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INDIANA'S TRIAL RULE 59: P-M GAS & WASH CO. v. SMITH*

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INTRODUCTION

With the adoption of the current Indiana Rules of Trial Procedure, the Rule 59 motion to correct errors was enshrined as the "sacred document"[1] of trial and appellate practice. The Supreme Court of Indiana made the post trial motion a condition of appeal[2] and thus created a fertile source of confusion.[3] Bench and bar have wrestled with the requirements of Rule 59, seeking to determine who must file a motion to correct errors, when it must be filed, and what it must contain.[4] The appellate courts have denied decisions on the merits in hundreds of cases because attorneys have failed to follow the dictates of Rule 59.[5]

In *P-M Gas & Wash Co. v. Smith*,[6] the Supreme Court of Indiana offered some relief to bewildered practitioners. Using a simple negligence case as a vehicle to discuss Rule 59, the divided court[7]

*___ Ind. ___, 375 N.E.2d 592 (1978).

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1. Moore v. Spann, 157 Ind. App. 33, 38, 298 N.E.2d 490, 494 (1973).

2. IND. R. TR. P. 59(G). The court rejected the Civil Code Study Commission's recommendation that the motion be optional. 4 W. HARVEY & R. TOWNSEND, INDIANA PRACTICE 118 (1971).

3. Supreme Court of Indiana, Order Adopting Rules of Procedure, July 29, 1969. The motion to correct errors was basically taken from the earlier statutory motion for a new trial. *See* Acts 1881 (Spec. Sess.), ch. 38, § 420, pp. 319-20; Supreme Court of Indiana, Rule 2-6 (effective Sept. 1, 1960).

4. *Compare* Miller v. Mansfield, 164 Ind. App. 583, 330 N.E.2d 113 (1975), *with* Easley v. Williams, 161 Ind. App. 24, 314 N.E.2d 105 (1974) (necessity of more than one motion). *See, e.g.*, Whitfield v. State, ___ Ind. ___, 366 N.E.2d 173 (1977) (specificity); Hendrickson & Sons Motor Co. v. Osha, ___ Ind. App. ___, 331 N.E.2d 743 (1975) (specificity); Murray v. Murray, 160 Ind.App. 72, 309 N.E.2d 831 (1974) (time of filing); Spall v. State, 156 Ind. App. 189, 295 N.E.2d 852 (1973) (time of filing).

5. *E.g.*, Minnette v. Lloyd, ___ Ind. App. ___, 333 N.E.2d 791 (1975); Hansbrough v. Indiana Revenue Board, 164 Ind. App. 56, 326 N.E.2d 599 (1975); Brunner v. Terman, 150 Ind. App. 139, 275 N.E.2d 553 (1971).

6. ___ Ind. ___, 375 N.E.2d 592 (1978), *vacating on petition to transfer*, ___ Ind. App. ___, 352 N.E.2d 91 (1976).

7. Chief Justice Givan, joined by Justice Pivarnik, concurred in result only. He was particulary critical of the "new rules of procedure" outlined in the majority opinion. ___ Ind. at ___, 375 N.E.2d at 598.

resolved two procedural questions. First, the court overruled a long line of cases[8] in holding that a subsequent motion to correct errors is not required when the trial court takes any action on the errors alleged in a first motion. Thus, even where the trial court alters the judgment in response to a motion, either party may appeal without filing another motion.[9] Any errors raised in that first motion are preserved for appellate review. Second, the court held that Rule 59(D), requiring the filing of cross-errors within fifteen days after service of a motion to correct errors, applies only when the motion is based on evidence outside the record.[10]

In addition to these generally welcome clarifications of Trial Rule 59, the opinion also contains sweeping and often unclear commentary on other facets of Rule 59 practice.[11] This article explores *P-M Gas & Wash Co. v. Smith*, attempting to determine the impact it will have on methods of preserving errors or cross-errors for appeal. Methods of preserving at least three types of errors were considered by the *P-M Gas* court. New errors made in ruling on the first motion to correct errors may apparently now be raised for the first time on appeal. Cross-errors which challenge the judgment must be raised in a motion filed within sixty days of judgment. Finally, cross-errors which would sustain the trial court's judgment must also be raised within sixty days. It is apparent that the extensive and not altogether clear comment on Rule 59 found in *P-M Gas* went far beyond what was necessary for the court to decide the controversy before it[12] and is bound to create continuing problems for the practicing bar until the rules themselves are carefully and thoughtfully revised.

A SIMPLE NEGLIGENCE ACTION—"A PROCEDURAL NIGHTMARE"

P-M Gas & Wash Co. v. Smith was a negligence action brought on behalf of a child injured by machinery in an automatic car wash.[13]

8. The "*Deprez* line" had established that a subsequent motion to correct errors was a prerequisite to appeal whenever the trial court modified its judgment in response to a motion to correct errors. *See* State v. Deprez, 260 Ind. 413, 296 N.E.2d 120 (1973). The issue is discussed *infra* at notes 23-48.

9. ___ Ind. at ___, 375 N.E.2d at 595.

10. *Id.* at ___, 375 N.E.2d at 596.

11. The decision included a "summary" consisting of ten outline points and seven subpoints. This format, plus the complexity of the issues discussed, makes it extremely difficult to understand the opinion.

12. *See* text accompanying notes 52-53 *infra*.

13. *See* Brief of Appellant. Neither report of the case included the facts or substantive issues in the case.

By the time the case reached the supreme court, it presented what the court characterized as "a procedural nightmare."[14]

The case was tried before a jury, which returned a verdict for the defendant company. After judgment was entered on the verdict,[15] plaintiff Smith filed a timely[16] motion to correct errors containing seven specifications of error. After briefs and argument, the trial court denied six of the specifications. However, it agreed with the plaintiff that the giving of an instruction on custom in the trade was error. Granting that one specification, the trial court ordered a new trial.

Defense counsel was left in a quandary. Due to inconsistent decisions by the court of appeals on the necessity of filing a further motion to correct errors after a new trial is ordered,[17] P-M Gas did not know how to proceed. It filed a Rule 59 motion and also prepared to take an immediate appeal by filing a praecipe for the record, in case the motion was unnecessary. Its motion was denied and appeal followed.

In order to understand the complex procedural questions facing the appellate courts, it is essential to outline the positions taken on appeal. Before the court of appeals, the defendant-appellant company argued that the trial court erred in granting a new trial because the questioned instruction was proper. In the alternative, it argued that any error in giving the instruction was mooted because the trial court should have granted defendant's motion for a directed verdict at the close of the plaintiff's case.[18] The plaintiff-appellee responded, defending the grant of a new trial. It further raised as cross-errors the six specifications contained in its original Rule 59 motion which had been denied by the trial court.

Appellant moved to dismiss the cross-errors, arguing that they were barred by Rule 59(D), which states that cross-errors must be filed within fifteen days after service of the appellant's motion to

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14. ____ Ind. at ____, 375 N.E.2d at 593.

15. Transcript at 303. Neither court mentioned entry of judgment on the verdict. It was essential, however, or the initial motion to correct errors would have been premature. Spall v. State, 156 Ind. App. 189, 295 N.E.2d 852 (1973).

16. Trial Rule 59(C) requires filing not later than sixty days after entry of judgment.

17. *Compare* Miller v. Mansfield, 164 Ind. App. 583, 330 N.E.2d 113 (1975) (motion required), *with* Easley v. Williams, 161 Ind. App. 24, 314 N.E.2d 105 (1974) (motion not required).

18. This error had been specified in P-M's motion to correct errors. Brief of Appellant at 7.

correct errors. Responding to the 59(D) argument, appellee asserted that the fifteen day requirement only applies when the moving party relied on evidence outside the record. Both parties agreed that appellant P-M Gas had not relied on any such evidence. Appellee's alternative argument questioned the necessity of appellant's motion after the new trial was ordered. Even if 59(D) applied when there was no evidence outside the record, appellee asserted, it should not be read to require appellee to respond to an unnecessary motion to correct errors.[19]

The Court of Appeals of Indiana, Second District, granted appellant's motion to dismiss. In a per curiam opinion it struck those parts of appellee's brief which dealt with the six purported cross-errors. The court acknowledged appellee's construction of 59(D), but held that the rule requires filing cross-errors within fifteen days after service of the motion to correct errors, "regardless of whether the motion to correct errors is, or is not based on evidence outside the record."[20] This reading of the rule was based on the oft-repeated basis for Rule 59, that claimed errors must first be presented to the trial court before they can be considered on appeal.[21]

Curiously, it was only by misreading the record on appeal and disregarding the appellee's first motion to correct errors that the court of appeals was able to dispose of the purported cross-appeal without questioning the need for the appellant's Rule 59 motion. Clearly, the errors now raised by the appellee had not been "raised for the first time in the appellee's brief on appeal," as the court of appeals stated.[22] Rather, those errors had been raised in the original motion to correct errors. Because they were presented to the trial court at that time, the court's reason for applying 59(D) even where there was no evidence outside the record was inapplicable.

