Trial Rules 59 and 60(B)—Clearing the Murky Waters of Postjudgment Relief?

In a recent opinion, *Siebert Oxidermo, Inc. v. Shields*,[1] the Indiana Supreme Court resolved a conflict among the various districts of the Indiana Court of Appeals. Previously, litigants seeking to set aside a default judgment or an involuntary dismissal with prejudice had been victims of the courts of appeals' collective uncertainty concerning the proper procedure for obtaining this type of postjudgment relief under the Indiana Rules of Trial Procedure (Trial Rules).[2] The appellate courts disagreed as to whether a Trial Rule 59 motion to correct errors or a Trial Rule 60(B) motion for relief from judgment was initially required when this relief was sought within sixty days of judgment. The source of the uncertainty was the confusing time overlap for filing motions under Trial Rules 59 and 60(B): both motions are available within sixty days of judgment.[3] Trial Rule 59, which requires a motion to correct errors as a prerequisite to appeal in Indiana, was a major cause of the problem.

I. *Oxidermo*—Resolution of the Conflict

In *Siebert Oxidermo, Inc. v. Shields*,[4] Shields sued Oxidermo, and a default judgment was entered on May 24, 1979, after Oxidermo failed to answer Shields' complaint. Oxidermo filed a motion to set aside the default judgment in accordance with Trial Rules 55(C) and 60(B) on June 28, 1979, claiming its failure to appear was caused by excusable neglect. A hearing was held on Oxidermo's motion on September 6, 1979. The motion to set aside the default judgment was denied by the trial court on October 9, 1979, and the findings of fact and the conclusions of law were entered. Subsequently, Oxidermo filed a confusing series of postjudgment motions: two more motions to set aside the default judgment as well as three Trial Rule 59 motions to correct errors. A praecipe for the record was filed in the trial court on February 21, 1980. The trial court denied all six of Oxidermo's post-

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[1]No. 1282 S 471, slip op. (Ind. 1983).

[2]*See, e.g.*, Houston v. Wireman, 439 N.E.2d 732 (Ind. Ct. App. 1982); Mathis v. Morehouse, 433 N.E.2d 814 (Ind. Ct. App. 1982); Dawson v. St. Vincent Hosp. & Health Care Center, Inc., 426 N.E.2d 1328 (Ind. Ct. App. 1981). *See infra* notes 13-76 and accompanying text.

[3]Trial Rule 59 requires that a motion to correct errors be made within sixty days of judgment. A Trial Rule 60(B) motion must be made within a reasonable time, not to exceed one year. Thus, during the sixty days immediately following the judgment both motions are available.

[4]No. 1282 S 471, slip op. (Ind. 1983).

judgment motions. Finally, on May 14, 1980, the trial record was filed with the court of appeals to initiate Oxidermo's appeal.[5]

The Indiana Court of Appeals initially issued a memorandum decision affirming the actions of the trial court. However, a subsequent decision on rehearing remanded the case for a retrial solely on the issue of damages. Both parties then petitioned the Indiana Supreme Court for transfer. Shields' petition, which alleged, inter alia, jurisdictional problems resulting from the postjudgment relief procedures, was granted by the supreme court. In its initial decision of *Oxidermo*, the supreme court held that Oxidermo had forfeited its right to appeal because Oxidermo had failed to file a praecipe within thirty days of the denial of the first Trial Rule 59 motion to correct errors.[6] That decision was withdrawn after Oxidermo pointed out in a petition for rehearing that a praecipe was filed on February 21, 1980, within thirty days of the denial of the first Trial Rule 59 motion to correct errors. In the supreme court's subsequent decision, the court determined that it did have appellate jurisdiction over the case, but that the issue of excessive damages was not appealable by Oxidermo because it had failed to raise the issue in its first motion to set aside the default judgment.[7] As a result the Indiana Supreme Court, adopting the original decision of the court of appeals, affirmed the trial court's decision and award of damages.[8]

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[5]Oxidermo's motions following denial of the first Trial Rule 60(B) motion were as follows:

November 15, 1979	—Second "Motion to Set Aside Default and Default Judgment," filed by Oxidermo.
December 4, 1979	—First "Motion to Correct Errors," responding to denial of first motion to set aside, filed by Oxidermo.
January 23, 1980	—Second motion to set aside (filed November 15, 1979) denied.
February 1, 1980	—Second "Motion to Correct Errors," responding to denial of second motion to set aside, filed by Oxidermo.
February 13, 1980	—Third "Motion to Set Aside Default and Default Judgment," filed by Oxidermo.
February 14, 1980	—First and second motions to correct error (filed December 4, 1979, and February 1, 1979) denied.
February 21, 1980	—Praecipe for record filed in trial court by Oxidermo.
March 28, 1980	—Third motion to set aside (filed February 13, 1980) denied.
May 13, 1980	—Third "Motion to Correct Errors," responding to denial of third motion to set aside, filed by Oxidermo. Denied this date.
May 14, 1980	—Record filed with Clerk of Supreme Court and Court of Appeals.

Id. at 3-4.

[6]*Id.* at 2. The initial decision was issued on December 7, 1982.

[7]No. 1282 S 471, slip op. (Ind. 1983). The subsequent decision was issued on March 16, 1983.

[8]*Id.* at 19.

The supreme court's ultimate decision in *Oxidermo* was not as significant as the court's resolution of the confusion surrounding the proper procedure for setting aside default judgments and involuntary dismissals. The source of this confusion, the overlap of Trial Rules 59 and 60(B), was illustrated by one of Shields' jurisdictional arguments. Relying upon a third district court of appeals decision, Shields argued that Oxidermo's first Trial Rule 60(B) motion to set aside the default judgment should have been treated as a Trial Rule 59 motion to correct errors, because it was filed within sixty days of the default judgment.[9] If a Trial Rule 60(B) motion is treated as a Trial Rule 59 motion, then denial of that Trial Rule 60(B) motion would trigger the thirty day filing requirement for a praecipe. Thus, according to Shields' argument, the praecipe would need to be filed within thirty days of the denial of that motion, making Oxidermo's praecipe untimely.

The supreme court rejected Shields' argument and, specifically overruling five appellate court cases,[10] resolved the dispute regarding the use of Trial Rules 59 and 60(B) in obtaining postjudgment relief from default judgments and involuntary dismissals. The supreme court determined that under no circumstances should a Trial Rule 60(B) motion be treated as a Trial Rule 59 motion to correct errors.[11] The court stated that the proper procedure for setting aside a default judgment is

> to first file a Rule 60(B) motion to have the default or default judgment set aside. Upon ruling on that motion by the trial court the aggrieved party may then file a Rule 59 Motion to Correct Error alleging error in the trial court's ruling on the previously filed Rule 60(B) motion. Appeal may then be taken from the court's ruling on the Motion to Correct Error.[12]

Oxidermo set forth the procedure that must be followed to gain postjudgment relief from a default judgment or involuntary dismissal.

