

Comment

Revised Trial Rule 59 and *P-M Gas*

*The Honorable Jonathan J. Robertson**

Bridging the gap between trial and appeal has been, at times, a frustrating and difficult task for the prospective appellant. Once again, the methodology of the step is undergoing review by the Indiana Supreme Court Advisory Committee on Revision of Rules of Practice and Procedure to make Trial Rule 59 comport with *P-M Gas & Wash Co. v. Smith*.¹ An examination of past rules reveal that the procedure has broken down periodically from either overuse or overly strict application, thereby requiring the drafting of a new rule to correct defects discovered in the day-to-day application of the procedure.

I. A HISTORICAL LABYRINTH

At early common law, Indiana followed the English method of appellate practice whereby a judgment at law could only be attacked by a writ of error.² In such a case, the appellant filed the writ with a court of chancery. The ensuing order, if granted, would mandate the trial court to prepare and deliver the record to the court of appeals and would grant a commission to the appellate court to act on the matter.³ The appellate court only examined questions of law in reviewing writs of error issued by the chancery court.⁴ In contrast, the appellate court could review judgments of equity courts by appeal only.⁵ The appellate court could examine issues of fact as well as law on appeal.⁶

Before and after the writ of error procedure was abolished in favor of an appellate system, appellate counsel had the difficult task of

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¹375 N.E.2d 582 (Ind. 1978), discussed in Harvey, *Civil Procedure and Jurisdiction, 1979 Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 57, 81-85 (1980) [hereinafter cited as Harvey, *1979 Survey*]; Harvey, *Civil Procedure and Jurisdiction, 1978 Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 42, 67-68 (1979).

²A. IGLEHART, PLEADINGS AND PRACTICE 419-20 (1879).

³*Id.* See, e.g., Deputy v. Tobias, 1 Blackf. 311 (Ind. 1824).

⁴A. IGLEHART, *supra* note 2, at 419-20.

⁵*Id.*

⁶*Id.*

deciding which matters were properly a part of the record without filing a bill of exceptions. Generally, all written documents such as pleadings and motions were a part of the record, whereas written evidentiary documents or oral testimony were not included.⁷ The supreme court's policy of excluding certain questionable matters from review by omitting them from the record did not escape criticism:

There has been no little confusion in the practice in the supreme court in determining what is properly in the record in a given cause. . . . [T]he court seems to have favored that rule which would exclude from the record everything doubtful. Whether this is wise, it would hardly be profitable to inquire, but rulings of this class have frequently resulted in a failure of justice to the client for want of legal discrimination not possessed by the average attorney.⁸

The supreme court also required that documents properly of record had to be *copied* in the transcript; accordingly, originals in the record were disregarded.⁹

The bill of exceptions was another area of bewildering complexity. The bill of exceptions was designed to bring matters into the record which were not included as a matter of course.¹⁰ Unless certain matters were made part of the record by filing a bill of exceptions in a timely manner, an objection based on such matters would not be reviewed, although the matters had been accurately copied into the record by the clerk.

The supreme court strictly enforced the technical requirements for a bill of exceptions. For example, a document which lacked a formal caption denoting the document as a bill of exceptions was insufficient to preserve error, even when the document had been certified by the trial court and judge.¹¹ Moreover, matters in the bill would not be considered without a showing in the record that a party had filed the bill with the clerk after it had been signed by the judge.¹² The supreme court additionally held that a bill of exceptions which correctly *referred* to the pages in the transcript where the evidence was located was inadequate to present error; instead, such

⁷*Id.* at 422-24.

⁸*Id.* at 424.

⁹L. EWBANK, A MANUAL OF PRACTICE IN THE SUPREME AND APPELLATE COURTS OF INDIANA § 116, at 240 (2d ed. 1915).

¹⁰See generally 3 F. WILTROUT, INDIANA PRACTICE §§ 2271-2272, 2275 (1967); 4 WORKS' INDIANA PRACTICE §§ 62.6-8 (4th ed. C. Lowe 1952) [hereinafter cited as WORKS' 4th ed.].

¹¹*Knickerbocker Ice Co. v. Lewis*, 160 Ind. 494, 497, 67 N.E. 188, 189 (1903).

¹²*Venezini v. Morrissey*, 161 Ind. 391, 392, 68 N.E. 682, 682 (1903).

evidence had to be physically embraced within the bill of exceptions.¹³ Furthermore, although a motion for a new trial was properly of record without a bill of exceptions, factual averments contained in the motion did not become part of the record unless they were incorporated in a proper bill of exceptions.¹⁴ Also, a bill of exceptions which concluded that it contained all of the "testimony" in a given cause saved nothing for review because such a conclusion was not the equivalent of a statement that the bill contained all of the "evidence."¹⁵ Conversely, matters which *were* properly part of the record without a bill of exceptions could not be brought *into* the record by a bill of exceptions.¹⁶

In large measure, however, the confusion concerning documentary matters was eliminated by the following statute:

Matters that are part of the record without a bill of exceptions.—Every pleading, motion in writing, report, deposition or other paper filed or offered to be filed, in any cause or proceeding, whether received by the court, refused or stricken out, shall be a part of the record from the time of such filing or offer to file. Any order or action of the court in respect to any such pleading, motion in writing, report, deposition or other paper, and every exception thereto taken by any party, shall be entered by the clerk on the minutes or record of the court, and the same, when so entered, shall be a part of the record without any bill of exceptions. Every oral motion, and the ruling of the court thereon and the exceptions taken thereto, shall be entered upon the record or minutes of the court and shall be a part of the record without any bill of exceptions: Provided, That nothing herein shall be construed to prevent the bringing into or putting into the record by proper bill or bills of exceptions any matter which, under the common laws, would not be a part of the record without a bill of exceptions.¹⁷

The current rules of procedure also obviate the need for bringing the evidence into the record by a bill of exceptions.¹⁸

The stringent requirements for attacking a judgment demonstrate that the task of merely presenting the events of a trial could

¹³Blessing v. Blair, 45 Ind. 546 (1874).

¹⁴Hopkins v. Greensburg, Knightstown, & Clarksburg Turnpike Co., 46 Ind. 187, 195 (1874).

¹⁵Gazette Printing Co. v. Morss, 60 Ind. 153, 157 (1877).

¹⁶Wilson v. State, 156 Ind. 631, 635-36, 59 N.E. 380, 392 (1901).

¹⁷IND. CODE ANN. § 2-3104 (Burns repl. 1968) (repealed effective 1970).

