver of error on appeal and although it is closer to *City of Eldridge*, it is nonetheless clearly distinguishable. In *Arnold*, the plaintiff

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62. *Id.*

63. *See* note 3 *supra*.

64. IOWA R. CIV. P. 179(b). *See also* Arbie Mineral Feed Co. v. Nissen, 179 N.W.2d 593 (Iowa 1970); Grall v. Meyer, 173 N.W.2d 61 (Iowa 1969); Murphy v. Adams, 253 Iowa 235, 111 N.W.2d 687 (Iowa 1961).

65. City of Eldridge v. Caterpillar Tractor Co., 270 N.W.2d at 642 (dissenting opinion).

66. 249 N.W.2d 634 (Iowa 1977).

67. *Id.* at 637.

68. *Id.* at 638.

69. City of Eldridge v. Caterpillar Tractor Co., 270 N.W.2d at 638.

70. *Id.* at 638-39.

71. 259 N.W.2d 749, 753 (Iowa 1977).

brought a dram shop action.[72] In response to the defendant's motion to dismiss based on the plaintiff's failure to satisfy certain notice requirements under the statute, the plaintiff asserted the unconstitutionality of the statute.[73] The trial court did not address the constitutional question, nor did the plaintiff seek an additional rule 179(b) ruling, and the plaintiff was held to have failed to preserve the error.[74] However, a trial court's conclusions of law and interpretation of pertinent statutes are not binding on appeal.[75] Moreover, in *City of Eldridge,* the trial court noted in response to the plaintiff's post-judgment motion that "the finding sought by plaintiff's motion '[had] been by implication decided against plaintiff' in the previous order sustaining the defendants' motion for summary judgment."[76]

The dissent in *City of Eldridge* suggested several other reasons for which the majority's interpretation of rule 179 placed unsuccessful litigants in an "impossible" situation.[77] First, the dissent argued that the 1973 rule 179 amendments[78] resolved the doubt expressed earlier by the court concerning the rule's application in a summary judgment context[79] in favor of applicability.[80] In support of this position, the dissent in *City of Eldridge* argued: "By that amendment the trial court was given the power to enlarge or amend its conclusions in addition to its findings. Prior to that time the rule provided only for an enlargement of the findings. The 1973 amendment was aimed at precisely the situation in this case."[81] But was it really? Initially, if rule 179 is read against Federal Rule of Civil Procedure 52, as the annotated rules suggest,[82] then its application to any disposition of a case upon motion can be seriously questioned.[83] More importantly, the language changes of the 1973 amendment including "conclusions" within the scope of the rule do not warrant extension of its application to dispositions upon motion. The rule, as amended, provides for the enlargement or amendment of the trial court's "findings *and* conclusions."[84] The use of the conjunctive is not necessarily indicative of any intent to extend application of rule 179(b) to cover proceedings other than the trial of an issue of fact without a jury. The addition of a reference to "conclusions" in rule 179(b) can probably be more properly interpreted as merely effecting agreement between what may

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72. *Id.* at 750.
73. *Id.* at 753.
74. *Id.*
75. *See* note 6 *supra.*
76. City of Eldridge v. Caterpillar Tractor Co., 270 N.W.2d at 639.
77. *Id.* at 642 (dissenting opinion).
78. *See* note 3 *supra.*
79. Petit v. Ervin Clark Construction Co., 243 Iowa 118, 49 N.W.2d 508, 513 (1951).
80. City of Eldridge v. Caterpillar Tractor Co., 270 N.W.2d at 642 (dissenting opinion).
81. *Id.*
82. *See* 2 IOWA R. CIV. P. ANN. at 504-06.
83. *See* notes 51, 53 *supra.*
84. IOWA R. CIV. P. 179(b) (emphasis supplied).

be the subject of a motion under rule 179(b) and the requirement of rule 179(a) that "the court trying an issue of fact without a jury . . . shall find the facts in writing, separately stating its conclusions of law."[85] If the amendment of rule 179(b) were to support the dissent's application of the rule to situations where "findings" are not involved (*i.e.*, disposition on motion where no facts are in dispute), it should have provided for the enlargement or amendment of the trial court's "findings *or* conclusions."

Another problem posed by the dissent in *City of Eldridge* was that, on the one hand, an unsuccessful litigant "must take care not to appeal from an interlocutory order without permission," while at the same time being "careful not to act in the mistaken belief some final order was in fact interlocutory."[86] While the dissent's statement of the problem was certainly accurate enough, its application to the case at hand was less clear. It is difficult to see how the problem applies at all where a plaintiff's petition has been dismissed pursuant to a motion for summary judgment filed by the defendant. The nature of such an order leaves no doubt whatsoever as to its finality.