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[9]No. 1282 S 471, slip op. at 5 (citing *In re* Marriage of Robbins, 171 Ind. App. 509, 358 N.E.2d 153 (1976)).

[10]No 1282 S 471, slip op. at 9 (overruling Pre-finished Moulding & Door, Inc. v. Insurance Guidance Corp., 438 N.E.2d 16 (Ind. Ct. App. 1982); Mathis v. Morehouse, 433 N.E.2d 814 (Ind. Ct. App. 1982); Sowers v. Sowers, 428 N.E.2d 245 (Ind. Ct. App. 1981); Dawson v. St. Vincent Hosp. & Health Care Center, Inc., 426 N.E.2d 1328 (Ind. Ct. App. 1981); *In re* Marriage of Robbins, 171 Ind. App. 509, 358 N.E.2d 153 (1976)). Although not specifically overruled by the supreme court, other cases which are impliedly overruled by the supreme court's statement in *Oxidermo* that "[a]ny other cases following the overruled cases cited above are also hereby overruled," No. 1282 S 471, slip op. at 9, include Houston v. Wireman, 439 N.E.2d 732 (Ind. Ct. App. 1982); Protective Ins. Co. v. Steuber, 175 Ind. App. 139, 370 N.E.2d 406 (1977); Kelly v. Bank of Reynolds, 171 Ind. App. 515, 358 N.E.2d 146 (1976).

[11]No. 1282 S 471, slip op. at 9.

[12]*Id.* at 9-10.

The significance of this can be more readily understood through a discussion of the Indiana Trial Rules governing procedures for obtaining postjudgment relief and a discussion of the interpretations given these rules by the various districts of the court of appeals. An understanding of the overlap conflict and the role played therein by Trial Rule 59 highlights the inherent problems caused by requiring a Trial Rule 59 motion to be filed in all cases to establish appellate jurisdiction in Indiana.

II. The Overlap Conflict in the Court of Appeals

Generally, postjudgment relief is sought in the trial court via a motion to correct errors under Trial Rule 59. Only after this motion has been made and ruled upon may an aggrieved litigant seek relief in the appellate courts.[13] However, the Indiana Trial Rules indicate two exceptions to this general practice, which were the center of the controversy resolved in *Oxidermo*.

Indiana Trial Rules 55(C) and 41(F), respectively, provide that default judgments and involuntary dismissals with prejudice may be set aside "for the grounds and in accordance with the provisions of Rule 60(B)."[14] Thus, these two rules indicate that postjudgment relief following a default judgment or an involuntary dismissal with prejudice should be sought initially by means of a Trial Rule 60(B) motion. When a Trial Rule 60(B) motion is denied, the party must file a Trial Rule 59 motion to correct errors in the trial court to establish appellate court jurisdiction over his appeal.[15]

A Trial Rule 60(B) motion for relief from judgment must be made within a reasonable time, not exceeding one year after the judgment is entered.[16] A Trial Rule 59 motion to correct errors, which is a prerequisite to an appeal in Indiana, must be made no later than sixty days after judgment.[17] Thus, during the sixty days after a default judgment or an involuntary dismissal with prejudice, Trial Rules 59 and 60(B) overlap, and litigants must decide which motion to make, a Trial

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[13]Ind. R. Tr. P. 59. *See infra* note 84 and accompanying text.

[14]Ind. R. Tr. P. 55(C), 41(F).

[15]*See* Ind. R. Tr. P. 60(C). *See also* Ind. R. App. P. 2(A), 4(A), 7.2(A).

[16]Ind. R. Tr. P. 60(B) provides in part: "The motion shall be filed within a reasonable time. . . and not more than one year after the judgment, order or proceeding was entered or taken . . . ."

[17]Ind. R. Tr. P. 59(C) provides:

> (C) Time for filing: Service on judge. A motion to correct error shall be filed not later than sixty [60] days after the entry of a final judgment or an appealable final order. A copy of the motion to correct error shall be served, when filed, upon the judge before whom the case is pending pursuant to Trial Rule 5.

Rule 59 motion to correct errors or a Trial Rule 60(B) motion for relief from judgment.

Although Trial Rules 55(C) and 41(F) indicate that a default judgment or involuntary dismissal should be set aside "in accordance with the provisions of Trial Rule 60(B),"[18] some courts allowed or required a Trial Rule 59 motion to correct errors to be used initially to set aside the default judgment or involuntary dismissal with prejudice in certain situations.[19] Because Trial Rule 59(A)(9) permits a motion to correct errors "[f]or any reason allowed by these rules, statute or other law,"[20] these courts determined that a Trial Rule 59 motion could be made based upon the same grounds for relief proscribed in Trial Rule 60(B), because Trial Rule 60(B) is part of "these rules." Thus, these courts determined that a party could make a Trial Rule 59 motion to correct errors that was "in accordance with the provisions of Rule 60(B)."[21] However, because the various districts of the court of appeals did not agree whether a Trial Rule 59 motion to correct errors could be used in these situations, and because those courts which did allow its use did not agree as to when it was proper, many appellants who relied on the decision of one district of the court of appeals were denied an appeal by a contradictory opinion rendered by another district.[22]

The various districts of the Indiana Court of Appeals generally took four different approaches in determining the proper roles of Trial Rules 59 and 60(B) following a default judgment or an involuntary dismissal with prejudice. One approach taken by the courts was based on a strict interpretation of Trial Rules 55(C) and 41(F).[23] This view

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[18]IND. R. TR. P. 41(F), 55(C).

[19]*See, e.g.*, Houston v. Wireman, 439 N.E.2d 732 (Ind. Ct. App. 1982); Mathis v. Morehouse, 433 N.E.2d 814 (Ind. Ct. App. 1982); Sowers v. Sowers, 428 N.E.2d 245 (Ind. Ct. App. 1981); Dawson v. St. Vincent Hosp. & Health Care Center, Inc., 426 N.E.2d 1328 (Ind. Ct. App. 1981); *In re* Marriage of Robbins, 171 Ind. App. 509, 358 N.E.2d 153 (1976).

[20]IND. R. TR. P. 59(A)(9).