¹⁸IND. R. APP. P. 7.2. See also Registration & Management Corp. v. City of Hammond, 151 Ind. App. 471, 280 N.E.2d 327 (1972).

not be taken lightly. In addition, appellate counsel had to grope through an absurd procedural maze in seeking post-judgment relief. At early common law, the jury's verdict was deemed conclusive and could only be challenged by a proceeding to attain.¹⁹ To mitigate the harshness of a proceeding to attain, the common law began to recognize both a motion for a new trial, whenever "injustice had been done,"²⁰ and a writ of venire de novo, which was a writ requesting a reexamination of the facts for some error in the trial proceedings.²¹ Although both the writ and the motion requested the same remedy—a new trial, the two proceedings differed mechanically. A venire de novo was the proper method of attack when a defect appeared on the face of the record, whereas a motion for a new trial addressed matters which were not part of the record.²² Thus, if a jury returned a general verdict without determining an issue for or against either party, a venire de novo would be proper because the defect was present on the face of the record.²³ If, however, the jury or court made special findings of facts, the presumption that facts which had not been found were not proven could be controverted only by matters outside the record, such as the transcript of the evidence. Hence, the facts could be attacked only by a motion for a new trial.²⁴

The frustration resulting from post-judgment practice prior to the adoption of the modern rules generally involved the interplay of the motion for a new trial and the assignment of errors. Upon a writ of error in the early common law, all errors would be reviewed even though such errors were also grounds for a new trial.²⁵ Nevertheless, the supreme court held that if the asserted error was a proper cause for a new trial, the error must be asserted as such to

¹⁹A proceeding to attain was a product of English common law:

This inquiry was made by a grand assise or jury of twenty-four persons, usually knights, and, if they found the verdict a false one, the judgment was that the jurors should become infamous, should forfeit their goods and the profits of their lands, should themselves be imprisoned, and their wives and children thrust out of doors, should have their houses razed, their trees extirpated, and their meadows plowed up, and that the plaintiff should be restored to all that he lost by reason of the unjust verdict.

BLACK'S LAW DICTIONARY 116 (5th ed. 1979) (citing W. BLACKSTONE, 3 COMMENTARIES ON THE LAWS OF ENGLAND 402-04 (1768)).

²⁰Lowry v. Indianapolis Traction & Terminal Co., 77 Ind. App. 138, 144, 126 N.E. 223, 225 (1920).

²¹Bosseker v. Cramer, 18 Ind. 44, 46 (1862).

²²*Id.* at 46-47; Lowry v. Indianapolis Traction & Terminal Co., 77 Ind. App. at 150, 126 N.E. at 227.

²³Maxwell v. Wright, 160 Ind. 515, 518-20, 67 N.E. 267, 268-69 (1903).

²⁴See Graham v. State *ex rel.* Board of Comm'rs, 66 Ind. 386 (1897).

²⁵A. IGLEHART, *supra* note 2, at 428-29.

be properly before the court on appeal.²⁶ Under this requirement, the overruling of the motion for a new trial served as the assigned error.²⁷ In *State ex rel. Foster v. Swarts*,²⁸ the supreme court stated the now familiar purpose of this requirement:

It does not appear that the plaintiff moved the Court for a new trial. This was essential to enable the Court to review its own action. . . . It is due to the lower Court that its errors, if any, should be pointed out there, so that it may retrace its steps while the record is yet under its control. Without a motion for a new trial, the attention of that Court is not called to its own errors. It is not apprised of what they are. That motion was essential to bring any of the questions arising in the trial, before us²⁹

Another recurring problem for appellate counsel was the necessity of determining which errors fell within the parameters of the eight statutory causes for a new trial.³⁰ The early notion that only errors which could be remedied by a new trial—those errors occurring during the course of the trial—was incorrect.³¹ With respect

²⁶See, e.g., *Todd v. State*, 25 Ind. 212 (1865); *Stump v. Fraley*, 7 Ind. 679 (1856).

²⁷See, e.g., *Ferrenburg v. Studabaker Turnpike Co.*, 37 Ind. 251 (1871); *Caldwell v. Asbury*, 29 Ind. 451 (1868).

²⁸9 Ind. 221 (1857).

²⁹*Id.* at 222 (citation omitted).

³⁰The statutory causes for a new trial were:

First. Irregularity in the proceedings of the court, jury or prevailing party, or any order of court, or abuse of discretion, by which the party was prevented from having a fair trial.

Second. Misconduct of the jury or prevailing party.

Third. Accident or surprise, which ordinary prudence could not have guarded against.

Fourth. Excessive damages.

Fifth. Error in the assessment of the amount of recovery, whether too large or too small, where the action is upon a contract, or for the injury or detention of property.

Sixth. That the verdict or decision is not sustained by sufficient evidence, or is contrary to law.

Seventh. Newly-discovered evidence, material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial.

Eighth. Error of law occurring at the trial and excepted to by the party making the application; and the court, in granting new trials, may allow the same at the costs of the party applying therefor, or on the costs abiding the event of the suit, or a portion of the costs, as the justice and equity of the case may require, taking into consideration the causes which may make such new trial necessary.

IND. CODE ANN. § 2-2401 (Burns repl. 1968) (repealed effective 1970).

³¹L. EW BANK, *supra* note 9, § 39, at 84-85.

to an irregularity in the proceedings, a motion for a new trial would include erroneous rulings on proceedings for a continuance and rulings on motions to suppress depositions.³² The overruling of a motion alleging that a special judge was selected in an erroneous manner also required assignment as a cause for a new trial.³³ When a default judgment was entered, however, error with respect to a change of judge had to be independently assigned as error because a new trial was impossible.³⁴

Matters relating to a change of venue had to be alleged in a motion for a new trial.³⁵ Because a petition for removal resembles a motion for a change of venue in that both matters are collateral to the merits, Indiana courts required that any error relating to the petition be asserted in a motion for a new trial.³⁶ On the other hand, if the court permitted an amendment to the pleadings, even during the course of trial, the error relating to the petition had to be assigned independently.³⁷

The courts zealously enforced this rigid system of classifying errors according to the statutory causes for a new trial. With respect to tort damages, only the fourth statutory cause, excessive damages,³⁸ was available to raise an error,³⁹ even when an error was based on incorrect instructions.⁴⁰ The fifth statutory cause, involving errors in damage amounts,⁴¹ embraced tort actions only when the alleged error was inadequate damages.⁴² Cases based on breach of contract or detention of property could also qualify under the fifth statutory clause, provided the recovery was allegedly too large or too small.⁴³

The sixth ground, which provided "[t]hat the verdict or decision is not sustained by sufficient evidence, or is contrary to law,"⁴⁴ required an allegation that the verdict or decision was contrary to law

³²*Id.*, § 41, at 85-86. See also 4 WORKS' 4th ed., *supra* note 10, §§ 61.27-28, at 29-30.

³³Walb v. Eshelman, 176 Ind. 253, 260, 94 N.E. 566, 569 (1911).

³⁴Goodrich v. Stangland, 155 Ind. 279, 284-85, 58 N.E. 148, 150 (1900).

³⁵Horton v. Wilson, 25 Ind. 316, 317-18 (1865).

³⁶Southern Ry. Co. v. Sittasen, 166 Ind. 257, 260, 76 N.E. 973, 974 (1906).

³⁷Reed v. Light, 170 Ind. 550, 567, 85 N.E. 9, 16 (1908).