Finally, the dissent expressed a concern generally with forcing litigants to make "fine, error-prone judgments."[87] Citing the recent amendment to rule 5 of the Iowa Rules of Appellate Procedure to accommodate enlargement motions,[88] the dissent seemed to suggest that simply filing something called a motion to enlarge should extend the appeal period to thirty days following the trial court's action on the motion.[89] The rule of *Qualley v. Chrysler Credit Corp.*,[90] however, is loud and clear: an improper post-judgment motion will not toll the running of the thirty day period for filing an appeal under rule 5 of the Iowa Rules of Appellate Procedure.[91] Given the Iowa Supreme Court's history of going beyond the labels attached to post-trial motions to review their substance in order to determine their effect upon timeliness of appeal,[92] it certainly does not seem unduly demanding to require litigants to comply with the language and spirit of applicable procedural rules. If, to use the dissent's example,[93] a mixed question of fact and law is raised in the context of a motion for summary judgment, the solution is simple. If the facts involved in the "mixed question" are in dispute, a

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85. *Id.*

86. City of Eldridge v. Caterpillar Tractor Co., 270 N.W.2d at 642 (dissenting opinion). The consequence of appealing from an interlocutory order without permission under rule 2 of the Iowa Rules of Appellate Procedure, of course, is that the appellate court will lack jurisdiction to entertain the appeal; conversely, the incorrect assumption that a final order is interlocutory will result in the lapse of the appeal period. *Id.*

87. *Id.*

88. *See* note 130 *infra.*

89. City of Eldridge v. Caterpillar Tractor Co., 270 N.W.2d at 642 (dissenting opinion).

90. 261 N.W.2d 466 (Iowa 1978).

91. *See id.* at 470-71.

92. *See* note 58 *supra.*

93. City of Eldridge v. Caterpillar Tractor Co., 270 N.W.2d at 642 (dissenting opinion).

summary judgment disposition would be inappropriate. If the facts are not in dispute, but the conclusions based thereon are, that is what appellate courts are in the business of deciding. A rule 179(b) motion would not advance anyone's cause in either event. If, indeed, the trial court does not respond to a point or theory raised by the motion, adequate resort to clarification exists under rule 118 of the Iowa Rules of Civil Procedure.[94]

Within a matter of months following the court's decision in *City of Eldridge*, the case of *Orr v. Iowa Public Service Co.*[95] provided the court with an opportunity to clarify and expand upon its explanation of whether a summary judgment disposition constitutes a trial for purposes of determining the propriety of post-judment motions. The court in *Orr*, began its consideration of the question by noting that "[u]nder *City of Eldridge*, a summary judgment proceeding is not a trial of facts without a jury."[96] Rather, it is "a means of avoiding a trial . . ."[97] which is necessary "only when the case is not fully adjudicated on motion."[98] Although rule 176 of the Iowa Rules of Civil Procedure defines a trial quite broadly as "a judicial examination of issues in an action, whether of law for fact," the court concluded that "a trial, even as so defined, does not occur when the case is disposed of through summary judgment . . ."[99] because "[a] trial within the meaning of rule 176 is a hearing on the merits of the controversy after the opportunity for . . . preliminary proceedings has passed."[100] Included among such "preliminary proceedings," in addition to summary disposition, were motion proceedings under rules 104(b),[101] 105[102] and 222.[103] Although two Justices dissented, the court's *en banc* consideration of the case appeared to constitute a definitive disposition of the question, as well as providing guidance by way of dictum in other related situations.

2. *Judicial Review of Administrative Proceedings*

In *Budde v. City Development Board*,[104] which was decided between *City of Eldridge* and *Orr*, the court took the important step of ruling that certain types of judicial review proceedings did not constitute trials for pur-

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94. *See* text accompanying notes 45-48 *supra*.
95. 277 N.W.2d 899 (Iowa 1979).
96. *Id.* at 900.
97. *Id.*
98. *Id.*
99. *Id.* at 901.
100. *Id.*
101. Rule 104(b) of the Iowa Rules of Civil Procedure provides for motions to dismiss for failure to state a claim on which relief can be granted. IOWA R. CIV. P. 104(b).
102. Rule 105 of the Iowa Rules of Civil Procedure provides for applications for separate adjudication of law points. IOWA R. CIV. P. 105.
103. Rule 222 of the Iowa Rules of Civil Procedure provides for motions for judgment on the pleadings. IOWA R. CIV. P. 222.
104. 276 N.W.2d 846 (Iowa 1979).