[21]IND. R. TR. P. 41(F), 55(C). For a list of recent cases adopting this interpretation see *supra* note 19.

[22]*See, e.g.*, Houston v. Wireman, 439 N.E.2d 732 (Ind. Ct. App. 1982); Mathis v. Morehouse, 433 N.E.2d 814 (Ind. Ct. App. 1982); Dawson v. St. Vincent Hosp. & Health Care Center, Inc., 426 N.E.2d 1328 (Ind. Ct. App. 1981). In his dissent to one such ruling, *Houston v. Wireman*, Judge Sullivan stated:

> [T]he permutations possible from the application or misapplication of Trial Rules 59 and 60 are virtually endless. It is another instance of the trap baited for the conscientious and careful practitioner who is not sufficently clairvoyant to anticipate which particular appellate inconsistency will attach to his particular assertion of error.

439 N.E.2d at 734 (Sullivan, J., dissenting).

[23]*See* Yerkes v. Washington Mfg. Co., 163 Ind. App. 692, 326 N.E.2d 629 (1975); Hooker v. Terre Haute Gas Corp., 162 Ind. App. 43, 317 N.E.2d 878 (1974); Northside

did not recognize the overlap of Trial Rules 59 and 60(B); it required that relief initially be sought by means of a Trial Rule 60(B) motion. If the Trial Rule 60(B) motion was denied, then an aggrieved party seeking an appeal had to file a Trial Rule 59 motion to correct errors directed to the denial. This approach was adopted by the first district in both *Hooker v. Terre Haute Gas Corp.*[24] and *Yerkes v. Washington Manufacturing Co.*,[25] which were decisions giving the first interpretations of the rules following their adoption.

The second district adopted a "relief-sought" approach in *Kelly v. Bank of Reynolds*,[26] a 1976 case. The *Kelly* court explained that in most instances defaulted parties are seeking equitable relief from the trial court, because the party failed in some way to appear or to plead and now wants to offer facts that encourage the court to excuse that failure.[27] Kelly, however, was alleging an error of law, rather than the usual equitable reasons for relief from a default judgment.[28] Because this default was based on an error of law rather than a plea in equity, the *Kelly* court held that "when a judgment (default or otherwise) has been entered against a party, and that party alleges that an error of law forms a basis of that judgment, the allegations may be presented via a T.R. 59 motion to correct errors."[29] In a 1981 case, *Dawson v. St. Vincent Hospital & Health Care Center*,[30] the fourth district also adopted the relief-sought approach.

In *Protective Insurance Co. v. Steuber*,[31] a 1977 case, the first district modified its earlier opinion in *Yerkes* that relief from a default judgment could be sought only in accordance with the provisions of Trial Rule 60(B). The court determined that an exception to its rule in *Yerkes* should be allowed when a Trial Rule 59 motion to correct errors, directed to *errors of law* in the trial court, is filed within sixty days of judgment.[32] Thus, the first district, in effect, adopted the relief-sought standard first used in *Kelly*.[33]

The third district adopted a "timing" approach in *In re Marriage of Robbins*,[34] a 1976 case handed down the same day as *Kelly*. The

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Cab Co. v. Penman, 156 Ind. App. 577, 197 N.E.2d 838 (1973). *See also* Pre-finished Moulding & Door, Inc. v. Insurance Guidance Corp., 438 N.E.2d 16, 21 (Ind. Ct. App. 1982) (Staton, J., concurring).

[24]162 Ind. App. 43, 317 N.E.2d 878 (1974).

[25]163 Ind. App. 692, 326 N.E.2d 629 (1975).

[26]171 Ind. App. 515, 358 N.E.2d 146 (1976).

[27]*Id.* at 519, 358 N.E.2d at 149.

[28]*Id.* at 521, 358 N.E.2d at 150.

[29]*Id.* at 522, 358 N.E.2d at 150.

[30]426 N.E.2d 1328 (Ind. Ct. App. 1981).

[31]175 Ind. App. 139, 370 N.E.2d 406 (1977).

[32]*Id.* at 143, 370 N.E.2d at 408-09.

[33]*See supra* notes 26-29 and accompanying text.

[34]171 Ind. App. 509, 358 N.E.2d 153 (1976). The Indiana Courts of Appeals,

court stated that "one of the common, overlapping purposes [of Trial Rules 59 and 60(B)] is to call errors, *either in equity or in law*, to the attention of the trial court to avoid an injustice."[35] The only difference the court suggested between the use of the two rules was the timing of the two motions.[36] Thus, the *Robbins* court held that a Trial Rule 59 motion could be used to seek relief from judgment within sixty days thereof.[37] Additionally, any motion that was based on grounds included in Trial Rule 60(B) that was made within sixty days of judgment would be treated as a Trial Rule 59 motion with no further motion to correct errors required prior to appeal.[38] Of course, the court in *Robbins* also stated that due to the sixty-day time limit for filing motions to correct errors, any Trial Rule 60(B) motion filed later than sixty days after judgment must be treated as a Trial Rule 60(B) motion and could be appealed only by filing a subsequent motion to correct errors.[39]

In 1981, only one month after *Dawson v. St. Vincent Hospital & Health Care Center*[40] was handed down by the fourth district, the third district again followed the timing approach of *Robbins* in *Sowers v. Sowers*.[41] The court in *Sowers* treated a Trial Rule 60(B) motion as a Trial Rule 59 motion to correct errors because it was filed within sixty days of judgment. As a result, the party was able to appeal without filing an additional motion to correct errors.[42]

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throughout this conflict, and the Indiana Supreme Court, in *Oxidermo*, cited *Robbins* as an appeal from a default judgment. In *Robbins*, however, Judge Staton specifically stated:

> Although Edley Robbins refers to the judgment rendered in this action as a default judgment, it is not a default judgment. An answer was filed by Edley Robbins to his wife's petition for dissolution of their marriage. Both Edley Robbins and his wife had notice of the trial date for a trial on the merits. When a trial court proceeds to hear a divorce action on the merits even though one of the parties is absent, the resulting judgment is on the merits. The judgment is not a default judgment. Indiana Rules of Procedure, Trial Rule 55(B) would not be applicable. Aetna Securities Company v. Sickels (1949), 120 Ind. App. 300, 88 N.E.2d 789.