³⁸IND. CODE ANN. § 2-2401 (Burns repl. 1968).

³⁹4 WORKS' 4th ed., *supra* note 10, § 61.69, at 59-60. See, e.g. Finster v. Wray, 131 Ind. App. 303, 313-14, 164 N.E.2d 660, 665 (1960) (allegation that recovery of tort damages was "too large" insufficient to present error).

⁴⁰4 WORKS' 4th ed., *supra* note 10, § 61.72, at 61.

⁴¹IND. CODE ANN. § 2-2401 (Burns repl. 1968).

⁴²4 WORKS' 4th ed., *supra* note 10, § 61.77, at 64.

⁴³*Id.*, § 61.78, at 65 (allegation that damages were "excessive" improper).

⁴⁴IND. CODE ANN. § 2-2401 (Burns repl. 1968) (repealed effective 1970).

or not sustained by sufficient evidence. An allegation that the verdict or decision was contrary to the evidence, however, did not satisfy the sixth ground.⁴⁵ Moreover, "decision" was not synonymous with "judgment" under this statutory ground.⁴⁶ Consequently, the use of the word "judgment" in alleging the same to be contrary to law or not sustained by sufficient evidence was not a cognizable error under the statute.⁴⁷

Not to be outdone by the procedures of moving for a new trial, the process of assigning errors became a procedural morass without logical support. Consider the following statements by Ewbank:

It is only rulings of a final character that can properly be assigned as error on appeal. Any ruling which the trial court retains authority to correct must be presented to that court for review in a proper manner before the appeal is taken, or it will not be reviewed on appeal. Therefore, erroneous rulings which are causes for a new trial can not be assigned as error.⁴⁸

. . . .

The sufficiency of a paragraph of pleading must be tested by a demurrer, the rulings of the court at the trial must be presented for review by a motion for a new trial, the sufficiency of the verdict must be tested by a motion for a venire de novo, and the judgment must be attacked by a motion to set it aside or to modify it, before the errors which might be reached in that manner will be considered by an appellate tribunal; and the assignment of errors must refer, not to the original error, but to the ruling of the court when it was presented in an appropriate manner for its consideration.⁴⁹

Thus, erroneous conclusions of law were reviewable only if a proper exception were made, and an error was *independently* assigned because a motion to modify the judgment or a motion for a new trial would not reach the issue.⁵⁰ In contrast, a judgment which did not conform to the conclusions of law could only be attacked by a motion to modify the judgment.⁵¹ Moreover, if the answers to special inter-

⁴⁵4 WORKS' 4th ed., *supra* note 10, § 61.84, at 71-72.

⁴⁶*Id.*, § 61.82, at 68.

⁴⁷*Id.*, § 61.84, at 70-71. *See, e.g.*, *Adkins v. State*, 234 Ind. 81, 123 N.E.2d 891 (1955).

⁴⁸L. EWBANK, *supra* note 9, § 134, at 285 (footnote omitted).

⁴⁹*Id.*, § 136, at 289.

⁵⁰*Nelson v. Cottingham*, 152 Ind. 134, 137, 52 N.E. 702, 702-03 (1899).

⁵¹*Id.* at 136, 52 N.E. at 702.

rogatories were inconsistent with the general verdict, a motion for a new trial was improper, and the question could only be preserved by an independent assignment of error on the overruling of a motion for a judgment notwithstanding the general verdict.⁵² These are only a few of the examples illustrating the ludicrous requirements for assigning error.⁵³

By revising Indiana Supreme Court Rule 2-6⁵⁴ in 1949, the supreme court eliminated the confusion by permitting all errors arising up to the filing of a motion for a new trial to be asserted in such a motion. This practice was optional; errors which previously could have been assigned independently could still be assigned as such.⁵⁵

In 1960, the rule was revised to mandate the raising of errors in the motion for a new trial.⁵⁶ If the error were properly assignable in a motion for a new trial, the error would not be reviewed if assigned independently⁵⁷ or if not first presented in the motion for new trial.⁵⁸ Thus, when the appellant assigned as error the identical grounds presented in the motion for a new trial, no issue was before the court because the errors could only be presented by assigning error in the overruling of the motion for a new trial.⁵⁹ When a motion for a new trial was filed, the asserted errors in the motion could be preserved *only* by assigning as error the overruling of the motion:

It has been a cause of regret to us that so many cases which are brought to this court, on which, frequently, much labor has been bestowed in their preparation, and in some of which error plainly appears, must be disposed of without our

⁵²Inland Steel Co. v. Harris, 49 Ind. App. 157, 160, 95 N.E. 271, 272 (1911).

⁵³For matters properly assigned independently, see L. EW BANK, *supra* note 9, §§ 39, 133, 136; 3 F. WILTROUT, *supra* note 10, § 2388, at 207-10; 4 WORKS' 4th ed., *supra* note 10, § 61.120, at 106 n.2. As to errors which had to be assigned as grounds for a new trial under former practice, see 4 WORKS' 4th ed., *supra* note 10, §§ 40-49a; 5 WORKS' INDIANA PRACTICE § 90.16, at 134-35 (5th ed. A. Bobbitt 1979).

⁵⁴Ind. Sup. Ct. R. 2-6 (Burns Supp. 1959) (1949 revision).

⁵⁵The 1949 revision was discussed in 4 WORKS' 4th ed., *supra* note 10, § 70.73, at 651:

[T]his affords a safe and sure method of saving all questions presented in the trial court on appeal. All that is required is to specify each ruling of the trial court from the commencement of the action to the filing of the motion for a new trial as one of the grounds for a new trial. When the motion for a new trial is overruled, an assignment of error that the court erred in overruling such motion will present all of the questions on appeal.

⁵⁶Ind. Sup. Ct. R. 2-6 (Burns repl. 1967) (1960 revision).

⁵⁷Wilson v. State, 247 Ind. 454, 456, 217 N.E.2d 147, 149 (1966); Brown v. Harding, 136 Ind. App. 678, 682, 204 N.E.2d 680, 682 (1965).

⁵⁸Denton v. State, 246 Ind. 155, 158, 203 N.E.2d 539, 540 (1965); Parker v. State, 243 Ind. 482, 483, 185 N.E.2d 727, 727 (1962).

⁵⁹Payne v. State, 243 Ind. 400, 186 N.E.2d 9 (1962).

being able to reach the merits of the controversy. . . . In order to bring before us all the questions presented in the motion for a new trial, it was simply necessary for the appellants to say, in the assignment of errors, that the court erred in overruling the motion for a new trial. Instead, however, of doing that, the appellants have, in the assignment, set forth certain reasons for which, if well founded, the court might have granted a new trial, but which present to this court no question whatever.⁶⁰

In sum, the task of appealing a case in Indiana has been fraught historically with pitfalls precluding even the most worthy appeals.⁶¹

II. TRIAL RULE 59: ONE STEP OUT OF THE MAZE?

Although Supreme Court Rule 2-6 represented an effort to streamline the procedure of seeking different types of relief from a trial court judgment, the illogic of filing a new motion for a new trial when a party was seeking relief other than a new trial influenced the adoption of Trial Rule 59.⁶² Trial Rule 59 provides that a party seeking post-judgment relief must file a motion to correct errors.⁶³ By filing a motion to correct errors, a party can seek many types of relief in addition to a new trial.⁶⁴ Logically, a motion to correct

⁶⁰*Ferrenburg v. Studabaker Turnpike Co.*, 37 Ind. 251, 252 (1871) (citations omitted).