poses of the application of rule 179. The case involved the attempted annexation of territory to the City of Dubuque. The city development committee heard, considered and approved the subject annexation petition by the City of Dubuque, and objectors to the annexation then filed suit in district court for judicial review.[105] No additional evidence was taken by the district court in the judicial review proceeding, pursuant to the parties' prior agreement not to introduce evidence beyond that already in the record; the agreement was reflected in the court's pretrial conference order.[106] The district court set aside the approval of the petition by the committee and the subsequent election, in which a majority of qualified electors approved the annexation. Neither actual findings of fact on new evidence nor *de novo* review of prior evidence was made.[107]

The application of rule 179(b) came into play because the board and committee filed a motion to reconsider. The subsequent filing of the notice of appeal following denial of the motion was untimely if the motion was not a proper one under rule 179. After noting the rule established in *City of Eldridge* that "rule 179 is applicable only when the court is 'trying an issue of fact without a jury,' . . ."[108] the court proceeded to examine the nature of the judicial review proceeding. Relying primarily upon the parties' pretrial agreement that no additional evidence would be taken and the judicial re-

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105. Chapter 368 of the Iowa Code establishes the procedures currently governing annexation of territory to Iowa municipalities. The city development committee is composed of the state city development board (a three-member body created by Iowa Code section 368.9) and local representatives appointed by the board under Iowa Code section 368.14 to consider the annexation petition. Iowa Code section 368.16 directs the committee to approve any proposal which it finds to be in the public interest. Thereupon the board is to set a date within ninety days for a special election on the proposal. IOWA CODE § 368.19 (1981). Objectors are provided the right by Iowa Code section 368.22 to appeal a decision of the board or a committee, or the legality of an election, to the appropriate district court.

106. The order from the pretrial conference stated in part:

> All parties advised the Court that no party proposes to introduce evidence in addition to the record before the City Development Board and the official record of the subsequent election, all of which are now on file herein, and any hearing required will be restricted to legal arguments only and shall not be an evidentiary hearing.

Budde v. City Development Board, 276 N.W.2d 846, 848 (Iowa 1979). These provisions of the order seemed quite compatible with the instruction of Iowa Code section 368.22 that "[t]he court's review on appeal . . . is limited to questions relating to jurisdiction, regularity of proceedings, and whether the decision appealed from is arbitrary, unreasonable, or without substantial supporting evidence." Similarly, the Iowa Administrative Procedure Act (which the court held controlled over chapter 368 as the exclusive method of judicial review, *id.* at 850) provides that "[i]n proceedings for judicial review of agency action in a contested case . . . a court shall not itself hear any further evidence with respect to those issues of fact whose determination was entrusted . . . to the agency in that contested case proceeding." IOWA CODE § 17A.19(7) (1981). Although the court did not hold that the proceedings of the board or committee constituted a "contested case," *id.* at 851, the result was consistent with such a characterization.

107. *Id.* at 848.

108. *Id.* at 851.

view hearing would be restricted to legal arguments, the court concluded that there had been no "trying of an issue of fact."[109] Accordingly, the court held that there had been "no appropriate basis upon which to premise a rule 179(b) motion to reconsider."[110] Thus, the motion filed did not toll the thirty day period for filing a notice of appeal, and the appeal was dismissed.

In view of the court's references to the exclusive review provisions of the Iowa Administrative Procedure Act, the decision in *Budde* had enormous significance to the procedural aspects of judicial review proceedings. Dictum in the opinion clearly reflected the court's impression that a rule 179(b) motion could not be used as a means of seeking revision of the outcome of a trial court's review of agency action in a contested case.[111] The court's opinion, note, was consistent with the federal courts' application of rule 52 of the Federal Rules of Civil Procedure to district court review of administrative action.[112]

3. *Jurisdictional Determination on Special Appearance*

In *Kagin's Numismatic Auctions, Inc. v. Criswell*,[113] Kagin's (an Iowa corporation with its principal place of business in Polk County) entered into an agreement with Criswell (a resident of Florida) to sell Criswell's coins at auction at a coin show. Kagin's later sued Criswell in Iowa for return of a portion of a cash advance it had made to Criswell as security for the coins and for interest and commission. Criswell filed a special appearance, supported by affidavit, challenging jurisdiction. Kagin's responded with a resistance, also supported by affidavit. The trial court sustained the special appearance, but on the basis of a file from which Kagin's resistance and affidavit had inadvertently been omitted, Kagin's moved for reconsideration on the basis of the entire record. The trial court reconsidered, with Kagin's resistence and affidavit as part of the record, but reached the same result. Kagin's appealed. The problem, of course, was that Kagin's notice of appeal was filed within thirty days of the second sustention of the special appearance but not within thirty days of the first sustention. Thus, if the motion to reconsider was proper, the appeal period was tolled and the notice of appeal was timely; if the motion was not proper, there was no tolling and the court would lack jurisdiction to proceed with the appeal.