On transfer, the supreme court viewed the case in a different light by noting that the cross-errors had been specified in appellee's first motion to correct errors. It found that the court of appeals erred in dismissing the cross-appeal. In so finding, the supreme court

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19. Because P-M Gas had also filed a praecipe, appellee Smith could not challenge the timeliness of the appeal, as appellees often do. If an unnecessary motion is filed, it does not extend the thirty day period after ruling on the previous motion in which the praecipe must be filed. T.S. v. B.J.S., ___ Ind. App. ___, 370 N.E.2d 969 (1977); Lake County Title Co. v. Root Enterprises, Inc., ___ Ind. App. ___, 339 N.E.2d 103 (1975).

20. ___ Ind. App. at ___, 352 N.E.2d at 93.

21. *Id.* at ___, 352 N.E.2d at 92. *See* notes 78-80 *infra* and accompanying text.

22. *Id.* at ___, 352 N.E.2d at 93.

stated that the appellant's subsequent motion to correct errors was unnecessary. This holding, together with other language in the case about methods of preserving errors and cross-errors, makes *P-M Gas* a case of major impact on Indiana practice.

One Motion to Correct Errors is Enough

In *P-M Gas*, the supreme court resolved the controversy before it by making a major change in Rule 59 practice. The court stated:

> *One motion for each party or each appellant, if there is more than one, shall be sufficient.* That will give the trial court its opportunity to remedy error, and it will serve the other purposes [of the motion], too. 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. A second motion to correct error is not needed . . . .[23]

Appellant had thus preserved its issues for appeal by filing a praecipe after the trial court's ruling. Since the errors raised on appeal were specified in the original motion and challenged the trial court's action in response to that motion, no further motion was necessary. Likewise, appellee had preserved its cross-errors by specifying them in its motion to correct errors. As the court stated, "Either party [may] appeal a ruling on a motion to correct error."[24] No further motions were needed.

This holding, dispensing with the need for any party to file more than one motion to correct errors, was a marked departure from earlier Indiana practice. Since the supreme court decided *State v. Deprez*[25] in 1973, Rule 59 had been interpreted to require the filing of a further motion to correct errors whenever the trial court did more than "simply grant or deny" an earlier motion. If a "new judgment" resulted, another motion was required as a prerequisite to appeal.[26] A brief examination of *Deprez* and of the interpretations given it by the court of appeals[27] reveals that the *P-M Gas* decision

23. ___ Ind. at ___, 375 N.E.2d at 595 (emphasis in original).

24. *Id.* at ___, 375 N.E.2d at 596.

25. 260 Ind. 413, 296 N.E.2d 120 (1973).

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

27. A full analysis of the *Deprez* line is unnecessary here. Jeffrey Grove, in the article cited in note 26 *supra*, fully surveyed and adequately critiqued the numerous cases which arose under the "new judgment" standard.

completely changed the standard for determining when more than one motion is necesary. *Deprez* and its progeny were overruled.[28]

Deprez, the case which gave rise to the subsequent motion requirement, was a condemnation action. When a motion to dismiss for failure to prosecute was filed,[29] the trial court entered a simple judgment of dismissal. The state filed a motion to correct errors which prompted the trial court for the first time to enter special findings and conclusions, together with a judgment again dismissing the action. In dismissing the state's appeal, which followed directly, the supreme court held that a subsequent motion to correct errors directed at the second entry of dismissal was necessary.[30] It noted that had the trial court "simply either granted or denied" the first motion, an immediate appeal could follow.[31] However, because the court found that the second entry constituted a "new judgment," a second motion to correct errors was needed.[32]

This "new judgment" standard led the three districts of the court of appeals to give varying interpretations to the *Deprez* doctrine. Eleven days before the supreme court spoke in *Deprez*, the second district had addressed the issue in *Davis v. Davis*,[33] a divorce action. Appellee's motion to correct errors was granted and an amended property settlement entered. The appellant-husband then initiated an appeal without filing his own motion to correct errors. The court of appeals framed the issue: "whether the party adversely affected by the trial court's granting of a motion to correct errors must, as a condition precedent to appealing that ruling, file another motion to correct errors, alleging as error the trial court's sustaining of the prior motion to correct errors."[34] The court held that a subsequent motion was not required. This initial *Davis* decision concentrated on the language of Appellate Rule 4(A) which states: "A

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28. ___ Ind. at ___, 375 N.E.2d at 595.

29. IND. R. TR. P. 41(E). It had been more than eleven years since the action was filed.

30. 260 Ind. at 421, 296 N.E.2d at 124.

31. *Id.* at 420, 296 N.E.2d at 124.

32. *Id.* at 421, 296 N.E.2d at 124. One comment by the court suggests that the merits of the motion to dismiss and not the failure to address a Rule 59 motion to the second entry may have been the real motivation for dismissing the appeal. The court stated: "From the long history of delay in this litigation, it is abundantly clear that the controversy herein must come to an end sometime. We feel that the time came long ago." *Id.*

33. 156 Ind. App. 176, 295 N.E.2d 837 (1973), *rev'd on pet. for reh.*, 159 Ind. App. 290, 306 N.E.2d 377 (1974).

34. 156 Ind. App. at 177-78, 295 N.E.2d at 838.

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." The court emphasized the impractical procedure which could result if a further motion were required. It noted that an endless series of motions could be required if an appeal could be taken only from denial of a motion.

After *Deprez* was handed down, the second district overruled its prior holding in *Davis*.[35] On rehearing, it construed *Deprez* in language which has been repeated in numerous subsequent decisions:

> [I]f a trial court grants or denies a motion to correct errors which is accompanied by a new entry or judgment consisting of additional findings, amendments, or other alterations of the prior judgment, the party aggrieved thereby must file a motion to correct errors addressed to the new entry which has become the final judgment from which appeal is taken.[36]

The court stated that such interpretation of Appellate Rule 4(A) stressed the need for specificity of alleged errors. Finding that the *Davis* trial court had made additional findings and altered the judgment by amending the property settlement, the court dismissed the appeal because the husband had not filed any motion to correct errors.[37] The trial court, it stated, did not have a chance to correct any errors made in its amendment of the prior judgment. Apparently, the specter of an endless succession of motions was forgotten.

The third district of the court of appeals relied on the second district's explanation of *Deprez* in numerous cases.[38] It applied the requirement of a second motion most stringently:

> This Court reads *Deprez* to mean that if the trial court, in ruling on the motion to correct errors, does *anything*

35. 159 Ind. App. at 292, 306 N.E.2d at 379.

36. *Id.* at 294, 306 N.E.2d at 380.

37. Judge Sullivan filed a concurring opinion filled with veiled criticism of the *Deprez* rule. He noted that practitioners could have "reasonably, rationally and justifiably" concluded that the original *Davis* holding was proper. *Id.* at 296, 306 N.E.2d at 381. Nevertheless, being bound by *Deprez*, he was compelled to concur in a requirement for a second motion which "could not have been reasonably anticipated." *Id.* at 297, 306 N.E.2d at 381.

38. Arthur L. Yarde & Sons, Inc. v. Molargik, ___ Ind. App. ___, 358 N.E.2d 145 (1976); Lake County Title Co. v. Root Enterprises, Inc., ___ Ind. App. ___, 339 N.E.2d 103 (1975); Weber v. Penn-Harris-Madison School Corp., 162 Ind. App. 28, 317 N.E.2d 811 (1974); State v. Kushner, 160 Ind. App. 464, 312 N.E.2d 523 (1974).

> other than simply granting or denying the motion, that ruling becomes a new judgment to which a new motion to correct errors must be directed. Therefore, *any amendment* of a judgment creates a new judgment which requires a motion to correct errors.[39]

Thus, in *Miller v. Mansfield*,[40] the third district held that granting appellees' motion and ordering a new trial created a new judgment requiring a second motion.