⁶¹Other early procedural quirks included the right to a new trial as a matter of right in disputes concerning land. *See, e.g.*, *Studabaker v. Alexander*, 179 Ind. 189, 100 N.E. 10 (1912). The *Studabaker* court stated that the statute was anomalous, that it should be strictly construed, and that it was derived from the English policy of the sanctity of real estate. *Id.* at 192-93, 100 N.E. at 11. Another procedural pitfall concerned the impropriety of a motion for a new trial after a motion in arrest of judgment. *See, e.g.*, *McKinney v. Springer*, 6 Ind. 453 (1855); *Howard v. State*, 6 Ind. 444 (1855).

⁶²4 W. HARVEY, INDIANA PRACTICE 113 (Civil Code Study Commission Comments). *See Indiana & Mich. Elec. Co. v. Louck*, 243 Ind. 17, 20-21, 181 N.E.2d 855, 856 (1962) (prior to adoption of new trial rules in 1970).

⁶³IND. R. TR. P. 59.

⁶⁴IND. R. TR. P. 59(I) provides in part:

The court, if it determines that prejudicial or harmful error has been committed, shall take such action as will cure the error, including without limitation the following with respect to all or some of the parties and all or some of the issues:

- (1) Grant a new trial;
- (2) Enter final judgment;
- (3) Alter, amend, modify or correct judgment;
- (4) Amend or correct the findings or judgment as provided in Rule 52(B);
- (5) In the case of excessive or inadequate damages, enter final judgment

errors, instead of a motion for a new trial, is a prerequisite for appealing a trial court judgment under the trial rules.⁶⁵

Despite the logical appeal of Trial Rule 59, new procedural problems have impeded a party's entry into the appellate court system. Until recently amended, Trial Rule 59(C) provided that "a motion to correct errors shall be filed not later than sixty [60] days after the entry of judgment."⁶⁶ This rule arguably required a motion to correct errors after the entry of every judgment. Professor Grove recently identified the absurdity of this requirement:

Following the trial court's entry of judgment, one of the parties files a timely motion to correct errors; in the course of its ruling on the motion, the trial court enters a new judgment. Should a second motion to correct errors addressed to the judgment be required as a prerequisite to appeal? According to Appellate Rules 4(A) and 2(A) the answer would seem to be "no": the ruling on the motion is "deemed" to be the "final judgment" from which a timely appeal may be perfected. Trial Rule 59(C), however, suggests the necessity of a motion to correct errors directed to the new "entry of judgment." . . . [I]t is plausible to conclude that any error occurring prior to the time when a motion addressed to the new judgment could be filed must be specified in such motion, including error already set forth in the motion to correct errors directed to the original judgment.⁶⁷

Nevertheless, the Indiana Supreme Court in *Deprez v. State*⁶⁸

on the evidence for the amount of the proper damages, grant a new trial, or grant a new trial subject to additur or remittitur;

(6) Grant any other appropriate relief, or make relief subject to condition; or

(7) In reviewing the evidence, the court shall grant a new trial if it determines that the verdict of a nonadvisory jury is against the weight of the evidence; and shall enter judgment, subject to the provisions herein, if the court determines that the verdict of a nonadvisory jury is clearly erroneous as contrary to or not supported by the evidence, or if the court determines that the findings and judgment upon issues tried without a jury or with an advisory jury are against the weight of the evidence.

This provision was formerly Trial Rule 59(E).

⁶⁵*Bradburn v. County Dep't of Pub. Welfare*, 148 Ind. App. 387, 390, 266 N.E.2d 805, 806 (1971); Ind. R. Tr. P. 59(G) (altered in amended version of trial rule).

⁶⁶Ind. R. Tr. P. 59(C). The amended version of Trial Rule 59(C) replaces old Trial Rules 59(C) and 59(G). See IND. R. TR. P. 59(C).

⁶⁷Grove, *The Requirement of a Second Motion to Correct Errors as a Prerequisite to Appeal*, 10 IND. L. REV. 462, 463 (1977).

⁶⁸260 Ind. 413, 296 N.E.2d 120 (1973), *overruled*, *P-M Gas & Wash Co. v. Smith*, 375 N.E.2d 592 (Ind. 1978). For a further discussion of *DePrez*, see notes 74-75 and accompanying text.

adopted the requirement of a second motion to correct errors after the trial court enters a new judgment.⁶⁹

The supreme court overruled *Deprez* in *P-M Gas & Wash Co. v. Smith*⁷⁰ by adopting several procedural rule changes eliminating the second motion requirement. The *P-M Gas* court made critical changes in the process of filing "motions to correct errors, cross-errors, and the various rights of appeal on assignment of error."⁷¹

The following essential facts are crucial for understanding the substantive changes made in *P-M Gas*: (1) Smith filed a personal injury suit against P-M Gas. The jury returned a verdict for P-M Gas; (2) Smith filed a motion to correct errors. Although the trial court overruled certain specifications, it sustained one ground and ordered a new trial; (3) P-M Gas filed a motion to correct errors which was denied; (4) At the appellate level, Smith, the appellee, assigned cross-errors in his brief concerning questions raised in his original motion to correct errors, which the trial court had overruled; and (5) P-M Gas, the appellant, moved to strike Smith's cross-errors for failure to comply with Trial Rule 59(D) which, according to P-M Gas, required Smith to file cross-errors within fifteen days after P-M Gas's motion to correct errors.

On transfer, the supreme court considered a two-pronged argument that the court of appeals had erred in striking the cross-errors in Smith's appellee brief: (1) P-M Gas unnecessarily filed a motion to correct errors. Because the motion was unnecessary, Smith was not required to file cross-errors under Trial Rule 59(D); and (2) Trial Rule 59(D) applies only to a motion filed on evidence outside the record.

P-M Gas essentially argued for the necessity of filing a subsequent motion to correct errors by an aggrieved party when a prior motion is granted in part and a new trial is ordered. The supreme court observed that P-M Gas was caught in a "procedural quagmire"⁷² created by the court's own "initial judicial error"⁷³ in *Deprez*.⁷⁴ Admitting that the *Deprez* ruling was erroneous, the court explained:

In *Deprez*, the trial court in a long standing condemnation action entered a judgment against the state, *dismissing with prejudice*. The state filed a motion to correct error,

⁶⁹See 260 Ind. at 420, 296 N.E.2d at 124.

⁷⁰375 N.E.2d 592 (Ind. 1978).

⁷¹*Id.* at 597.