The court regarded Kagin's motion to reconsider as a rule 179(b) motion.[114] Accordingly, given the principle that rule 179 applied only when the court was trying an issue of fact without a jury, the question became "whether a court tries an issue of fact without a jury in a special appearance

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109. *Id.*
110. *Id.*
111. *Id.*
112. *See* 5A J. MOORE, FEDERAL PRACTICE ¶ 52.08, at 2737-38 (2d ed. 1980).
113. 284 N.W.2d 224 (Iowa 1979).
114. *Id.* at 226.

proceeding."[115] The court held that it did. The court reasoned:

> The hearing and disposition of a special appearance is a special proceeding; upon the materials and any testimony presented, the trial court finds the facts, draws conclusions of law, and enters its decision. . . . While the facts in this case are not controverted, the district court nonetheless had to find the facts.[116]

One might ask, with good reason, how a proceeding in which the facts "are not controverted" can possibly be regarded as differing in any substantial way from a summary judgment disposition so as to yield a different result than was achieved in *City of Eldridge* or *Orr*.[117] Beyond that, any consideration by the court of the language of the Iowa rule governing special appearances[118] would clearly have revealed that such a proceeding falls squarely within the classification of "preliminary proceedings" which can "result in rulings disposing of a case without a trial,"[119] with respect to which a rule 179 motion had been held improper in *Orr*.[120]

In *Matter of Estate of Dull*,[121] the court further confused the issue by equating a motion for new trial with a rule 179(b) motion. *Estate of Dull* also involved a special appearance challenging the jurisdiction of the trial court.[122] The special appearance was sustained and a motion for new trial was later denied. Thereafter a notice of appeal was filed, within thirty days from the date of the ruling on the motion for new trial but beyond thirty days from the ruling on the special appearance.[123] The timeliness of the appeal was therefore dependant upon the propriety of the motion for a new trial.

After noting the well-settled rule that "a proper motion for a new trial extends the time for appeal,"[124] the court's opinion veers off to an analysis

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115. *Id.*

116. *Id.*

117. Had there been any controverted facts, the court could have relied on the federal courts' application of rule 52 of the Federal Rules of Civil Procedure in venue cases, *see* 5A J. MOORE, FEDERAL PRACTICE ¶ 52.08, at 2738 (2d ed. 1980), as further support for its decision. No such authority, however, was cited.

118. Rule 66 of the Iowa Rules of Civil Procedure provides:

> A defendant may appear specially for the sole purpose of attacking the jurisdiction of the court, but only *before taking any part in a hearing or trial of the case*, personally or by attorney, or filing a motion, written appearance, or pleading. The special appearance shall be in writing, filed with the clerk and shall state the grounds thereof. If the special appearance is erroneously overruled, defendant may plead to the merits *or proceed to trial* without waiving such error.

IOWA R. CIV. P. 66 (emphasis supplied).

119. Orr v. Iowa Public Service Co., 277 N.W.2d 899, 901 (Iowa 1979).

120. *Id.*

121. 303 N.W.2d 402 (Iowa 1981).

122. *Id.* at 403.

123. *Id.* at 404.

124. *Id.* at 404. *See* IOWA R. APP. P. 5(a).

of whether the motion for new trial "should have been treated as an Iowa rule 179(b) motion."[125] The point, however, is that regardless of whether the motion fell within the confines of rule 179, the court had to determine that the special appearance proceeding constituted a trial in order to toll the running of the appeal period. The court did not engage in any new analysis on this point, choosing instead simply to rely on the precedent it had established to that effect a couple of years earlier in *Criswell*.[126] Once the court expressed its satisfaction that a special appearance proceeding is the equivalent of a trial, why did it feel that it had to consider rule 179 at all, in view of the fact that the motion was designated a motion for new trial,[127] and Iowa Rule of Appellate Procedure 5(a) expressly tolls the running of the appeal period for a motion for new trial? The answer is not clearly discernible.