171 Ind. App. at 510, n.1, 358 N.E.2d at 154 n.1. Because *Robbins* was based on a judgment on the merits and was not an appeal from a default judgment, the appellate court was correct in allowing the appellant to seek relief by means of a Trial Rule 59 motion to correct errors. It appears that the court in *Robbins* allowed use of a Trial Rule 59 motion to allege Trial Rule 60 grounds for relief merely to avoid the requirement, at that time, of multiple motions to correct errors. *See supra* notes 101-08 and accompanying text.

[35]171 Ind. App. at 512, 358 N.E.2d at 155 (emphasis added).

[36]*Id.* at 513, 358 N.E.2d at 155.

[37]*Id.*

[38]*Id.*

[39]*Id.* at 513, 358 N.E.2d at 156.

[40]426 N.E.2d 1328 (Ind. Ct. App. 1981).

[41]428 N.E.2d 245 (Ind. Ct. App. 1981).

[42]*Id.* at 247.

In *Mathis v. Morehouse*,[43] decided in 1982, the second district followed and extended the timing test of *Robbins*, while specifically disapproving *Dawson's* relief-sought test.[44] The appellant in *Mathis* had made a Trial Rule 60(B) motion for relief from judgment. Upon its denial, the appellant made a Trial Rule 59 motion to correct errors that was also denied. Mathis then filed a praecipe within the required thirty days.[45] This was the proper procedure under the strict intrepretation of the rules applied in the early cases.[46] It was also correct procedure under the relief-sought test of *Kelly* and *Dawson* because the appellant was seeking equitable relief and not correction of a legal error.[47] The *Mathis* court, however, held that Mathis had not properly preserved any errors for appeal.[48] The court ruled that any attack on a default judgment made within sixty days of that judgment shall be made by means of a Trial Rule 59 motion to correct errors.[49] The court treated Mathis' Trial Rule 60(B) motion as a Trial Rule 59 motion to correct errors because it was filed within sixty days of judgment. This interpretation resulted in the appellant's praecipe not being timely filed and the subsequent dismissal of his appeal.[50]

It is interesting to note that although the courts in *Kelly* and *Robbins* rejected the strict ruling of *Yerkes* in order to allow appeals to be heard on the merits, in *Dawson* and *Mathis*, the courts' extensions of the rulings in *Kelly* and *Robbins* operated to deny the appeals.

Compromise was attempted, later in 1982, in *Pre-finished Moulding & Door, Inc. v. Insurance Guidance Corp.*,[51] when the third district took a "liberal" approach to the problem. The court reviewed Trial Rules 41(F), 55(C), 59, and 60(B) and the long line of cases construing these rules.[52] Two of the most recent cases, *Dawson*[53] and *Mathis*,[54] were compared. The court explained that it could not agree with *Dawson's* relief-sought approach. It did not believe that a motion to correct errors was necessary following a Trial Rule 60(B) motion to alert the trial court or the appellate court to the errors to be raised

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[43]433 N.E.2d 814 (Ind. Ct. App. 1982).

[44]*Id.* at 816.

[45]*Id.* at 815.

[46]*See supra* notes 23-25 and accompanying text.

[47]*See supra* notes 26-30 and accompanying text.

[48]433 N.E.2d at 815.

[49]*Id.* at 815-16.

[50]*Id.* Indiana Appellate Rule 2(A) requires that the praecipe be filed within thirty days of the trial court's ruling on the motion to correct errors.

[51]438 N.E.2d 16 (Ind. Ct. App. 1982).

[52]*Id.*

[53]*Id.* at 18 (citing Dawson v. St. Vincent Hosp. & Health Care Center, Inc., 426 N.E.2d 1328 (Ind. Ct. App. 1981)).

[54]438 N.E.2d at 18 (citing Mathis v. Morehouse, 433 N.E.2d 814 (Ind. Ct. App. 1982) (Sullivan, J., dissenting)).

on appeal.[55] Because denial of a Trial Rule 60(B) motion is generally reviewed only for abuse of discretion, this court determined that a motion to correct errors following a Trial Rule 60(B) motion did little to aid the reviewing court.[56]

The *Pre-finished Moulding* court indicated that the *Mathis* timing approach of allowing only a Trial Rule 59 motion to correct errors within sixty days of judgment would be preferable because it would be quick and inexpensive.[57] However, the court in *Pre-finished Moulding* expressed a strong belief that interests of justice and fair play required that both the *Dawson* and *Mathis* procedures be allowed "until such time as our Supreme Court establishes by rule or decision that no motion to correct errors will be permitted to be addressed to the ruling on a TR 60 motion."[58] This court refused to deny appellate review to a litigant who was forced to choose among three different judicial views of the postjudgment procedure. Instead, the court decided to take a more liberal approach and allow the use of either a Trial Rule 59 or 60(B) motion initially, until the Indiana Supreme Court determined what was proper.[59]

Judge Staton concurred in the result but disagreed with the majority's reasoning, stating that "the majority's reasoning needlessly complicates the procedural law when the wording of the Trial Rules is unmistakably clear."[60] He would have followed the strict interpretation of the early cases that required an initial Trial Rule 60(B) motion following a default judgment or involuntary dismissal.[61]

The majority in the second district, in September of 1982, refused to adopt this liberal compromise approach. In *Houston v. Wireman*,[62] the second district reaffirmed its ruling in *Mathis*; it held that within sixty days of judgment *only* a Trial Rule 59 motion to correct errors could be used to set aside a default judgment.[63] In a lengthy footnote, the majority discussed *Pre-finished Moulding*'s liberal view allowing the use of a Trial Rule 59 motion, or a Trial Rule 60(B) motion followed by a Trial Rule 59 motion, until the supreme court specifies which is correct.[64] The second district responded that "[t]here is arguable merit to [the third district's] position. However, contrary to the major-

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[55]438 N.E.2d at 19.

[56]*Id.*

[57]*Id.* at 20.

[58]*Id.*

[59]*Id.*

[60]*Id.* at 21 (Staton, J., concurring).

[61]*Id.*

[62]439 N.E.2d 732 (Ind. Ct. App. 1982).

[63]*Id.* at 734. *See supra* notes 43-50 and accompanying text.