⁷²*Id.* at 593.

⁷³*Id.* at 597.

⁷⁴For a discussion of many of these appellate court cases, see Grove, *supra* note 67.

after which the trial court set forth, for the first time, findings of fact and conclusions of law and entered a judgment of dismissal which is a final judgment. The state then directly appealed without a second motion to correct error addressed to the "new judgment" and this Court agreed with the appellee in that case that the appeal should be dismissed because the state had not filed a second motion to correct error. The designation of the second judgment of *dismissal with prejudice* as "new" did not make it more final than the original judgment of *dismissal with prejudice*.

That conclusion was incorrect, and it and the *Deprez* cases are overruled herewith.⁷⁵

The supreme court held that the requirement of a second motion to correct errors was error because Appellate Rule 4(A)⁷⁶ "states that a trial court's ruling on a motion to correct error shall be deemed the 'final judgment' from which appeal is to be taken."⁷⁷ The court observed that Appellate Rule 4(A) accords with Appellate Rule 2(A)⁷⁸ involving the initiation of an appeal and Appellate Rule 7.2(A)(1)⁷⁹ concerning the inclusion of documents in the record.⁸⁰ Moreover, according to the court, Trial Rule 59(G)⁸¹ did not require a second mo-

⁷⁵375 N.E.2d at 594.

⁷⁶IND. R. APP. P. 4(A) provides in part:

Appeals may be taken by either party from all final judgments of Circuit, Superior, Probate, Criminal, Juvenile, County, and where provided by statute for Municipal Courts. A ruling or order by the trial court granting or denying a motion to correct errors shall be deemed a final judgment, and an appeal may be taken therefrom.

⁷⁷375 N.E.2d at 594.

⁷⁸IND. R. APP. P. 2(A) states:

An appeal is initiated by filing with the clerk of the trial court a praecipe designating what is to be included in the record of the proceedings, and that said praecipe shall be filed within thirty (30) days after the court's ruling on the Motion to Correct Errors or the right to appeal will be forfeited. A copy of such praecipe shall be served promptly on the opposing parties.

⁷⁹IND. R. APP. P. 7.2(A)(1) states:

The record of the proceedings shall consist of the following documents:

(1) A certified copy of the motion to correct errors or an assignment of errors.

(a) In all appeals from a final judgment, a certified copy of the motion to correct errors filed with the trial court shall constitute for all purposes the assignment of errors. No assignment of error other than the motion to correct errors shall be included in the record.

(b) In all appeals from interlocutory orders, there shall be included instead of the certified copy of the motion to correct errors a specific assignment of the errors alleged.

⁸⁰375 N.E.2d at 594.

⁸¹Ind. R. Tr. P. 59(G) provided:

tion, notwithstanding suggestive language otherwise.⁸² The court flatly declared in *P-M Gas*: "One motion for each party or *each appellant, if there is more than one, shall be sufficient. . . .* Once it is made and acted upon, whatever action the trial court takes, then the items specified in that motion, and the trial court's disposition constitute the basis for the appellant's appeal."⁸³ In short, the court ruled

In all cases in which a motion to correct errors is the appropriate procedure preliminary to an appeal, such motion shall separately specify as grounds therefor each error relied upon however and whenever arising up to the time of filing such motion. Issues which could be raised upon a motion to correct errors may be considered upon appeal only when included in the motion to correct errors filed with the trial court. A motion to correct errors shall not be required in the case of appeals from interlocutory orders, orders appointing or refusing to appoint a receiver, and from orders in proceedings supplemental to execution.

⁸²375 N.E.2d at 595.

⁸³*Id.* The *P-M Gas* court elaborated on these points as follows:

IV. [IND. R. APP. P.] 4(A) should be read as allowing either party to appeal a ruling on a motion to correct error, and the principles of law on 'finality' are well stated in [3 W. HARVEY, INDIANA PRACTICE § 54.2 (Supp. 1978)].

V. If a party seeks to raise error which occurred at trial, or afterward in a verdict or judgment, then [Ind. R. Tr. P.] 59(G), second sentence, requires that party to make a motion to correct error. Once made, no second motion should ever be required from that party.

(A) If a party wants to complain about the relief granted to another party, when that other party made a motion to correct error which was granted in whole or in part, then that party can appeal that order, and commence the process under [IND. R. APP. P.] 2(A).

(B) This would not require that party to make a motion to correct error in his own right. In that way, that party then becomes an appellant, and the regular appeal process obtains.

(C) It is often the case that an appellee will not raise trial error in the appellate court, and will only answer the appellant's positions and brief. If so, then it is not necessary for the appellee to file a motion to correct error in the trial court.

VI. If the appellant, on the other hand, is a party who seeks to reinstate a jury verdict, for example, after it was received by the appellant but changes as a result of a motion to correct error by the appellee, who now defends the final judgment entered, it is not necessary for that appellant to file a motion to correct error, if appellant does not raise error himself. If appellant seeks reinstatement of that jury verdict because it was incorrect for the trial court to have granted the appellee's motion to correct error, then it is not necessary for the appellant to do more than request relief on brief in the appellate court. The "complaint on appeal" will be measured, in such an example, by the original verdict and judgment and the motion to correct error filed by the appellee *and* the favorable relief given to that motion by the trial court.

VII. If the appellant maintains that there was error, he can say that on brief and explain why, after he has initiated the appeal under the Indiana Rules of Appellate Procedure.

VIII. Of course, if trial was to the court, and the trial court first

that an appellant does not have to file a second motion to correct errors if he has raised the error in a previous motion.⁸⁴

With this foundation established, the court held that the cross-errors raised in Smith's brief should not have been dismissed for failure to comply with Trial Rule 59(D) because he raised the cross-errors in his original Trial Rule 59 motion.⁸⁵ Disagreeing with the lower appellate court's interpretation,⁸⁶ the supreme court simply stated that Trial Rule 59(D) "only covers matters *dehors* the record."⁸⁷ Notwithstanding the Trial Rule 59(D) situation, the court acknowledged that cross-appeals are not addressed in Indiana's rules of procedure. The court took the initiative to develop a set of rules for cross-appeals.⁸⁸ According to the court, the second sentence of Trial Rule 59(G),⁸⁹ which eliminated the need to file a second motion to correct errors after the motion is made, applied to a *cross-appellant*.⁹⁰ In addition, the court ruled that

[i]f an appellee desires to become a cross-appellant, then he must make that decision within sixty days after the entry of the judgment in his favor, pursuant to [Trial Rule] 59(C). When that has been done, then the ruling which is made on that motion to correct error becomes the "complaint on the cross-appeal." Thereafter, the rules of appellate procedure apply, and in that regard . . . it might not be necessary to file a praecipe if, as therein, the original praecipe filed covered the entire record.⁹¹

entered a judgment for the appellant and then changed it on appellee's motion to correct error, the same process would result as in the example when the trial was to the jury.

IX. If each party makes a motion to correct error, then each can raise the ruling on that motion and the ruling on the other party's motion on appeal as cross-errors, respectively.