In *Miller*, Judge Garrard filed a strong dissent from what he called "the majority's blind application of the *Deprez* doctrine."[41] He noted that it was only when the trial court amended findings, made new findings, altered, amended, or modified a judgment that a new judgment resulted. In those circumstances, he stated, the purposes of Rule 59 could be served only by requiring a further motion; errors no longer pertinent on appeal would be dropped, and the trial and appellate courts would be able to examine specifications which depended on the court's alterations. However, he emphasized that no purposes are served by requiring a further motion after a new trial is ordered; errors presented in the original motion were already reviewed by the trial court, and there simply is no new judgment.

The first district followed the new judgment standard and dismissed appeals in cases where it found that a new judgment resulted from the trial court's ruling on a motion. If the appellant had not filed a second motion directed to that judgment, the appeal was dismissed.[42] However, the first district parted company with the third district on the necessity of a second motion after a new trial is ordered. In *Easley v. Williams*[43] the first district adopted the reasoning of Judge Garrard's dissent in *Miller*. It held that granting a new trial abolished the original judgment and no new judgment resulted.[44] Therefore, no further motion was required.

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39. Weber v. Penn-Harris-Madison School Corp., 162 Ind. App. 28, 32, 317 N.E.2d 811, 813 (1974) (emphasis added).

40. 164 Ind. App. 583, 330 N.E.2d 113 (1975).

41. *Id.* at 587, 330 N.E.2d at 115.

42. Campbell v. Mattingly, ___ Ind. App. ___, 344 N.E.2d 858 (1976); Minnette v. Lloyd, ___ Ind. App. ___, 333 N.E.2d 791 (1975).

43. 161 Ind. App. 24, 314 N.E.2d 105 (1974).

44. In T.S. v. B.J.S., ___ Ind. App. ___, 370 N.E.2d 969 (1977), the first district explored the split of authority and reached the same result it had reached in *Easley*. A subsequent motion was not required after a new trial was ordered. *Easley* is used here to represent the first district's position only because neither the *P-M Gas* court nor the litigants discovered or relied on the well-reasoned *T.S.* decision.

In spite of the conflict and confusion in the court of appeals, the supreme court denied transfer in several post-*Deprez* cases.[45] Thus, *P-M Gas* was the first case in which the court took an opportunity to re-examine its holding in *Deprez*. This re-examination resulted in the court's overruling *Deprez* and changing the standard for Rule 59 filings.

Technically, the *Deprez* doctrine was not at issue in *P-M Gas*. That doctrine addressed the need for a subsequent motion to correct errors by the party aggrieved by trial court action on the first motion. The precise question presented by appellant's motion to dismiss the purported cross-appeal in *P-M Gas* was whether those cross-errors had been preserved by appellee Smith's first motion, not whether appellant P-M Gas, which was the party aggrieved by the grant of a new trial, had to file a subsequent motion. Smith was clearly not a "party aggrieved" by the trial court's ruling—a new trial was exactly what Smith wanted and what he got. At most, he was "aggrieved" because only one reason for a new trial was assigned. Perhaps to this limited extent the *P-M Gas* court had to interpret *Deprez* to determine whether Smith's cross-errors were preserved or whether some subsequent assertion of error was required. On that point the court stated:

> 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 [or cross-appellant's, here] appeal. A second motion to correct error is not needed . . . .[46]

Thus, the court held that appellee's cross-errors, specified in his motion, were preserved for appeal.[47]

The *P-M Gas* court went beyond the precise question presented by appellant's motion to dismiss when it explored the necessity for appellant's motion to correct errors following the trial court's grant of a new trial. Faced with irreconcilable decisions in *Easley* and *Miller*, the supreme court chose to explore the *Deprez* doctrine and

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45. Transfer was denied in eight of the cases. *See* ___ Ind. at ___, 375 N.E.2d at 594 n.1.

46. *Id.* at ___, 375 N.E.2d at 595 (emphasis deleted).

47. It is ironic that on remand the court of appeals decided the case on the merits of P-M Gas's appeal and found it unnecessary to reach the merits of the cross-appeal. ___ Ind. App. ___, 383 N.E.2d 357 (1978).

decide whether appellant, as the party aggrieved by the grant of a new trial, had to file its own motion to correct errors as a prerequisite to appeal. The *P-M Gas* court could have held concisely that no further motion was required because there was no new judgment, thus agreeing with *Easley*. Rather, the court made a radical change in Indiana practice by rejecting the "new judgment" inquiry, and holding that no subsequent motion is required by either party regardless of what action the trial court takes:

> 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* favorable relief given to that motion by the trial court.[48]

Thus, even when the trial court makes extensive modifications of the judgment, direct appeal follows. The *Deprez* line of cases was overruled.

The *P-M Gas* court further stated that either party may institute direct appeal.[49] This did not mark a change in Indiana practice. Although earlier cases had not made an issue out of who could appeal after trial court action in response to the initial motion, in some cases, the issue was whether the original moving party was required to file a second motion after adverse trial court action,[50] and in others, whether the party originally satisfied but aggrieved after

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48. ___ Ind. at ___, 375 N.E.2d at 597.

49. The court stated:

> IV. Ind.R.App. 4(A) should be read as allowing either party to appeal a ruling a motion to correct error, and the principles of law on 'finality' are well stated in Harvey, 3 Indiana Practice, section 54.2 (1978 Supp.).

___ Ind. at ___, 375 N.E.2d at 596. The apparent non-sequitur of the court's cite to Harvey's treatise is puzzling. The cited section digests cases under Rule 54 dealing with judgments involving multiple parties or claims and reports cases dealing with the appealability of partial or interlocutory orders. 3 HARVEY, *supra* note 2, at § 54.2 (Supp. 1978). The section gives no interpretation of Appellate Rule 4(A). Clearly, the language of the rule itself was the best authority for the court's statement.

50. State v. Deprez, 260 Ind. 413, 296 N.E.2d 120 (1973); Arthur L. Yarde & Sons, Inc. v. Molargik, ___ Ind. App. ___, 358 N.E.2d 145 (1976); Campbell v. Mattingly, ___ Ind. App. ___, 344 N.E.2d 858 (1976); Lake County Title Co. v. Root Enterprises, Inc., ___ Ind. App. ___, 339 N.E.2d 103 (1975).

the ruling had to file a subsequent motion.[51] Apparently, the court of appeals read literally Appellate Rule 4(A), which says that appeals may be taken *by either party* from all final judgments, including a ruling on a motion to correct errors.

These *P-M Gas* holdings on the need for a Rule 59 motion more than solved the controversy presented. P-M Gas's appeal was proper, not because its own unnecessary motion was denied,[52] but because it had filed a praecipe within thirty days of the ruling on appellee's motion.[53] Appellee's alleged errors were preserved for appeal because they were contained in a motion filed within sixty days of the original judgment. Thus, the case was decided and the motion to dismiss the cross-errors should have been denied.

However, the supreme court did not stop. Technically, one could confidently state that the remainder of the opinion was dictum.[54] The majority recognized this, but issued a caveat in no uncertain terms.

> Therefore, this decision shall not be construed as dictum but shall be interpreted as controlling all future cases where rulings on motions to correct errors and their procedural aspects may differ, in whole or in part, from the procedural posture of the case before us.[55]

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51. T.S. v. B.J.S., ___ Ind. App. ___, 370 N.E.2d 969 (1977); Miller v. Mansfield, 164 Ind. App. 583, 330 N.E.2d 113 (1975); 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); Davis v. Davis, 159 Ind. App. 290, 306 N.E.2d 377 (1974).

52. P-M's motion was filed more than sixty days after the original judgment. Any independent errors raised in it would presumably be waived after the *P-M Gas* decision. *See* text accompanying notes 113-16, 122-24 *infra*.

53. IND. R. APP. P. 2(A). *See* note 19 *supra*.

54. "Dictum" is "an observation or remark made by a judge in pronouncing an opinion upon a cause, concerning some rule, principle, or application of law, or the solution of a question suggested by the case at bar, but not necessarily involved in the case or essential to its determination . . . ." BLACK'S LAW DICTIONARY 541 (rev. 4th ed. 1968).

55. ___ Ind. at ___, 375 N.E.2d at 597-98.

The *P-M Gas* court, declaring that the opinion was not to be construed as dictum, gave the decision limited retroactive force. The procedures it laid out were to govern all future cases, including those then pending in trial or appellate courts. However, the court stated that in cases then pending in the court of appeals, "if a party might by operation of time limits for appeal be deprived of a review of the merits, this opinion shall not be construed to so deny a party his rights to a meritorious decision." ___ Ind. at ___, 375 N.E.2d at 597-98. Presumably the court meant to say "a decision on the merits," rather than a "meritorious" decision.