[64]439 N.E.2d at 733 n.2 (citing Pre-finished Moulding & Door, Inc. v. Insurance Guidance Corp., 438 N.E.2d 16 (Ind. Ct. App. 1982)).

ity's conclusion, the Supreme Court has spoken."[65] The majority then explained that

> to the extent T.R. 60(B) provides grounds for relief not explicitly enumerated as grounds for relief in T.R. 59(A), it has explicitly incorporated the grounds by the provisions of T.R. 59(A)(9). Thus, the reasonable time envisioned by T.R. 60(B) excludes any error which is discovered or is discoverable by due diligence within the time limitations of T.R. 59(C). Hence, the provisions of T.R. 41(F) and T.R. 55(C) . . . must be read in the context of the scheme presented by T.R. 59 and T.R. 60 so that relief may be appropriate under T.R. 60 only so far as the basis for relief was not discovered or . . . discoverable with due diligence within the limitations for a timely T.R. 59 motion.[66]

As in *Mathis*, Judge Sullivan again dissented from the majority opinion.[67] He stated that the "[a]ppellee properly preserved and presented the error by resort to Trial Rule 60,"[68] and suggested that the majority's opinion "indicates that the permutations possible from the application or misapplication of Trial Rules 59 and 60 are virtually endless."[69] Judge Sullivan also lamented that in recent years the courts had rendered many decisions concerning the interrelationship of Trial Rules 59 and 60(B), "few of which may be harmonized or reconciled; neither have the individual judges and justices been consistent or in agreement."[70] Presenting a long list of citations to cases involving Trial Rules 59 and 60, the Judge stated that "[i]f all the words written by our appellate courts concerning Trial Rule 59 vis a vis Trial Rule 60 were placed end to end, they would stretch to nowhere."[71]

After this review of the conflicting cases and views of the various districts and judges, it becomes apparent that the purposes for Trial Rules 59 and 60(B) in this area of postjudgment relief were not clear when *Oxidermo* arrived before the Indiana Supreme Court. The majority in the second district had stated that the rules were clear in requiring the use of a Trial Rule 59 motion, rather than a Trial Rule 60(B) motion, when a party seeks to set aside a default judgment or an involuntary dismissal within sixty days of judgment.[72]

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[65]439 N.E.2d at 733 n.2 (citing Logal v. Cruse, 267 Ind. 83, 86, 368 N.E.2d 235, 237 (1977)).

[66]*Id.*

[67]*Id.* at 734 (Sullivan, J., dissenting).

[68]*Id.*

[69]*Id.*

[70]*Id.*

[71]*Id.*

[72]*E.g.*, Houston v. Wireman, 439 N.E.2d 732, 733 n.2 (Ind. Ct. App. 1982).

Judge Staton, of the third district, believed that the rules clearly required that a default judgment or an involuntary dismissal be set aside *only* by means of a Trial Rule 60(B) motion.[73] The fourth district believed that a Trial Rule 60(B) motion should be used, but the court would allow the use of a Trial Rule 59 motion when the motion was based on a legal error.[74] The majority in the third district believed that the timing approach taken by the second district was preferable, but due to the diversity of opinion among the judges on the courts of appeals and the resulting unfairness to litigants, the court awaited direction from the Indiana Supreme Court.[75] Judge Sullivan, of the second district, was also dismayed by this confusing line of cases that "stretch to nowhere."[76] Thus, as this brief overview clearly indicates, if the rules *were clear* there would not have been all these different interpretations.

In *Siebert Oxidermo, Inc. v. Shields*,[77] the supreme court agreed with the original strict interpretation established by the first district in *Yerkes v. Washington Manufacturing Co.*[78] The supreme court stated that the rule in *Yerkes* required the initial filing of a Trial Rule 60(B) motion to set aside the default judgment. Upon its denial, a Trial Rule 59 motion to correct errors may be made within sixty days of the court's ruling on the Trial Rule 60(B) motion, and an appeal could be taken from the court's denial of the motion to correct errors.[79] The supreme court also stated that under no circumstances should a Trial Rule 60(B) motion be treated as a Trial Rule 59 motion to correct errors.[80] The *Oxidermo* court accused the *Robbins* court and others that diverged from the holding in *Yerkes* of having " 'hopelessly obscured the already murky requirements for post judgment relief . . . .' "[81]

The procedure chosen by the Indiana Supreme Court is most in accord with the wording of Trial Rules 55(C) and 41(F), which allow default judgments and involuntary dismissals to be set aside "for the grounds and in accordance with the provisions of Rule 60(B)."[82] The

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[73]Pre-finished Moulding & Door, Inc. v. Insurance Guidance Corp., 438 N.E.2d at 21 (Staton, J., dissenting).

[74]*E.g.*, Dawson v. St. Vincent Hosp. & Health Care Center, Inc., 426 N.E.2d 1328 (Ind. Ct. App. 1981).

[75]Pre-finished Moulding & Door, Inc., 438 N.E.2d at 20.

[76]Houston v. Wireman, 439 N.E.2d at 734 (Sullivan, J., dissenting).

[77]No. 1282 S 471, slip op. (Ind. 1983).

[78]163 Ind. App. 692, 326 N.E.2d 629 (1975).

[79]No. 1282 S 471, slip op. at 8 (Ind. 1983).

[80]*Id.* at 9

[81]*Id.* (citing 4 W. HARVEY & R. TOWNSEND, INDIANA PRACTICE 76 (Supp. 1982)) (quoting Harvey, *Civil Procedure and Jurisdiction, 1976 Survey of Recent Developments in Indiana Law*, 11 IND. L. REV. 51, 71 (1977)).

[82]IND. R. TR. P. 55(C), 41(F).

required filing of a Trial Rule 59 motion to correct errors following a denial of the Trial Rule 60(B) motion is also in accordance with Trial Rule 60(C), which states that "[a] ruling or order of the court denying or granting relief, in whole or in part, by motion under subdivision (B) of this rule shall be deemed a final judgment, and an appeal may be taken therefrom as in the case of a judgment."[83] Furthermore, all other judgments may be appealed only after the requisite filing of a Trial Rule 59 motion to correct errors in the trial court.[84] Therefore, the court's ruling appears to be a logical interpretation of the Trial Rules governing default judgments and involuntary dismissals.

III. Prerequisite to Appeal—Inherent Problem of Trial Rule 59

Although the supreme court's ruling in *Oxidermo* on the overlap conflict certainly clarified the procedures for setting aside a default judgment in a manner that is consistent with the Trial Rules, the decision does not solve certain inherent problems involved with seeking postjudgment relief in Indiana. Since its adoption, Trial Rule 59 has been a source of great confusion and controversy for litigants, especially those whose appeals have not been heard on the merits as a result of a failure to comply with the technical requirements of Trial Rule 59.[85] Therefore, it is not surprising that Trial Rule 59 played a leading role in the recent dispute concerning the proper procedure for setting aside a default judgment or an involuntary dismissal with prejudice.