X. If a party does not make a motion to correct error, he has nothing belonging to him which can be appealed, unless, of course, he is harmed if the other party moves to correct error and the motion is granted in some aspect.

375 N.E.2d at 596-97.

⁸⁴375 N.E.2d at 595.

⁸⁵*Id.*

⁸⁶352 N.E.2d at 92, *quoted in* 375 N.E.2d at 595.

⁸⁷375 N.E.2d at 596.

⁸⁸Chief Justice Givan and Justice Pivarnik disagreed with the majority's rule-making-by-opinion approach. *Id.* at 598 (Givan, C.J., Pivarnik, J., concurring).

⁸⁹The second sentence of Ind. R. Tr. P. 59(G) stated: "Issues which could be raised upon a motion to correct errors may be considered upon appeal only when included in the motion to correct errors filed with the trial court."

⁹⁰375 N.E.2d at 596.

⁹¹*Id.* The court relied on *Seco Chemicals, Inc. v. Stewart*, 349 N.E.2d 733 (Ind. Ct. App. 1976). In *Seco*, the Indiana Court of Appeals held that once an appellant filed its

The court also held that when both parties move to correct errors, each party "can raise the ruling on that motion and the ruling on the other party's motion on appeal as cross-errors respectively."⁹²

Since *P-M Gas*, the Indiana Supreme Court and Courts of Appeals have construed and applied several aspects of the new procedural rules enunciated by *P-M Gas*. The supreme court found certain *P-M Gas* principles controlling in two recent cases, *Bridge v. Board of Zoning Appeals*⁹³ and *Indiana Revenue Board v. State ex rel. Board of Commissioners*.⁹⁴

In *Bridge*, the supreme court observed that the detailed findings of fact made by the trial court in granting the appellant's request for these findings in his motion to correct errors "expanded upon, but did not alter, the substance of the original decision."⁹⁵ "The errors to be presented on appeal," the court wrote, "were stated in the original motion to correct errors and the basis for them was not affected by the subsequent entry of findings of fact."⁹⁶ The court of appeals had dismissed the appeal because no second motion to correct errors was filed. Because the court of appeals relied on *Deprez*, which was overruled by *P-M Gas*, the supreme court granted transfer and remanded *Bridge* for a decision on the merits.⁹⁷

Similarly, the supreme court granted transfer in *Indiana Revenue Board*, which had been dismissed by the court of appeals due to the revenue board's failure to file a second motion to correct errors after the trial court amended the amount of its judgment awarded to a number of Indiana counties in a class action suit. The supreme court held pursuant to *P-M Gas* that a second motion was not needed "as the same justiciable issues were completely expressed within the original motion."⁹⁸

In both cases, the original judgment was neither altered nor amended by the motion to correct errors, at least not to such an extent that the errors to be presented on appeal were affected. The supreme court's language, however, suggests that a different result might obtain when the substance of an original decision is altered upon the trial court's ruling on a motion to correct errors. Indeed,

praecipe, thereby invoking appellate jurisdiction, Appellate Rule 2(A) was satisfied, and a cross-appellant was not required to make a separate filing of a praecipe to preserve the appellate issue. The appellant in *Seco* included the entire record in the praecipe. *Id.* at 739.

⁹²375 N.E.2d at 597.

⁹³381 N.E.2d 1060 (Ind. 1978), referred to in Harvey, 1979 Survey, *supra* note 1, at 82.

⁹⁴385 N.E.2d 1131 (Ind. 1979).

⁹⁵381 N.E.2d at 1060.

⁹⁶*Id.*

⁹⁷*Id.* at 1060-61.

⁹⁸385 N.E.2d at 1132.

the question remains whether the supreme court in subsequent *P-M Gas* cases has created an exception to the one-motion rule of *P-M Gas* which will require a second motion in an appropriate case. The short answer would seem to be "no" inasmuch as the reviewing court would have to overrule explicit *P-M Gas* language mandating only one motion;⁹⁹ three justices apparently adhere to this rule.¹⁰⁰ The view is not without dissent, however. Chief Justice Givan, concurring in the *P-M Gas* result, expressed his preference for a rule requiring "that any time a judgment is substantially modified no appeal may be taken from that judgment unless a motion to correct errors is filed."¹⁰¹ Chief Justice Givan concluded that he would not have overruled the *Deprez* line of cases.¹⁰²

Subsequent decisions of the Indiana Court of Appeals have also strictly applied the *P-M Gas* rules. Recently, in *DeHart v. Anderson*,¹⁰³ the court delineated the parameters of the issues to be considered on appeal in view of *P-M Gas*. The plaintiff-appellee Anderson filed a motion to correct errors questioning the trial court's entry of a judgment upon the defendant-appellant DeHart's motion to dismiss, which had been granted. The trial court granted the appellee's motion to correct errors and ordered the case to be set for trial. DeHart then appealed from the ruling without filing his own motion to correct errors. The court of appeals implicitly held that an appellant can appeal the determination in favor of an appellee's motion to correct errors without filing his own motion and can seek reinstatement of the trial court judgment.¹⁰⁴ Citing *P-M Gas*, the court held that the issues raised by DeHart were "determined by the judgment dismissing the cause, the motion to correct errors, and the trial court's ruling on the motion [to correct errors]."¹⁰⁵

In *Schmal v. Ernst*,¹⁰⁶ the defendant Ernst's petition for release of escrow money held by the trial court clerk was denied. Ernst then filed a motion to correct errors alleging as error the court's failure to release the money. Schmal did not contest the release but requested that it be credited against a \$12,500 judgment. The trial

⁹⁹See note 83 *supra* and accompanying text.

¹⁰⁰Justices DeBruler and Prentice concurred in Hunter's majority opinion. 375 N.E.2d at 598.

¹⁰¹*Id.* (Givan, C.J., concurring).

¹⁰²*Id.* (Givan, C.J., concurring).

¹⁰³383 N.E.2d 431 (Ind. Ct. App. 1978), *cited in* Harvey, 1979 Survey, *supra* note 1, at 83.

¹⁰⁴See 383 N.E.2d at 434.

¹⁰⁵*Id.*

¹⁰⁶387 N.E.2d 96 (Ind. Ct. App. 1979), *discussed in* Harvey, 1979 Survey, *supra* note 1, at 83.

court granted the motion to correct errors and ordered that the money be released to Ernst; however, the money was not to be credited against the judgment. Schmal appealed from the order by filing a praecipe and an appellate brief with the belief that he was appealing from an interlocutory order.¹⁰⁷ On appeal, Ernst contended that the order sustaining the motion to correct errors was a final judgment requiring Schmal to file a motion to correct errors to preserve error.

Without reaching the question whether the order was interlocutory or final, the court of appeals held that, in any event, Schmal followed the proper procedure to preserve error in view of this *P-M Gas* language:

“(A) If a party wants to complain about the relief granted to another party, when that other party made a motion to correct error which was granted in whole or in part, then that party can appeal that order, and commence the process under [Appellate Rule] 2(A).