B. *Related Rule Amendments*

One could easily conclude that what really lay behind the court's opinion in *Criswell* was a decision to do away entirely with the basic functional approach toward rule 179 developed in *City of Eldridge*. Indeed, that is precisely what the court did in its 1980 report to the General Assembly.[128] The Iowa Supreme Court amended rule 237(c) establishing the rules for proceedings on summary judgment motions by adding: "If summary judgment is rendered on the entire case, rule 179(b) shall apply." In order to undo what it had done in the *Budde* case, on the basis of the precedent established by *City of Eldridge*, the court propounded a new Division XVI to be added to the Iowa Rules of Civil Procedure to govern proceedings for judicial review of agency action. That division, consisting of new rules 331-33, provides that in proceedings for judicial review of agency action in a contested case pursu-

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125. Matter of Estate of Dull, 303 N.W.2d at 404-05.

> [The] motion for a new trial was in substance a motion requesting the trial court to reconsider and amend its ruling on the special appearance. The motion alleged both errors of law and fact and requested the trial court to rescind its prior ruling. In addition, in ruling on the motion for new trial, the court, after stating that such a motion does not lie from a ruling on a special appearance, in effect enlarged the findings contained in its ruling on the special appearance. We conclude that the motion for a new trial was in substance a motion within the meaning of rule 179(b). Hence, the appeal was timely, and we possess jurisdiction of the appeal.

Id. at 405.

126. *Id.* at 404-05.

127. Iowa Rule of Civil Procedure 244 discusses at great length the procedure for filing a motion for new trial and expressly provides for all of the grounds upon which it may be predicated. The express language of rule 179(b) on the other hand, clearly recognizes that a motion under that rule is something totally separate and apart from a motion for new trial: "On motion *joined with* or *filed within the time allowed for a motion for a new trial*, the findings may be enlarged or amended, and the judgment modified accordingly." Iowa R. Civ. P. 179(b). (emphasis supplied).

128. 1980 Iowa Acts ch. 1207.

ant to section 17A.19 of the Iowa Code, "the provisions of rule 179(b) shall apply."[129]

These peremptory amendments, which became effective on July 1, 1980, eliminated in one fell swoop the functional analysis of rule 179 and its proper application which the court had so carefully been developing in the *City of Eldridge* line of cases. If rule 179 is to be read as an integral whole, and rule 179(b) is designed to provide for motions in only the type of proceeding to which rule 179(a) speaks (*i.e.*, a court trying an issue of fact without a jury), then what consistency can there be in the court, by fiat, determining that rule 179(b) "applies" to summary judgments and judicial review proceedings—both of which the court had just determined did not constitute "trials." These amendments bear no resemblance whatsoever to the modification of the predecessor to Iowa Rule of Appellate Procedure 5 in order to extend its tolling provision to include rule 179(b) motions.[130] The reason for extending the tolling provisions to rule 179(b) motions was obviously to allow the trial court to fully dispose of those motions (and perhaps the need for an appeal) before requiring the commencement of an appeal; it had nothing to do with what was the proper subject or scope of a rule 179(b) motion. The 1980 amendments described above, on the other hand, are totally incompatible with the reasoning developed in the *City of Eldridge* line of cases describing the appropriate function and scope of a rule 179(b) motions by providing that such motions "apply" precisely where the court had just held them inappropriate.

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129. Iowa R. Civ. P. 333(c).

130. Prior to 1970, Iowa Rule of Civil Procedure 335 (the predecessor to Iowa Rule of Appellate Procedure 5) provided for tolling of the appeal period only in the case of motions for new trial or for judgment notwithstanding the verdict. Applications to the trial court to modify, reconsider or set aside a previous final judgment did not toll the time limit of Iowa Rule of Civil Procedure 335. Litigants filing post-judgment motions in the latter class who waited for a ruling before commencing appeal thus often fell into the trap and lost their appeal. *See, e.g.*, Lundberg v. Lundberg, 169 N.W.2d 815, 817 (Iowa 1969); Neff v. Iowa State Highway Commission, 253 Iowa 98, 102, 111 N.W.2d 293, 296 (1961). The failure of rule 335 to toll the appeal period pending resolution of a rule 179(b) post-judgment motion met with significant criticism:

> In a recent case appellant had filed what seemed to be a motion to enlarge or amend findings of fact by a court and when the ruling of the trial court proved unsatisfactory he filed notice of appeal; the appeal was dismissed because notice was not filed within the 30-day period following final judgment or exceptions allowed in R. Civ. P. 335-36. Since rule 179(b) is of the same nature as a motion for new trial or judgment notwithstanding, there seems to be no valid reason why a motion to enlarge or amend findings of fact by a court is not included along with motions for new trial and judgment notwithstanding the verdict in the exceptions to rule 335 which extend time to file notice of appeal.