The problems created by Trial Rule 59 are even less surprising in light of the development of the Indiana Trial Rules governing postjudgment relief and, specifically, Trial Rule 59. Prior to the adoption of the Indiana Rules of Trial Procedure in 1969, a "great need for compilation and centralization"[86] of the statutory provisions for attack-

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[83]Ind. R. Tr. P. 60(C).

[84]An amendment to Trial Rule 59 subsequent to the supreme court decision in P-M Gas & Wash Co. v. Smith, 268 Ind. 297, 375 N.E.2d 592 (1978), eliminated language in the Trial Rule that specifically stated that a Trial Rule 59 motion to correct errors was a condition to appeal. For the text of Trial Rule 59(G) prior to the 1980 amendment, see *infra* note 104. However, Indiana Appellate Rules 2(A), 4(A), and 7.2(A) suggest that the motion to correct errors is still a prerequisite to appeal in Indiana. *See also* 4 W. Harvey & R. Townsend, Indiana Practice 14 (Supp. 1982) [hereinafter cited as Harvey].

[85]*See, e.g.*, State v. Deprez, 260 Ind. 413, 296 N.E.2d 120 (1973); Snider v. Gaddis, 413 N.E.2d 322 (Ind. Ct. App. 1980); Ebersold v. Wise, 412 N.E.2d 802 (Ind. Ct. App. 1980); Diaz v. Duncan, 406 N.E.2d 991 (Ind. Ct. App. 1980); Davis v. McElhiney, 396 N.E.2d 140 (Ind. Ct. App. 1979); Stuteville v. Downing, 391 N.E.2d 629 (Ind. Ct. App. 1979); Trimble v. Trimble, 167 Ind. App. 600, 339 N.E.2d 614 (1976).

[86]Note, *Procedural Techniques for Belated Attacks on Judgments in Indiana*, 32 Ind. L.J. 205, 237 (1957).

ing judgments in Indiana existed. In 1957, one commentator complained that "present statutory remedies have sprung from different sources and have evolved independently; consequently, many areas overlap and others are not adequately provided for."[87] In 1969, the statutes were compiled and centralized. The new Indiana Trial Rules incorporated many of the Federal Rules of Civil Procedure, while maintaining some of the peculiarities of the old Indiana procedures.[88] However, before the new Indiana Trial Rules even became effective on January 1, 1970,[89] one scholar predicted that because the new Indiana Trial Rules contained "highly interrelated and overlapping provisions," they would "pose some challenging questions of construction and administration."[90]

As was predicted over a decade ago, the Indiana Trial Rules have posed many problems.[91] In a recent opinion, Judge Sullivan commented that "our rules constitute in many respects a morass and a mixture of overlap, insufficiency, inconsistency and incomprehensibility."[92] Judge Sullivan suggested that the root of the current problem was "the attempted adoption of many or most of the federal rules but thereafter engrafting onto those rules incompatible old Indiana procedures."[93]

Judge Sullivan's comment is particularly applicable to the relationship between Trial Rule 60 and Trial Rule 59. The major provisions of Trial Rule 60 are nearly identical to Federal Rule 60;[94] Trial Rule 59, however, has little resemblance to Federal Rule 59.[95] Trial Rule 59 is actually a modification of the old Indiana motion for a new trial and was not designed to mesh with Trial Rule 60 which was modeled after Federal Rule 60. The failure of these two trial rules to complement each other in providing postjudgment relief has created troublesome overlaps and conflicts that result from trying to combine trial rules that come from different sources. As illustrated in the *Oxidermo* decision, the most recent example of this overlap con-

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[87]*Id.*

[88]Greenebaum, *Post Trial Motions Under the New Indiana Rules*, 45 IND. L.J. 377, 377 (1970).

[89]Act of March 13, 1969, ch. 191, 1969 Ind. Acts 546-717 (codified at IND. CODE § 34-5-1-5 (1982)).

[90]Greenebaum, *supra* note 88, at 377.

[91]*See id.*

[92]Mathis v. Morehouse, 433 N.E.2d 814, 817 (Ind. Ct. App. 1982) (Sullivan, J., dissenting).

[93]*Id.*

[94]*Compare* IND. R. TR. P. 60 *with* FED. R. CIV. P. 60. *See also* Greenebaum, *supra* note 88, at 384.

[95]*Compare* IND. R. TR. P. 59 (the Indiana rules require a Trial Rule 59 motion to correct errors as a prerequisite to appeal) *with* FED. R. CIV. P. 59 (the Federal Rules contain no similar provision).

flict was the confusion surrounding the use of Trial Rules 59 and 60(B) in seeking postjudgment relief from a default judgment or an involuntary dismissal.[96]

More serious than the problems that arise from the overlap of Trial Rules 59 and 60(B) are the problems created by making Trial Rule 59 a prerequisite for appeal. When the Indiana Trial Rules were adopted in 1969, the Indiana Supreme Court determined that the motion to correct errors should remain a condition to appeal, although the Civil Code Study Commission reported eleven reasons why it should not be a prerequisite.[97] Requiring a party to file a Trial Rule

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[96]Siebert Oxidermo, Inc. v. Shields, No. 1282 S 471, slip op. (Ind. 1983). *See supra* notes 13-84 and accompanying text.

[97] HARVEY, *supra* note 84, at 119-20 (1971) (quoting Civil Code Study Commission Comments). These reasons were:

> First: It will assure consideration of cases upon the merits, rather than solution on technical grounds which must be blamed only on the lawyer taking the appeal or the very uncertainty of the technical law involved.
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> Second: The motion to correct error seldom is effective below. It is common knowledge that not more than 2% or 3% of all cases are reversed when the motion is made. It, therefore, wastes everybody's time.
>
> Third: The transcript of evidence seldom, if ever, is available to aid a party in determining whether or not prejudicial error was committed. Consequently, a lawyer cannot fairly present the issues for correction within the time provided, and out of caution he is forced to raise issues which may prove not to be reversible error.
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> Fourth: The expenses of reproducing the motion for a new trial, rather than emphasizing the actual events in the record where error was committed are costly, and time consuming.
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> Fifth: Past experience has shown a tendency upon the part of courts on appeal to develop technical language for assigning error on appeal especially when such error must go through a series of restatements in motions, briefs and arguments.
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> Sixth: In criminal cases, the technical limitation that all errors be raised within a relatively short period of time after the trial and before the transcript is prepared is almost unbelievable in this day when the rights of those accused of crimes are so well recognized.
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> Seventh: The real effect of requiring a motion for a new trial is to consume time and promote delay. The delay involved often is such that, if generally known, it would lead to more radical innovations. *Compare, e.g.*, Indianapolis Life Ins. Co. v. Lundquist, 222 Ind. 359, 53 N.E.2d 338 (1944).
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> Eighth: If the trial judge is permitted to serve as a court of appeal, his decision on questions of law raised by the motion to correct error is made without the benefit of briefs which represent the final step in the appeal process. Briefs cannot be artfully drawn without the transcript and the record which usually are not available in the time and place where the motion is made below.
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> Ninth: Judges on appeal often admit that failure to raise error properly below is an effective means of allowing them to dispose of the cases. If the case is without merit, or if it is poorly presented, the proper remedy is by means of the court's power to deal with counsel, and in all cases with the merits.
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> Tenth: In view of the over-all ineffectiveness of the motion to correct