Accordingly, in Estate of Holderbaum v. Gibson, ___ Ind. App. ___ , 376

Because of this questionable departure from normal legal process, analysis of the remainder of the opinion is essential.

The *P-M Gas* formula limits relaxation of the second motion requirement by stating that only those items specified in the motion filed are preserved for review. This limitation raises at least two questions. First, it is not clear how new errors made in the first ruling are to be preserved. Second, cross-error practice is left without guidelines, especially as a result of the court's restrictive reading of Rule 59(D).

RULE 59(D)—LIMITED APPLICATION

The supreme court held that the fifteen day cross-error provision in Rule 59(D) applies only when the moving party relies on evidence outside the record. As discussed below, the court's restriction of the provision, without formulating a substitute, leaves a major gap in Indiana practice. The rule reads:

> (D) Motion to correct errors on affidavits—Opposing affidavits, cross-errors and other matters. When a motion to correct errors is based upon evidence outside the record, the cause must be sustained by affidavits showing the truth thereof served with the motion. The *opposing party has* fifteen [15] days after service of affidavits in which to serve opposing affidavits and *fifteen [15] days after service of the motion in which to file cross-errors* or in which to assert relevant matters relating to the kind of relief to be granted. The period for filing affidavits may be extended for an additional period not exceeding thirty [30] days for good cause shown or by written stipulation.[56]

The court of appeals gave this section broad scope in *P-M Gas* by isolating that portion emphasized above, and held that appellee's

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N.E.2d 1189 (1978), decided just six weeks later, the *P-M Gas* interpretation of Rule 59 was not applied. In *Gibson* after both parties filed motions to correct errors, the trial court changed its judgment for plaintiff to a judgment for defendant. Plaintiff then filed a second motion to correct errors, in response to which the trial court granted a new trial. On appeal defendant argued that the trial court had no jurisdiction to rule on the second motion to correct errors because under *P-M Gas* plaintiff was required to initiate direct appeal after the ruling on the first motions. The court of appeals refused to apply *P-M Gas* retroactively, as that would have precluded a decision on the merits. It held that because the law as it was at the time of the trial court's ruling required a second motion by the plaintiff, at least according to Miller v. Mansfield, 164 Ind. App. 583, 330 N.E.2d 113 (1975), the lower court had jurisdiction to rule on that second motion.

56. IND. R. TR. P. 59(D) (emphasis added).

cross-errors were barred because he had not filed them within fifteen days after appellant's motion. The fact that appellant had not relied on evidence outside the record was deemed immaterial.[57]

The supreme court approached the case differently. Having decided that the appellant's motion was unnecessary and that either party could appeal from the ruling on appellee's motion, the scope of 59(D)'s language on cross-errors was technically immaterial. The cross-errors were preserved because the appellee had included them in the first motion to correct errors. The court did, however, address the 59(D) question, perhaps to make it clear that the section would not complicate its holding on the right to direct appeal without a second motion or perhaps to make its review of Rule 59 more complete. The subsection, it said, applies only to those situations in which a Rule 59 motion is based on evidence outside the record.[58]

Prior to *P-M Gas*, cases discussing 59(D) did not examine the fifteen day cross-error provision.[59] They only determined what constitutes "evidence outside the record"[60] and questioned the relationship between 59(D) counter-affidavits and the thirty days allowed for a trial court to rule on a motion.[61] The scope of the cross-error provision was not involved, except in one case in which the supreme court itself assumed that the subsection was limited to instances where there was evidence outside the record. *Murray v. Lichlyter*[62] was an action before the supreme court to withdraw submission of a

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57. ___ Ind. App. at ___, 352 N.E.2d at 93.

58. ___ Ind. at ___, 375 N.E.2d at 596.

59. Seco Chemicals, Inc. v. Stewart, ___ Ind. App. ___, 349 N.E.2d 733 (1976), suggests that the court of appeals assumed that 59(D) always applied. There, the court held that a cross-appellant did not have to file a praecipe for the record if the appellant had already praeciped the entire record. There did not appear to be any evidence outside the record involved, yet the court noted that the cross-appellant had properly preserved its cross-errors by filing a motion to correct errors within fifteen days after service of the appellee's motion, as required by 59(D). Although the *P-M Gas* court stated that *Seco* left open the question of the scope of 59(D), ___ Ind. at ___, 375 N.E.2d at 596, by implication at least, the *Seco* court assumed unlimited application. *Accord*, Vogelgesang v. Metropolitan Bd. of Zoning Appeals, 157 Ind. App. 300, 308, 300 N.E.2d 101, 107 (1973); 1 A. BOBBITT, INDIANA APPELLATE PRACTICE & PROCEDURE ch. 52, § 1 (Supp. 1977).

60. Collins v. Dunifon, 163 Ind. App. 201, 323 N.E.2d 264 (1975) (matters which occurred in prior proceedings but were not placed in the record or newly discovered evidence).

61. Baker v. American Metal Climax Corp., 261 Ind. 500, 307 N.E.2d 49 (1974) (relationship of Rule 59(D) to Rule 53.1).

62. 259 Ind. 550, 290 N.E.2d 44 (1972).

motion because of delay in ruling. Defendant had filed a motion to correct errors; fifteen days later plaintiff filed its motion. Some thirty-two days after filing, defendant filed a Rule 53.1 praecipe to withdraw submission. Before the supreme court, plaintiff invoked 59(D), arguing that her motion under 59(D) extended the permissible ruling time. The court stated that by invoking 59(D) the plaintiff was implying that the first motion was based on evidence outside the record and that she was responding under 59(D).[63] However, because there was no evidence outside the record, the court found that 59(D) was not properly invoked.[64] Thus, existing case law did not support the *P-M Gas* restriction of 59(D).

Neither is the *P-M Gas* court's limitation of the subsection as clearly supported by secondary authorities as the opinion suggests. No analyst has specifically questioned the scope of the cross-error language. For example, the court cited William Harvey's treatise as support for its holding that "the plain language of TR 59(D) means what it says it means."[65] Yet the cited section merely repeats the rule. The section explores when affidavits must be filed under 59(D);[66] it does not consider when the fifteen day cross-error provision applies.

Comments by the Civil Code Study Commission are ambiguous at best.[67] They state: "This provision generally follows present Indiana Supreme Court Rule 1-15."[68] Reference back to Rule 1-15, effective from 1954 to 1970, indicates that the former rule was clearly limited to motions supported by affidavits.[69] But the rule did not

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63. *Id.* at 552, 290 N.E.2d at 46.

64. Even if 59(D) were involved, the court stated, the fifteen days provided therein would not extend the permissible ruling time. *Id.*

65. ___ Ind. at ___, 375 N.E.2d at 596 (citing 4 HARVEY, *supra* note 2, § 59.5, at 131).

66. 4 HARVEY, *supra* note 2, at 131.

67. Use of the Commission Comments may at first seem inconsistent in light of the supreme court's own power to make and revise rules of procedure. *See* note 129 *infra*. Nevertheless, Indiana courts have frequently looked at the history of various rules to determine the intent of the supreme court. *E.g.*, State *ex rel.* Peters v. Bedwell, ___ Ind. ___, ___, 371 N.E.2d 709, 712 (1978) (Rules 50(A) and 59(B)); Weening v. Wood, ___ Ind. App. ___, ___, 349 N.E.2d 235, 254 (1976). The courts have also used the Commission Comments as a guideline for interpreting the rules of practice. Szany v. City of Hammond, ___ Ind. App. ___, 352 N.E.2d 866 (1976); Weening v. Wood, ___ Ind. App. at ___, 349 N.E.2d at 257; Hendrickson & Sons Motor Co. v. Osha, ___ Ind. App. ___, ___, 331 N.E.2d 743, 750 (1975).

68. *Quoted in* 4 HARVEY, *supra* note 2, at 116.

69. The former rule read:

When a motion for new trial is supported by affidavits, notice of the filing

contain any reference to cross-errors or include the sentence which the court of appeals isolated in *P-M Gas* to require filing of cross-errors even when there was no evidence off the record.[70] Rule 1-15 spoke only of filing affidavits and counter-affidavits.