Rendleman & Pfeffer, *Appellate Procedure and Practice*, 19 Drake L. Rev. 74, 79 (1969). Rule 335 was soon amended to allow for tolling of the appeal period by a rule 179(b) motion as well, 1970 Iowa Acts ch. 1311, and the change was carried through to, and remains a part of Iowa Rule of Appellate Procedure 5(a). *See* Sykes v. Iowa Power & Light Co., 263 N.W.2d 551, 553 (Iowa 1978).

Moreover, the 1980 amendments are totally inconsistent with the oft-repeated observations of commentators, and the court itself, that the Iowa procedural rules should track their counterpart provisions in the Federal Rules of Civil Procedure. As has already been noted,[131] the court's decision in *City of Eldridge* placed considerable reliance on the relationship between Iowa Rule of Civil Procedure 179 and Federal Rule of Civil Procedure 52. The amendment of rule 52 in 1946 "to exclude almost all motions, including those for summary judgment, from its operation," was regarded as firm support for a similar limitation of Iowa rule 179. The corresponding relationship between Iowa rule 179 and federal rule 52 as applied to judicial review of agency action and preliminary venue and jurisdiction matters has also already been discussed.[132] Both the annotation to Iowa Rule of Civil Procedure 237[133] and case authority[134] indicating the close relationship between the federal and Iowa summary judgment rules could be cited as providing further support for the functional analysis of rule 179 advanced by the *City of Eldridge* line of cases. All of this appears to have been ignored in the course of promulgating the 1980 amendments. Although the court has since had an opportunity to refer to the amendments,[135] we have not yet had the benefit of any detailed exposition of the rationale for the changes.[136]

Another question left open by the 1980 amendments is the vitality of the dictum in *Orr*[137] to the effect that a rule 179(b) motion would also be inapplicable to disposition of cases by way of motions under Iowa Rules of Civil Procedure 104(b), 105 and 222. The court's treatment of *Orr* in *Matter of Estate of Dull*[138] is limited to drawing the distinction between the special appearance proceeding involved in that case and the types of "preliminary proceedings" discussed in *Orr*. It does not even mention the fact that the *City of Eldridge* and *Orr* holdings which rendered a rule 179(b) motion inapplicable to a summary judgment disposition, had been overturned by the 1980 amendment to Iowa Rule of Civil Procedure 237. By only amending rule 237, was it intended that rule 179(b) motions remain inapplicable to dispositions by motion under Iowa Rules of Civil Procedure 104(b), 105 and 222? We have yet to see an answer.

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131. *See* text accompanying notes 49-54 *supra*.

132. *See* note 117 and text accompanying note 112 *supra*.

133. 3 IOWA R. CIV. P. ANN., *supra* note 4, at 497-502 (comments on rule 237).

134. *E.g.*, Brody v. Ruby, 267 N.W.2d 902 (Iowa 1978). "Because our rule 237 is patterned on rule 56, Federal Rules of Civil Procedure, federal interpretations are persuasive." *Id.* at 904.

135. Nuzum v. State of Iowa, 300 N.W.2d 131, 134 (Iowa 1981).

136. A VESTAL & P. WILLSON, IOWA PRACTICE § 20.04 at 128 (Cum. Supp. 1981) states that "under the 1980 amendment to Rule 237(c) it is now clear that a motion to enlarge or amend a summary judgment on the entire case is proper and will toll the time for appeal under the appellate rules as well." It does not, however, furnish any reasoning for the departure from the analysis in the *City of Eldridge* line of cases which had yielded just the opposite result.

137. 277 N.W.2d 899, 901 (Iowa 1979).

138. 303 N.W.2d 402, 404 (Iowa 1981).

For all of the reasons suggested above, the desirability of the 1980 amendments as they bear on the application of rule 179(b) can be seriously questioned. The court had, in several cases over a period of two years, developed a set of principles for the application of rule 179(b) based on a functional analysis of its purpose and scope and maintaining substantial consistency with treatment of like situations under the federal rules. Overturning those results with a rule change unsupported by explanation simply does not seem to constitute the most logical or predictable approach toward the development of procedural law. At this point in time, though, the 1980 amendments do represent the current status of the law governing the application of rule 179(b).