59 motion to correct errors prior to appeal has adversely affected thousands of appellants. Appellants are routinely denied a hearing on the merits of their appeal, because they failed to fully comply with the technical requirements of the motion to correct errors. This failure to comply may result from neglecting to include an alleged error in the motion to correct errors,[98] from filing the motion later than the prescribed sixty-day period after final judgment,[99] or from merely failing to use the technical language required by the appellate court.[100]

In addition to these general problems resulting from the prerequisite filing of a Trial Rule 59 motion, a major problem arose involving the requirement of multiple motions to correct errors. This was finally resolved in 1980, when Trial Rule 59 was subjected to a major revision[101] that brought it in line with the Indiana Supreme Court decision in *P-M Gas & Wash Co. v. Smith*.[102] In *P-M Gas*, the Indiana Supreme Court overruled a long line of cases[103] that had interpreted Trial Rule 59(G)[104] as requiring a new motion to correct errors each

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error (formerly motion for a new trial), it presents, in final analysis, a technical obstacle in the way of consideration of a case upon its merits. Parties who feel that relief can be obtained below are free to seek it. As a mandatory rule it presents an unreasonable cost to the time of professors, students and lawyers in getting to the merits on an appeal.

Eleventh: The old rule followed in Indiana has long since been rejected in the federal courts and other jurisdictions where effort has been made to eliminate delay and cost in judicial administration.

[98] *See, e.g.*, Cunningham v. Associates Capital Servs. Corp., 421 N.E.2d 681 (Ind. Ct. App. 1981); Means v. Indiana Fin. Corp., 416 N.E.2d 896 (Ind. Ct. App. 1981); Hieb v. Metropolitan Dev. Comm'n of Marion County, 412 N.E.2d 321 (Ind. Ct. App. 1980).

[99] *See, e.g.*, Kelsey v. Nagy, 410 N.E.2d 1333 (Ind. Ct. App. 1980); Kratkoczki v. Regan, 381 N.E.2d 1077 (Ind. Ct. App. 1978); Lines v. Browning, 156 Ind. App. 185, 295 N.E.2d 853 (1973).

[100] HARVEY, *supra* note 84, at 119 (1971).

[101] IND. CODE ANN., IND. R. TR. P. 59 Supreme Court Committee note (West 1981). *See also* Robertson, *Revised Trial Rule 59 and P-M Gas*, 13 IND. L. REV. 541 (1980).

[102] 268 Ind. 297, 375 N.E.2d 592 (1978) (holding that appellants need not file a motion to correct errors each time the judgment was altered prior to appeal).

[103] 268 Ind. at 301, 375 N.E.2d at 594 (overruling State v. Deprez, 260 Ind. 413, 296 N.E.2d 120 (1973); Campbell v. Mattingly, 168 Ind. App. 651, 344 N.E.2d 858 (1976); Lake County Title Co. v. Root Enter., 167 Ind. App. 559, 339 N.E.2d 103 (1975); Minnette v. Lloyd, 166 Ind. App. 1, 333 N.E.2d 791 (1975); Miller v. Mansfield, 164 Ind. App. 583, 330 N.E.2d 113 (1975); Hansbrough v. Indiana Revenue Bd., 164 Ind. App. 56, 326 N.E.2d 599 (1975); Weber v. Penn-Harris-Madison School Corp., 162 Ind. App. 28, 317 N.E.2d 811 (1974); Koziol v. Lake County Plan Comm'n, 161 Ind. App. 232, 315 N.E.2d 374 (1974); Easley v. Williams, 161 Ind. App. 24, 314 N.E.2d 105 (1974); State v. Kushner, 160 Ind. App. 464, 312 N.E.2d 523 (1974); Wyss v. Wyss, 160 Ind. App. 281, 311 N.E.2d 621 (1974); Davis v. Davis, 159 Ind. App. 290, 306 N.E.2d 377 (1974)).

[104] Indiana Trial Rule 59(G), before it was amended in 1980, provided:

(G) Motion to correct error a condition to appeal. 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.

time the court changed its judgment in any manner.[105] In those cases, many appellants were unable to obtain a decision on the merits because they had failed to make multiple motions to correct errors.[106] The amended rule has been interpreted to require that at least one motion to correct errors be made in the trial court before an appeal can be taken,[107] and either party may appeal from the ruling on that initial motion to correct errors.[108]

One result of the *P-M Gas* amendment to Trial Rule 59 is that some errors can now be raised on appeal although they were not included in a motion to correct errors.[109] If errors in this limited area may be raised in the appellate brief without previously being included in a motion to correct errors, it would seem plausible that all errors could be raised in this manner. The supreme court refused to make such a dramatic move, however, and in *P-M Gas*, the court emphasized three purposes it believed were served by the motion to correct errors:

> (1) to present to the trial court an opportunity to correct error which occurs prior to the filing of the motion; (2) to develop those points which will be raised on appeal by counsel; and (3) to inform the opposing party concerning the points which will be raised on appeal so as to provide that party an opportunity to respond in the trial court and on appeal.[110]

Upon careful examination, it appears that all three purposes for the prerequisite filing of a Trial Rule 59 motion could be accomplished by other means. The first purpose appears negligible considering, as the Civil Code Study Commission reported, "not more than 2% or

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> 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.

[105]268 Ind. at 302, 375 N.E.2d at 594.

[106]*See supra* note 103 and accompanying text. *See also* Grove, *The Requirement of a Second Motion to Correct Errors as a Prerequisite to Appeal*, 10 IND. L. REV. 462 (1977).

[107]HARVEY, *supra* note 84, at 14 (Supp. 1982).

[108]*Id. See also* Robertson, *supra* note 101.

[109]Robertson, *supra* note 101, at 561 n.125 (citing IND. CODE ANN., IND. R. TR. P. 59 Supreme Court Committee note (West 1981)). Judge Robertson noted that:

> 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.