The 1970 rule, however, added the sentence stating that the "opposing party has . . . fifteen [15] days after service of the motion in which to file cross-errors . . . ." That additional sentence, not limited to instances involving affidavits or evidence outside the record, may indicate that a broader scope was intended. Indiana courts have frequently noted that "a change of phraseology from that of the original act will raise a presumption that a change of meaning was also intended."[71] Using such a rule of statutory construction to interpret a court rule is permissible, as the supreme court itself has recognized that "[a]lthough a Supreme Court adopted trial rule is not a statute, it has the same binding force as any formally promulgated statute."[72] Similarly, the court has characterized at least one of its trial rules as "specific statutory authority."[73] If a mere change in phraseology in a statute, then, raises a presumption of intent to change its meaning, surely the addition of a sentence addressing an entirely new subject in a trial rule raises a similar presumption that a change of meaning was intended.

The example given in the Commission Comments also suggests that the addition of the cross-error language was intended to make

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> thereof shall be served upon the opposing party, or his attorneys of record, within ten [10] days after the filing thereof, and the opposing party shall have twenty [20] days after such service to file counter affidavits; reply affidavits may be filed within ten [10] days after filing of counter affidavits, which periods may be extended . . . .

The remainder of the rule spoke of transcription of any additional evidence received. Supreme Court Rule 1-15 (effective January 29, 1953).

70. ____ Ind. App. at ____, 352 N.E.2d at 92. That sentence is:

> The opposing party has fifteen (15) days after service of affidavits in which to serve opposing affidavits and fifteen (15) days after service of the motion in which to file cross-errors or in which to assert relevant matters relating to the kind of relief to be granted.

IND. R. TR. P. 59(D).

71. Gingerich v. State, 228 Ind. 440, 445, 93 N.E.2d 180, 182 (1950); Daubenspeck v. City of Ligonier, 135 Ind. App. 565, 571, 183 N.E.2d 95, 98 (1962) (en banc). *See also* Chism v. State, 203 Ind. 241, 179 N.E. 718 (1932); Indiana Dept. of Revenue v. Wm. A. Pope Co., ____ Ind. App. ____, 367 N.E.2d 47 (1977).

72. State *ex rel.* Bicanic v. Lake Circuit Court, 260 Ind. 73, 76, 292 N.E.2d 596, 598 (1973).

73. *Id.* (interpreting IND. R. TR. P. 76).

59(D) more broadly applicable than the old rule. After stating that 59(D) follows the clearly narrower former rule, the Commission wrote:

> The opposing party may file cross-errors, and may assert matters relating to the kind of relief to be granted within fifteen days from the time the motion is served. Thus (by way of example) if a defendant moves to correct error and for judgment on the evidence because there is no reasonable evidence to support the plaintiff's claim, and the decision is clearly erroneous, the plaintiff may show error in excluding from the jury certain evidence which would have made a prima facie case for him. If the judge finds double error, he must grant a new trial, since the jury did not consider the correct evidence.[74]

In this example, the moving party relies solely on the record, not on outside evidence. The plaintiff's asserted error, which the Commission fit within 59(D), likewise comes from the record, as the excluded evidence must have been preserved on the record by way of an offer to prove, or the error was waived.[75] Thus, the Commission may well have intended that the cross-error language apply regardless of whether there is evidence outside the record.

Nevertheless, that intent was not expressed plainly in 59(D), as a reading of the cross-error language in context supports the supreme court's restriction of the subsection to cases involving affidavits. The cross-error portion of 59(D) is part of a sentence which speaks of opposing affidavits and is followed by a sentence dealing with time limits for affidavits. Read in context, it means that the cross-error language is limited to situations in which affidavits are filed.

The court of appeals should not be too severely criticized for taking the cross-error language out of context and finding it always applicable. Indeed, the restrictive reading by the supreme court leaves the rules essentially silent on how cross-errors are to be preserved. The supreme court recognized that the rules "do not address cross-appeals as a general category."[76] However, the *P-M Gas* court's discussion of cross-appeals did not provide satisfactory

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74. *Quoted in* 4 HARVEY, *supra* note 2, at 116.

75. Marposon v. State, 259 Ind. 426, 287 N.E.2d 857 (1972); Lipner v. Lipner, 256 Ind. 151, 267 N.E.2d 393 (1971).

76. ___ Ind. at ___, 375 N.E.2d at 596.

guidelines. In fact, the decision may have raised more questions than it answered.

PRESERVING ERRORS & CROSS-ERRORS: THE IMPACT OF *P-M GAS*

P-M Gas is sure to create problems in Indiana appellate practice which the court will have to address in the future.[77] At best, the decision offers welcome clarification and simplification by dispensing with the need for a subsequent motion to correct errors after a new trial is ordered in response to a Rule 59 motion. However, the *P-M Gas* court went far beyond the issue before it and, without solid analysis, touched on many areas of Rule 59 practice. A critical reading of the often murky decision shows that methods of preserving at least three types of errors were changed by the decision. First, new errors made by the trial court in ruling on the first motion to correct errors will now be raised for the first time on appeal. Second, cross-errors which challenge the judgment must be filed within sixty days of judgment, which makes it unnecessarily difficult for those errors to be presented to the trial court. Third, and most troublesome, cross-errors which would sustain the judgment must also be filed within sixty days. This forces some prevailing and satisfied parties to divine whether the losing party will challenge the judgment and to file what might well be an unnecessary motion to correct errors, solely to prepare for a potential cross-appeal.

The cursory manner in which the court addressed each of these points suggests that it may not have been aware of the impact of the decision. With little comment by the majority, a major force in the philosophy of appellate review in Indiana has apparently been changed.[78] Indiana appellate courts have long proclaimed the need for errors to be presented to the trial court before appellate review, noting that the post-trial Rule 59 motion to correct errors plays a major role in requiring trial court review. As the court of appeals stated, "While the motion to correct errors serves as the complaint on appeal, its primary purpose is to afford the trial court the opportunity to rectify errors it has committed."[79] This fundamental pur-

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77. *See* note 117 *infra*.

78. Errors not preserved at trial cannot, even after *P-M Gas*, be raised on appeal. Decisions by the supreme court after *P-M Gas* provide assurance that this fundamental rule survived unscathed. *See, e.g.*, Minton v. State, ___ Ind. ___, 378 N.E.2d 639 (1978); Jones v. State, ___, Ind. ___, 377 N.E.2d 1349 (1978); Lagenour v. State, ___ Ind. ___, 376 N.E.2d 475 (1978).

79. Bennett v. State, 159 Ind. App. 59, 61, 304 N.E.2d 827, 829 (1973).

pose for the rule has been so often stated[80] that its frustration by the *P-M Gas* court is surprising.

The effectiveness of Rule 59 in actually securing correction by the trial court has frequently been questioned.[81] The rule as proposed by the Study Commission made filing of a motion to correct errors optional, paralleling the federal rules.[82] Frequently, the application of Rule 59 has served only to prevent cases from being decided on the merits, even absent solid justification for penalizing the irregularity of practice the courts perceived.[83] Nevertheless, the supreme court did make a motion to correct errors a prerequisite of appeal when the rules were adopted and did not abolish the necessity for a Rule 59 motion in *P-M Gas*.

In fact, the supreme court in *P-M Gas* noted that the motion gives the trial court an opportunity to correct error.[84] Surely, allowing direct appeal from the grant of a new trial does not frustrate this purpose.[85] However, other "holdings" by the *P-M Gas* court

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80. *See, e.g.*, Johnson v. State, ___ Ind. App. ___, 338 N.E.2d 680 (1975); Bud Gates, Inc. v. Jackson, 147 Ind. App. 123, 258 N.E.2d 691 (1970). Deciding the necessity for a subsequent motion to correct errors, the court in Arthur L. Yarde & Sons, Inc. v. Molargik, ___ Ind. App. ___, 358 N.E.2d 145, 146 n.1 (1977), emphasized that the purpose of the motion was to allow the trial court to re-examine its actions before appeal. This purpose, the court stated, "would be subverted were the second Motion to Correct Errors not mandatory."

81. *See, e.g.*, Civil Code Study Commission Comments, 4 HARVEY, *supra* note 2, at 118-20.

82. 4 HARVEY, *supra* note 2, at 118.

83. In Miller v. Mansfield, 164 Ind. App. 583, 330 N.E.2d 113 (1975), the majority dismissed an appeal for failure to file a further motion to correct errors after the trial court ordered a new trial in response to the first motion. Judge Garrard wrote a strong dissent in which he emphasized that the purposes of Rule 59 were not served by the requirement. He stated, "The viable error, if present, has already been considered by the trial court and needs no further preservation or amplification to enable us to make a proper review." *Id.* at 588, 330 N.E.2d at 115-16 (Garrard, J., dissenting).