(B) This would not require that party to make a motion to correct error in his own right. In that way, that party then becomes an appellant, and the regular appeal process obtains.”¹⁰⁸

The court of appeals also relied on other *P-M Gas* language:

“It is not necessary for that appellant to file a motion to correct error if appellant does not raise error himself. If appellant seeks [only to appeal the favorable relief given to appellee] because it was incorrect . . . then it is not necessary for the appellant to do more than request relief on brief in the appellate court.”¹⁰⁹

The court of appeals decided that Schmal was not required to file a motion to correct errors because the only error alleged was the failure to apply the escrow money against the judgment.¹¹⁰

Two appellate decisions have avoided the harshness of retroactive application of *P-M Gas* by determining that under the law existing prior to *P-M Gas*, the proper procedure was to file an additional motion to correct errors. In *Estate of Holderbaum v. Gibson*,¹¹¹ the court of appeals held:

¹⁰⁷Ind. R. Tr. P. 59(G) did not require a motion to correct errors for interlocutory orders. This exception is preserved under the amended rules in Trial Rule 59(C).

¹⁰⁸387 N.E.2d at 98 (quoting 375 N.E.2d at 597).

¹⁰⁹387 N.E.2d at 98 (quoting 375 N.E.2d at 597).

¹¹⁰387 N.E.2d at 98.

¹¹¹376 N.E.2d 1189 (Ind. Ct. App. 1978).

When the trial judge, in the case before us, granted the estate's motion to correct errors, he altered the prior judgment in the most drastic manner possible. He not only vacated the judgment previously entered for Gibson, but also entered a judgment for the estate. The law as it existed at the time the estate's motion was granted very clearly required Gibson to file an additional motion to correct errors in order to preserve her right to appeal.¹¹²

More recently, in *Nehring v. Raikos*,¹¹³ the trial court amended its judgment on the appellant's first motion to correct errors. The appellant filed his second motion to correct errors when *Deprez* and its progeny were the law. Observing that *Deprez* required the second motion to be directed at the amended judgment, the court of appeals denied the appellee's motion seeking to vacate the trial court orders and dismiss the appeal upon jurisdictional (timing) grounds.¹¹⁴

The most significant application of the *P-M Gas* procedure on the court of appeals level was in *State ex rel. Sacks Brothers Loan Co. v. DeBard*.¹¹⁵ In *DeBard*, the appellee DeBard filed a motion to dismiss, citing Sacks' failure to comply with the statute¹¹⁶ requiring a transcript to be filed within fifteen days of the administrative decision pursuant to the Indiana Administrative Adjudication Act.¹¹⁷ The trial court overruled the motion. On appeal, DeBard's motion to correct errors did not cite the trial court's overruling of the motion to dismiss as error. The court of appeals initially raised the question of lack of jurisdiction *sua sponte* in a memorandum opinion and remanded the case for the trial court to dismiss Sacks' appeal from the administrative decision denying a license; Sacks, however, in his petition for rehearing sought reexamination in light of *P-M Gas*.

Upon reconsideration, the court of appeals held that the failure to comply with the Act was a jurisdictional defect which may be waived by a party because the defect did not involve lack of jurisdiction over the subject matter but rather lack of jurisdiction over the particular case.¹¹⁸ The question of the trial court's jurisdiction in the particular case, therefore, was not preserved on appeal because the appellee failed to file a motion to correct errors as required by *P-M Gas*. In reaching this conclusion, the second district court of appeals relied on the following *P-M Gas* language:

¹¹²*Id.* at 1192.

¹¹³390 N.E.2d 1092 (Ind. Ct. App. 1979).

¹¹⁴*Id.* at 1094-95.

¹¹⁵381 N.E.2d 119 (Ind. Ct. App. 1978).

¹¹⁶IND. CODE § 4-22-1-14 (1976).

¹¹⁷*Id.* §§ 4-22-1-1 to -30 (1976).

¹¹⁸381 N.E.2d at 120.

"If an appellee desires to become a cross-appellant, then he must make that decision within sixty days after the entry of the judgment in his favor, pursuant to [Trial Rule] 59(C). When that has been done, then the ruling which is made on that motion to correct error becomes the 'complaint on the cross-appeal.'" ¹¹⁹

The *DeBard* court explained that "[t]his means, then, that a party (appellee) for whom a judgment ostensibly is rendered must express dissatisfaction with that judgment by filing a motion to correct errors pursuant to Trial Rule 59(C) in order to preserve cross-error on appeal." ¹²⁰

III. THROUGH THE LOOKING-GLASS

P-M Gas' policy of eliminating the need for multiple motions to correct error has recently prompted the Indiana Supreme Court Advisory Committee on Revision of Rules of Practice and Procedure to propose several trial rule changes to the supreme court, which has rulemaking powers. ¹²¹ The committee reported:

The proposed amendments [to Trial Rule 59] are intended to conform the Rule to *P-M Gas & Wash Co. v. Smith*, . . . which overruled *State v. Deprez* . . . and its progeny, subject, however, to the following qualifications. First, the proposed amendments allow a party to appeal the granting of a motion to correct errors without himself filing a subsequent motion to correct errors, and to raise for the first time in his appellate brief errors that occurred at trial and which the party claims were prejudicial to him. Secondly, the proposed amendments allow a party who is prejudiced by any action taken by the trial court on its own motion during the time for filing a motion to correct errors to appeal that action without the party himself filing a motion to correct errors. ¹²²

¹¹⁹*Id.* (quoting 375 N.E.2d at 596).

¹²⁰381 N.E.2d at 120. The court of appeals in *Continental Cas. Co. v. Novy*, 397 N.E.2d 294 (Ind. Ct. App. 1979), recently treated another case dealing with the *P-M Gas* doctrine. The court decided that the parties have the "discretion to appeal immediately or file a motion to correct errors in those cases where the court has altered, amended or supplemented its findings and/or judgment after the filing of one motion to correct errors." *Id.* at 296.

¹²¹*State ex rel Bicanic v. Lake Circuit Court*, 260 Ind. 73, 76, 292 N.E.2d 596, 598 (1973); IND. CODE § 34-5-2-1 (1976) (statute conferring rulemaking powers).

¹²²INDIANA SUPREME COURT ADVISORY COMMITTEE ON REVISION OF RULES OF PRACTICE AND PROCEDURE, SYNOPSIS OF PROPOSED AMENDMENTS TO TRIAL RULE 59 MOTION TO CORRECT ERRORS 3 (July 1, 1979) (citations omitted).

On November 13, 1979, the Indiana Supreme Court promulgated the new version of Trial Rule 59¹²³ which among other things, incorporated the two qualifications suggested by the advisory committee. The updated version of Trial Rule 59(E) states: "A party who is prejudiced by any modification or setting aside of a final judgment or an appealable final order following the filing of a motion to correct error may appeal that ruling without filing a motion to correct error."¹²⁴ In sum, Trial Rule 59(E) not only conforms to the rules an-

¹²³IND. R. TR. P. 59 (effective January 1, 1980).