Robertson, *supra* note 101, at 561 n.125.

[110]268 Ind. at 301, 375 N.E.2d at 594 (1978).

3% of all cases are reversed when the motion is made."[111] Even if trial courts currently make numerous corrections of error as a result of Trial Rule 59 motions, they would not necessarily be precluded from doing so merely because the litigant was not required to make the motion to correct errors as a condition to appeal.[112] As for the second and third purposes, the points to be raised on appeal can be more carefully and fully developed in the briefs of the parties than in a motion to correct errors that must usually be filed without the benefit of an opportunity to look over the transcript of the evidence.[113] Because the trial record is not yet available, appellants are more likely to make broad allegations of error so that no error is missed and thereby waived.[114] Yet Trial Rule 59 requires that "[e]ach claimed error shall be stated in specific rather than general terms, and shall be accompanied by a statement of the facts and grounds upon which the errors are based."[115] These conflicting requirements force the appellant into a difficult position. He must be as general as possible to avoid waiving an error for appeal, without being so general that the court will not consider the motion due to a lack of specificity.

It appears that the purposes to be accomplished by the motion to correct errors could be accomplished just as well without the prerequisite filing of a motion to correct errors. As one commentator observed:

> Parties in federal court, where the motion to correct errors is unknown, seem to have no special difficulty in apprising trial courts of the existence of trial error, and there is no evidence that the federal appellate courts cannot do their jobs without having issues on appeal formulated in a motion to correct errors.[116]

Thus, the prerequisite motion to correct errors has caused routine problems with waiver of issues on appeal as well as major conflicts such as the pre-*P-M Gas* requirement of multiple motions and the more recent overlap conflict. All these problems have arisen because the

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[111]HARVEY, *supra* note 84, at 119 (1971) (quoting Civil Code Study Commission Comments).

[112]Dean Grove suggested an optional motion to correct errors. Grove, *supra* note 106, at 477.

[113]HARVEY, *supra* note 84, at 119 (1971).

[114]Because the Trial Rule 59 motion to correct error is a prerequisite to appeal, any alleged error that is not included in that motion is considered waived for purposes of appeal. *See, e.g.*, Stanley v. Fisher, 417 N.E.2d 932 (Ind. Ct. App. 1981); Ebersold v. Wise, 412 N.E.2d 802 (Ind. Ct. App. 1980); Hockelberg v. Farm Bureau Ins. Co., 407 N.E.2d 1160 (Ind. Ct. App. 1980); Ligon Specialized Hauler, Inc. v. Hott, 384 N.E.2d 1071 (Ind. Ct. App. 1979); Warren v. City of Indianapolis, 375 N.E.2d 1163 (Ind. Ct. App. 1978).

[115]IND. R. TR. P. 59(D)(2).

[116]Grove, *supra* note 106, at 477-78.

motion to correct errors is a condition to appeal in Indiana. Yet, it appears that the prerequisite motion to correct errors adds little to appellate procedure that could not be accomplished just as well by an appellate brief or an optional motion to correct error.

Judge Robertson warned, however, that "the overtaxed intermediate appellate system" might not be able to handle the raising of errors by means of a brief rather than by means of a motion to correct errors.[117] Judge Robertson suggested that "the court may rely on other procedural devises to eliminate frivolous appeals that threaten to clog the [courts]."[118] Although the concern with frivolous appeals is understandable, the motion to correct errors should not be used by the appellate courts as a "technical obstacle in the way of consideration of a case upon its merits."[119] The Civil Code Study Commission suggested that "[i]f the case is without merit, or if it is poorly presented, the proper remedy is by means of the court's power to deal with counsel, and in all cases with the merits."[120]

Additionally, elimination of the motion to correct errors as a condition to appeal is not likely to add greatly to the number of cases that are appealed because the cost of appealing a decision is tremendous even without the additional cost of a motion to correct errors. The more likely result of eliminating the prerequisite motion would be to require the appellate courts to consider more cases on the merits, rather than on the fulfillment of the technical requirements of Trial Rule 59. Its elimination would, however, reduce the workload of Indiana trial courts, which would no longer need to respond to, and usually deny, endless motions to correct errors.

IV. Conclusion

If the Trial Rules are really as clear as the supreme court indicated, why did the appellate courts have such a difficult time interpreting and applying them? The supreme court itself gave part of the answer when it accused the appellate decisions of having "hopelessly obscured the *already murky* requirements for post judgment relief."[121]

The procedure for seeking postjudgment relief from a default judgment or an involuntary dismissal, as clarified in *Oxidermo*, requires

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[117]Robertson, *supra* note 101, at 562.

[118]*Id.*

[119]Harvey, *supra* note 84, at 119 (1971) (quoting Civil Code Study Commission Comments).

[120]*Id.* (quoting Civil Code Study Commission Comments).

[121]No. 1282 S 471, slip op. at 8 (Ind. 1983) (citing Harvey, *supra* note 84, at 76 (Supp. 1982)) (quoting Harvey, *Civil Procedure and Jurisdiction, 1976 Survey of Recent Developments in Indiana Law*, 11 Ind. L. Rev. 51, 71 (1977)).

two motions prior to appeal, a Trial Rule 60(B) motion and a Trial Rule 59 motion to correct errors. The additional motion appears to add nothing to the litigation but extra expense and to extend the period required for resolution of the dispute. This two-motion approach, unless absolutely necessary, contradicts Trial Rule 1 which specifies that the rules "shall be construed to secure the just, speedy and inexpensive determination of every action."[122]

The problems remaining after the *Oxidermo* ruling, both the inherent problems of obtaining postjudgment relief due to "murky" trial rules and the lack of the "just, speedy and inexpensive determination of every action,"[123] could be easily resolved if the Indiana Supreme Court would make one change in the Indiana Trial Rules—eliminate the motion to correct errors under Trial Rule 59 as a prerequisite to appeal. This approach not only would have prevented the problems in *P-M Gas* and *Oxidermo*, but also would prevent future problems from developing. As Judge Sullivan recently stated: "It is time now for our appellate tribunals to adopt or effect procedures which permit resolution of genuine legal issues on appeal. It must not be [the courts'] function to make that resolution unduly complicated, expensive, burdensome and time consuming."[124]

SHARON B. HEARN

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[122]IND. R. TR. P. 1.

[123]*Id.*

[124]Houston v. Wireman, 439 N.E.2d 732, 735 (Ind. Ct. App. 1982) (Sullivan J., dissenting).