84. ___ Ind. at ___, 375 N.E.2d at 594. The court actually stated that the motion serves three purposes. The other two were "to develop those points which will be raised on appeal by counsel" and "to inform the opposing party." *Id.* This last purpose is open to question, since the court deprived the opposing party of a meaningful way to respond to asserted errors. *See* text accompanying notes 107-24 *infra*. Developing points for appeal is a somewhat more compelling purpose, although most practitioners would more effectively develop appellate arguments after a full transcript is available. *See* note 81 *supra*. This function is usually stated as providing certainty of exact errors so there can be "intelligent review," the "keystone in the arch of appellate review." Moore v. Spann, 157 Ind. App. 33, 41, 298 N.E.2d 490, 494 (1973).

85. Even the concurring justices agreed that "an understandable appeal" could follow when the trial court sustains a motion by granting a new trial. ___ Ind. at ___, 375 N.E.2d at 598 (Givan, C.J., concurring in result only).

deprive the rule of its major purpose and frustrate litigants' attempts to present error to the trial court.

Errors Made in Ruling on a Motion to Correct Errors

The trial court has broad latitude in ruling on a motion to correct errors[86] and may well make some change in the judgment which was not provoked by the specifications presented in the motion. In fact, the court may act on its own motion under Rule 59(A). For example, an unsuccessful defendant may raise as error that a directed verdict should have been granted because there was no proof of an essential element of the plaintiff's case. The trial court could deny this specification, but change the judgment by ordering remittitur. Under *Deprez*, there was no doubt that a subsequent motion to correct errors directed to this new entry would have been required before either party could appeal.[87] Error on the damages question had to be specifically presented to the trial court for review.

Under *P-M Gas*, the trial court review function of the motion to correct errors is preserved only as to errors which occurred before the first motion was filed. Whatever action the trial court takes in ruling on that motion,[88] either party may initiate appeal. This presents no problem if the appellant seeks merely to reinstate the original judgment after change by the trial court in response to the opposing party's motion to correct errors. Likewise, there is no problem if the appellant raises only those errors raised in its own motion to correct errors and denied by the trial court. Surely, change in the strict reading of *Deprez* by the court of appeals was justified. Requiring subsequent motions merely repeating errors specified in earlier motions serves no purpose. However, the *P-M Gas* decision did more than provide that a subsequent repetitive motion is unnecessary.

The court deprived Rule 59 of its purpose when it dispensed with the need for a motion specifying errors made for the first time in the lower court's ruling on the original motion. No matter what

86. Lake Mortgage Co. v. Federal Nat'l Mortgage Ass'n, 262 Ind. 601, 321 N.E.2d 556 (1975); Wireman v. Wireman, ___ Ind. App. ___, 343 N.E.2d 292 (1976).

87. Campbell v. Mattingly, ___ Ind. App. ___, 344 N.E.2d 858 (1976).

88. The supreme court thus went beyond the most relaxed reading of *Deprez* by the court of appeals. Even the first district, which had dispensed with the need for a motion after the grant of a new trial, Easley v. Williams, 161 Ind. App. 24, 314 N.E.2d 105 (1974), required one if the judgment was altered in any way by the trial court's action on the first motion. *E.g.*, Campbell v. Mattingly, ___ Ind. App. ___, 344 N.E.2d 858 (1976).

action the trial court takes,[89] direct appeal may follow. In a cryptic paragraph following the one in which direct appeal supporting the original judgment was discussed, the *P-M Gas* court stated: "If the appellant maintains that there was error, he can say that on brief and explain why, after he has initiated appeal under the Indiana Rules of Appellate Procedure."[90] Perhaps the "error" referred to is error in the modification of judgment in the ruling on the first motion. If so, then the court acknowledged that errors occurring initially in ruling on a motion to correct errors will be presented for the first time on appeal,[91] which has always been anathema in Indiana practice.[92]

It may be necessary to deprive the trial court of an opportunity to rectify errors through a subsequent motion in this context; a further Rule 59 motion is not a suitable vehicle for presenting new errors made in ruling on the first motion. Section 59(G) requires inclusion of errors "however and whenever arising *up to the time of filing* such motion."[93] Errors made for the first time in the ruling do not fit that formula, as the *P-M Gas* court noted.[94] But the court did not provide a substitute method for presenting such errors. Instead, trial court opportunity for review was abandoned.[95]

One can be relieved that in its sweeping revision of Rule 59 practice the supreme court did not fashion a new rule for raising errors occurring after an initial motion. Such a rule would merely reopen the *Deprez* dilemma: instead of having to determine whether there was a "new judgment," courts would have to determine whether there was "new error." The potential for an endless series

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89. ___ Ind. at ___, 375 N.E.2d at 595.

90. *Id.* at ___, 375 N.E.2d at 597.

91. Under the Rules of Appellate Procedure, appeal is initiated by filing a praecipe with the clerk of the trial court, not by any further presentation of error to the trial court itself. IND. R. APP. P. 2(A).

92. *See* note 78-80 *supra* and accompanying text.

93. IND. R. TR. P. 59(G) (emphasis added).

94. ___ Ind. at ___, 375 N.E.2d at 595.

Former Supreme Court Rule 2-6, from which Trial Rule 59 was essentially taken, included a separate sentence providing that errors made after the motion could be raised by an independent assignment of error in the appllate court. *See* 1 A. BOBBITT, INDIANA APPELLATE PRACTICE & PROCEDURE ch. 41, § 9, at 318 (1972). The omission of that provision in Rule 59 created practice problems. *See* note 96 *infra*.

95. The trial court is placed in an uncomfortable position by this facet of *P-M Gas*. Always seeking to avoid being reversed, the court must now exercise its wide latitude under Rule 59 more cautiously, as there will be no further chance to review its action. Trial courts are advised to require memoranda and full arguments from both sides before amending the judgment in any way.

of motions and numerous dismissals of appeals on unforeseeable procedural grounds would re-emerge in a new form. Given the *P-M Gas* court's criticism of those results under *Deprez*, one may assume that a new rule requiring assertion of post-motion errors will not be forthcoming.

Therefore, in this limited instance, the court has abandoned its policy of requiring trial court review of all errors before appeal. New errors made in the court's ruling on a motion to correct errors may now be raised for the first time on appeal.[96] Cross-errors, however, must be raised at the trial level.

Cross-Errors

Historically, Indiana appellate courts have had a policy favoring assertion of cross-errors.[97] Cross-errors promote judicial economy by ensuring that the entire controversy is resolved in one ruling. When cross-errors are presented, the trial court has all asserted errors presented at once before final judgment is entered. Also, with cross-errors assigned, the appellate court is fully informed and may settle the whole case in one appeal. In spite of this sound policy, however, Indiana has not consistently provided methods to facilitate assertion of cross-errors. This deficiency in the trial rules was exacerbated in *P-M Gas*: cross-error practice is left without effective guidelines.

The supreme court noticed a deficiency in the rules as early as 1899. In *Feder v. Field*, which discussed the benefits of permitting cross-errors, the court noted:

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96. Exactly how such errors are to be presented on appeal is unclear. At first glance, Appellate Rule 7.2 appears to provide the method—an assignment of errors. However, the rule states specifically that in appeals from final judgments, only the motion to correct errors shall be included in the record. Assignments of error are to be used only for interlocutory appeals. IND. R. APP. P. 7.2(A) (1) (a) and (b).

Writing before the supreme court created the subsequent motion requirement of *Deprez*, commentator Bobbitt considered the procedures appropriate for raising errors made after a motion to correct errors is filed. He wrote:

> In the event such errors arise, under the present provisions . . . , it is suggested that a petition be filed with the court to which the appeal is to be prosecuted requesting permission to file a supplemental assignment of errors covering the error occurring after the filing of the motion to correct errors.

BOBBITT, *supra* note 94, ch. 51, § 2, at 499-500. Perhaps his suggestion could be adopted if the court prefers a specific assignment in addition to argument in the brief.