¹²⁴IND. R. TR. P. 59(E) (as amended). The committee offered the following comments:

This section is new, and it speaks to several situations. A party under *P-M Gas* can appeal an adverse determination made on another party's motion to correct errors, without making a motion himself. . . . That remains correct under this section.

In addition, any party is allowed to appeal a ruling on a motion to correct errors without making another motion, or a "second" motion to correct errors, see *Bridge v. Board of Zoning Appeals of Ft. Wayne*, 381 N.E.2d 1060 (Ind. 1978). This provision is consistent with that holding, and rule.

(1) Under this provision, if the appellant received a judgment and the appellee made a motion to correct errors against that judgment which the trial court granted, and entered judgment against the appellant (or a lesser form of relief), then the appellant can appeal the granting of the motion to correct errors without making a motion himself and the appellant can ask for the reinstatement of the judgment which was set aside in the trial court as a result of the motion to correct errors. That was the factual setting in *DeHart v. Anderson*, 383 N.E.2d 431, 433-434 (Ind. App. 1978), in which the Court of Appeals pointed out that the issues on appeal were determined by: (1) the judgment dismissing the cause (which occurred in the case), (2) the motion to correct errors, and (3) the trial court's ruling on the motion. The provision is also consistent with the procedural facts and law in *Schmal v. Ernst*, 387 N.E.2d 96 (Ind. App. 1979).

(2) It is the intention of the Committee to change one of the holdings in *P-M Gas*, in this section. In *P-M Gas* the Court stated "[that] it is not necessary for that appellant to file a motion to correct error if appellant does not raise error himself. If appellant seeks [only to appeal the favorable relief given to appellee] because it was incorrect . . . then it is not necessary for the appellant to do more than request relief on brief in the appellate court." 375 N.E.2d at 597.

It is the Committee's judgment that *P-M Gas* has altered the traditional rule that a party must first specifically present error to the trial court for an opportunity for correction and only then can that party raise the error on appeal. That rule has been altered to the extent that an appealing party can raise error in the appellate court by appealing the trial court's ruling on a motion to correct error without making a motion to correct error too.

The Committee recommends that this principle be extended to the situation identified in the examples set out below.

The Committee recommends that this provision be interpreted to allow an appellant in this situation to appeal not only the granting of the motion to correct error, which would be raised on brief as set out in *P-M Gas*, but the

nounced in *P-M Gas* and its progeny but also extends the liberal principles advocated by the supreme court. The trial rule possesses the novel feature of allowing an appellant to raise errors occurring at trial on brief which have not been raised on a motion to correct errors.¹²⁵

appellant should be allowed to raise those errors which occurred at trial on brief in the appellate court too.

For example: X received a judgment as the plaintiff in an action against Y, but two rulings were made against X on the admissibility of evidence which caused X's evidence to be excluded. X properly preserved the questions at trial, by an offer to prove. Y made a motion to correct error against X's judgment, and had a judgment entered for Y, the defendant, and now appellee, on that motion.

It is the Committee's recommendation that X be allowed to appeal the entry of the motion to correct error, and raise, in addition, the two claimed errors which adversely affected X at trial, without making a motion to correct errors to that effect. In this way, that part of *P-M Gas* would be changed, and the limitation on issues on appeal found in *DeHart v. Anderson*, 383 N.E.2d 431, 433-434 (Ind. App. 1979) would be changed too.

In such a situation as the one confronting X in this appeal, it might be the case that the appellate court, and X too, believes that X's original judgment cannot be reinstated. Nevertheless, X might be entitled to a new trial because of the alleged trial court error, and can show the appellate court that error and ask for that relief, in the alternative, in X's appeal to the appellate court. The Committee believes that X should be able to make that appellate claim without filing a motion to correct error as a predicate for making it.

Of course, under this provision it will be necessary for the appellant to have objected to the ruling at trial which was adverse to the appellant. In that way the trial court has had an opportunity to examine the issue and rule; the Committee believes that is sufficient and that it need not recur in the trial court, and can be raised on brief by the appellant herein described.

To further demonstrate the intention of the Committee, the Committee considered but rejected the following language:

"If a party seeks relief on appeal from error which is claimed to have occurred prior to or in the trial court's entry of a judgment, or an appealable final order, that party must have filed a motion to correct error directed to the error which is claimed."

The Committee preferred a more liberal system of raising errors on appeal, if it is the appellant who raises that error, and hence rejected the provision set out.

INDIANA SUPREME COURT ADVISORY COMMITTEE ON REVISION OF RULES OF PRACTICES AND PROCEDURE, COMMITTEE NOTES ON TRIAL RULE 59 [hereinafter cited as COMMITTEE NOTES].

¹²⁵COMMITTEE NOTES, *supra* note 124. This result will arise in situations where the appellant receives a judgment against the appellee at the trial court level and the appellee files a motion to correct errors. If the trial court grants the appellee's motion overturning the appellant's judgment, the appellant not only may challenge the unfavorable determination in favor of appellee's motion but also may raise errors that occurred during trial on brief without filing any motion to correct errors. *See id.*

Although the elimination of the need for multiple motions to correct errors is a significant step, perhaps the most telling aspect of the new rule is its intent to provide "a more liberal system of raising errors on appeal."¹²⁶ Although not as readily documented, the same motivation could have prompted the progression of changes over the years in smoothing the gap between trial and appeal. Even though the new rule retains the traditional requirement of "making a record" at the trial level, a concern must exist on the appellate level for the consequences of a rule that purportedly eases entry into the appeals system and the subsequent result, if any, on an already constantly increasing caseload. Additionally, when a change in the trial rules occurs, the ultimate result of the change is not fully realized until judicial interpretation has occurred. The course of pervasive liberality in raising errors on appeal in this instance is, as yet, uncharted and will undoubtedly be subject to numerous perils before the outcome will be fully realized.

Thus, the practitioner contemplating an appeal should exercise restraint in issue selection. One may reasonably predict a judicial backlash if the bar seizes upon the opportunity to use the newly won liberality concept as a dumping ground for appeals comprised of less than meritorious questions. Although the court of appeals may not openly refuse to apply the new trial rule, the court may rely on other procedural devices to eliminate frivolous appeals that threaten to clog the overtaxed intermediate appellate system. Considering the possibility of a judicial backlash, an attorney should file a motion to correct errors to preserve errors on appeals rather than rely on his ability to raise these matters on brief. An overburdened court of appeals is likely to undercut the liberal spirit of new Trial Rule 59, if attorneys abuse the right to raise matters on brief. Given the collective ingenuity of the bench and the bar and the past history of this procedural area, one can only wonder how long the new rule will serve its intended purpose. Indeed, the adoption of this trial rule may mark the beginning of a new adventure "through the looking glass." The tortured history of the procedure for perfecting an appeal continues to unfold.

¹²⁶*Id.*