97. Feder v. Field, 117 Ind. 386, 20 N.E. 129 (1889), contains the classic and often cited articulation of this policy.

> It is true . . . that our Code makes no provision for the assignment of cross-errors by the appellee. But the practice has been so long and so often recognized as an appropriate one that it must be regarded as one of the unwritten rules of procedure.[98]

The cross-error rules of procedure remained unwritten, leaving courts[99] and commentators[100] alike to suggest procedures for raising cross-errors. Even wholesale revision of the trial and appellate rules in 1970 did not result in specific cross-error provisions. In 1976, the court of appeals noted that few rules of court even mention cross-errors:[101] the rules state when briefs on cross-errors shall be filed,[102] what the cross-error briefs shall contain,[103] and how oral arguments of cross-errors shall proceed.[104] Only one trial rule, 59(D), speaks of assertion of cross-errors at the trial court level. Since *P-M Gas* limited 59(D) to situations involving evidence outside the record,[105] the rules are even less helpful to an appellee than before.

The supreme court at least recognized in *P-M Gas* that the rules do not address cross-appeals satisfactorily. The court asked: "[H]ow shall cross-appeals in general, which arise from the record of the case, be taken?"[106] Its answer, however, was far from satisfactory.

An appellee might raise either of two distinct types of cross-errors, which historically have been treated differently.[107] The first are classic cross-errors which challenge the original judgment and seek affirmative relief for the appellee. The other type are those which do not entitle the appellee to affirmative relief, but merely nullify errors asserted by the appellant. As the following analysis shows, the decision in *P-M Gas* marks a change for the worse in the

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98. *Id.* at 387, 20 N.E. at 129.

99. American Mutual Life Ins. Co. v. Bertram, 163 Ind. 51, 64, 70 N.E. 258, 263 (1904); Horne v. Harness, 18 Ind. App. 214, 218, 47 N.E. 688, 689 (1897).

100. 3 F. WILTROUT, INDIANA PRACTICE § 2441-46 (1967).

101. Seco Chemicals, Inc. v. Stewart, ___ Ind. App. ___, 349 N.E.2d 733 (1976).

102. IND. R. APP. P. 8.1(A).

103. IND. R. APP. P. 8.3(D).

104. IND. R. APP. P. 10(D).

105. *See* text accompanying notes 56-76 *supra*.

106. ___ Ind. at ___, 375 N.E.2d at 596.

107. Howell v. Blackburn, 236 Ind. 242, 139 N.E.2d 905 (1957); American Mutual Life Ins. Co. v. Bertram, 163 Ind. 51, 65, 70 N.E. 258, 263 (1904); Feder v. Field, 117 Ind. 386, 20 N.E. 129 (1889); Ross v. Indiana Natural Gas & Oil Co., 76 Ind. App. 145, 131 N.E. 794 (1921).

methods of preserving each type of cross-error for appeal. Any cross-error is now deemed waived unless raised by the appellee in a motion to correct errors filed within sixty days of judgment.

Cross-Errors for Affirmative Relief

Cross-errors which challenge the original judgment and entitle the party asserting them to affirmative relief must now be raised within sixty days of judgment. The burden created by the *P-M Gas* court's revision of Rule 59 practice on these judgments challenging cross-errors falls unnecessarily on parties who are satisfied with the original judgment. This step backward leaves a major gap in Indiana practice.

A hypothetical case best illustrates the problem. During trial of a personal injury action, the court excludes certain evidence on the damages question which plaintiff believed to be essential to support a full damage award. Nevertheless, the jury returns a verdict for plaintiff, awarding full damages. At this point plaintiff is more than satisfied; based on the evidence, he expected a smaller award. He now has no motivation to raise or appeal the evidentiary error. However, on the sixtieth day after judgment is entered, defendant files a motion to correct errors, specifying as error that the damages are excessive and not supported by the evidence. Because the trial court might order remittitur, plaintiff now for the first time has reason to raise the evidentiary question. If in fact there was error in excluding the evidence, plaintiff would be entitled to a new trial.[108] Thus, plaintiff has a cross-error which challenges the original judgment.

Before the current trial rules became effective, the prevailing party had to raise the cross-error at the trial level or it would be waived.[109] The satisfied party, the plaintiff here, had to make a tactical decision whether the affirmative relief resulting from correction of the error was worth the risk and cost of independent appeal. When the fifteen day provision of 59(D) was applied to all cases,[110] the prevailing plaintiff then had a period of time in which to raise his evidentiary cross-error only in response to the loser's claimed error. The tactical decision was made easier. If the trial court

108. Smith v. Crouse-Hinds Co., ___ Ind. App. ___, 373 N.E.2d 923 (1978); American United Life Ins. Co. v. Peffley, 158 Ind. App. 29, 301 N.E.2d 651 (1973).

109. Howell v. Blackburn, 236 Ind. 242, 139 N.E.2d 905 (1957); Anderson Lumber & Supply Co. v. Fletcher, 228 Ind. 383, 387, 89 N.E.2d 449, 450 (1950); Ross v. Indiana Natural Gas & Oil Co., 76 Ind. App. 145, 131 N.E. 794 (1921).

110. *See* notes 59-64 *supra* and accompanying text.

granted remittitur, denying the cross-error, plaintiff would file another motion, again specifying error in excluding the evidence.[111] The supreme court's overruling of the subsequent motion requirement in this instance is wise: it is illogical to require the plaintiff to repeat the exact specification already raised in his cross-error motion and already considered by the trial court.[112] However, the court's restrictive reading of 59(D), limiting its fifteen day provision to cases involving evidence outside the record, only complicates post-judgment practice, unnecessarily forcing a premature tactical choice.

Under *P-M Gas*, a satisfied party no longer has fifteen days after the loser's motion to correct error in which to file cross-errors challenging the judgment.[113] Satisfied litigants, when there is no evidence outside the record, must file judgment-challenging cross-errors within sixty days of judgment. The supreme court stated:

> If an appellee desires to become a cross-appellant, then he must make that decision within sixty days after judgment in his favor, pursuant to 59(C). When that has been done, then the ruling which is made on that motion to correct errors becomes the 'complaint on the cross-appeal.'[114]

This puts our hypothetical plaintiff, who is more than satisfied with the generous judgment in his favor, in an uncomfortable position.[115] Solely to preserve error for a potential cross-appeal, he must challenge the judgment within sixty days, in case the losing party should file a motion before the time period expires.

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111. Campbell v. Mattingly, ___ Ind. App. ___, 344 N.E.2d 858 (1976).

112. Under the previous rules of procedure, the supreme court noted the futility of the second motion:

> What is the logic, reason, common sense, or purpose of requiring the losing party to file a second motion for new trial repeating exactly the words of the first motion in specifying a claim of error which has not been in any way affected by the entry of a modified finding or decision?

Hunter v. Hunter, 247 N.E.2d 236, 242 (Ind. App. 1969) (White, J., dissenting). The reasoning of the dissent was adopted by the supreme court on petition to transfer. 257 Ind. 1, 266 N.E.2d 609 (1971). *See generally* Grove, *supra* note 26.

113. Before the current rules of procedure, such cross-errors also were apparently required within the 30 day period for filing motions for a new trial. 3 F. WILTROUT, INDIANA PRACTICE § 2445 (1967). It may be that problems with such a practice motivated the Civil Code Study Commission to add the cross-error provision of Rule 59(D). *See* text accompanying notes 67-75 *supra*.

114. ___ Ind. at ___, 375 N.E.2d at 596.

115. *Cf.* Ross v. Indiana Natural Gas & Oil Co., 76 Ind. App. 145, 131 N.E. 794 (1921), *quoted* at note 119 *infra*.

If a prevailing party does not challenge the judgment within sixty days, he waives any independent error:

> 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 [*sic*].[116]

Without filing a motion to correct errors, a party may still defend the original judgment against errors asserted by the loser, but he has waived any cross-errors which would entitle him to relief from the original judgment.

The fifteen day response period of 59(D) made it easier for a prevailing party to decide whether to file the cross-error. However, the court may have wished to force litigants to disclose judgment-challenging errors. Rule 59(D) admittedly allowed the winner to withhold such errors until the loser chose to file a motion to correct errors before appeal. The court may have perceived some evil in the rules so catering to litigation tactics. If there is thus some merit to the court's treatment of cross-errors which challenge the judgment, there seems to be no merit to the court's treatment of cross-errors to sustain the original judgment. They, too, must be raised within sixty days of judgment.

Cross-Errors to Sustain the Judgment

The most troublesome aspect of *P-M Gas* is its treatment of cross-errors which do not entitle the appellee to affirmative relief. These are trial or judgment errors which nullify those raised by the appellant and thus sustain the original judgment. An example is not difficult to imagine. An unsuccessful plaintiff may raise as error the giving of an instruction. In response, the defendant presents a counter argument that the instruction was proper. Defendant also asserts a cross-error: even if the instruction was erroneous, that error was mooted or nullified by the trial court's error in not granting a directed verdict at the close of the plaintiff's case. This cross-error does not entitle the defendant to affirmative relief. If error would be found in failure to grant a directed verdict, the original judgment in favor of the defendant would be sustained.[117]

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116. ___ Ind. at ___, 375 N.E.2d at 597 (emphasis added).

117. In fact, *P-M Gas* itself included a cross-error of this type, in the defendant's assertion that there should have been a directed verdict. The case is complicated by the fact that relief was given plaintiff and defendant became the appellant.

Before the current trial rules were adopted, such a cross-error to sustain the judgment did not have to be presented to the trial court. This was made clear in *Ross v. Indiana Natural Gas & Oil Co.*,[118] a 1921 case in which the court of appeals emphasized that a motion for new trial was not required from an appellee content with the judgment.

> [W]here the appellee is content with the judgment, and assigns cross-error for the sole purpose of sustaining that judgment, the alleged errors need not be presented to the trial court for review, even if reviewable. Where a party is satisfied with the judgment, and is interested only in maintaining that judgment, it would be illogical and hazardous to ask for a new trial. To ask a new trial for the sole purpose of laying a foundation for an assignment of cross-errors whereby to sustain the judgment, involves a direct conflict of ideas.[119]

Cross-errors to sustain the judgment could be assigned for the first time at the appellate level.

This practice apparently changed when the current rules became effective in 1970. Cross-errors of any type were deemed to be subject to 59(D) and had to be filed with the trial court within fifteen days of the motion to correct errors.[120] Further, under the *Deprez* doctrine, a subsequent motion to correct errors was often used to assert cross-errors after the opposing party secured relief.[121]

Thus, what were cross-errors at the trial court became principal errors on appeal, with the plaintiff raising cross-errors. In essence, defendant won the race to the appellate court.

A cross-error of this type is also seen in the first case applying *P-M Gas*. In State *ex rel.* Sacks Brothers Loan Co. v. DeBard, ____ Ind. App. ____, 381 N.E.2d 119 (1978), the Superintendent of State Police denied an application for a retail gun license. The applicant appealed to the trial court, where the Superintendent moved to dismiss because the applicant had failed to comply with the Administrative Adjudication Act; he had not filed a petition within fifteen days of the administrative decision. IND. CODE § 4-22-1-14 (1976). The motion to dismiss was overruled and on the merits the trial court affirmed the license denial. Appeal followed.

The second district of the court of appeals reversed. Applying *P-M Gas* it held that the appellee Superintendent had waived the cross-error in the overruling of his motion to dismiss because he had not filed a motion to correct errors within sixty days of judgment in his favor. ____ Ind. App. at ____, 381 N.E.2d at 120.

118. 78 Ind. App. 219, 131 N.E. 794 (1921).

119. *Id.* at 227, 131 N.E. at 794. *See also* Howell v. Blackburn, 236 Ind. 242, 139 N.E.2d 905 (1957).

120. *See* text accompanying notes 59-76 *supra*.

121. *See* notes 35-44 *supra* and accompanying text.

Although a subsequent motion to correct errors was an inappropriate and unwieldy way to assert cross-errors, the fifteen days allowed by 59(D) worked well. Satisfied parties were given a chance to assert cross-errors sustaining the original judgment before a costly appeal, and trial courts were ensured that the entire controversy was presented to them before ruling. Surely the 59(D) provision was a rational way to handle cross-errors which nullify those errors raised by the appellant.

However, *P-M Gas* changed that sensible practice; now the party satisfied with the judgment must raise any error occurring in the trial by way of a Rule 59 motion within sixty days of judgment in his favor: "If an appellee desires to become a cross-appellant, then he must make that decision within sixty days after entry of the judgment in his favor, pursuant to TR 59(C)."[122] Indiana practitioners are now required to do what the *Ross* court called "illogical and hazardous." Satisfied with the judgment, and even aware of a trial error which, if corrected, would further sustain the judgment, the prevailing party must nevertheless challenge the judgment in order to preserve the error for potential cross-appeal.

This burden is not imposed where the loser has relied on evidence outside the record. In that instance, the prevailing party still has the fifteen days of 59(D) in which to raise cross-errors. Presumably cross-errors either challenging or sustaining the judgment can be raised within fifteen days, provided the loser has relied on evidence outside the record. It is illogical to treat most prevailing parties differently. Allowing fifteen days for assertion of *all* cross-errors in *all* cases would not create any new problems. Rather, it would remove from satified litigants the burden of having to divine whether the losing party will challenge the judgment. Permitting a period for response would facilitate a full review of the judgment, both at the trial court and on appeal.

Until the rules are revised, a party who is content with the judgment must predict whether the loser will file a motion to correct errors. If a motion is anticipated, the prevailing party should prepare its own motion to correct errors to file by the sixtieth day after judgment, specifying all cross-errors, whether they would entitle him to affirmative relief or merely sustain the judgment. Then, the satisfied party could simply wait at the courthouse until the loser's motion to correct errors appears or sixty days has passed. However, given that

122. ___ Ind. at ___, 375 N.E.2d at 596.

the loser may file his motion to correct errors by mailing it on the last day,[123] it is possible that the satisfied party will not even know the judgment was challenged until after the sixty days. By then, the prevailing party has waived any cross-errors. Therefore, one may predict that a satisfied party will respond to the dilemma created by *P-M Gas* by preparing and filing a motion at the last minute, fully intending to withdraw it if the other party does not challenge the judgment.

It is ironic that the supreme court viewed the possibility of an "absurd conclusion" as a key reason for overruling *Deprez*'s subsequent motion requirement.[124] Then, by dispensing with the 59(D) extension of fifteen days to file cross-errors, the court forced prevailing parties into an absurd position. The position these parties find themselves in, combined with the illogic of allowing the extension for some parties, suggests that the rules themselves need to be revised. All prevailing parties should have a period of time after a motion to correct errors is filed in which to assert any cross-errors.

CONCLUSION

P-M Gas & Wash Co. v. Smith made two major changes in Indiana practice. First, no subsequent motion to correct errors is required after the trial court rules on an initial motion. Second, the fifteen days allowed in Rule 59(D) for assertion of cross-errors applies only when there is evidence outside the record. These two changes effected by the supreme court probably do not constitute "new rules of procedure" as the concurring justices suggested;[125] they can be considered merely interpretation of existing rules. However, the court was not content with the interpretation necessary to solve the controversy before it; rather, it attempted a sweeping commentary on Rule 59 practice. In so doing, the *P-M Gas* court formulated some questionable "new rules."

The precise impact of the court's excursion far beyond the controversy presented in the case is not certain, partly because the opinion was unclear and at times confusing.[126] Nevertheless, it is certain that the impact will be substantial and troublesome. Errors made

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123. IND. R. TR. P. 5(E); Seastrom, Inc. v. Amick Constr. Co. Inc., 159 Ind. App. 266, 306 N.E.2d 125 (1974).

124. ___ Ind. at ___, 375 N.E.2d at 595.

125. *Id.* at ___, 375 N.E.2d at 598.

126. The impact is already being felt at the appellate level; the supreme court may soon have an opportunity to clarify the *P-M Gas* decision. See note 117 *supra*.

in modifying a judgment may now be raised for the first time on appeal. Prevailing parties with any cross-errors, entitling them to independent relief or sustaining the original judgment, must now play a potentially hazardous guessing game.

These probably unintended and surely questionable results highlight the dangers of using dicta to attempt to clarify or revise rules of procedure. Once it resolved the controversy before it, the court should have stopped. Without a specific fact situation before it which required sweeping clarification of Rule 59, the court did not, and possibly could not, consider the ramifications of its comments. Indeed a judicial opinion may never be the appropriate forum for complete and cogent re-examination of widely applicable procedural rules.[127] Although the Supreme Court of Indiana once recognized the importance of rule-making only by established procedures,[128] in *P-M Gas* it showed no restraint in commenting on the rules.

The dangers inherent in rule revision via dicta may be the very reason that more suitable mechanisms are provided for formulation of rules of procedure. Admittedly, the supreme court itself has the authority to adopt such rules.[129] To facilitate reasoned rule-making, the court set up an advisory committee on rules of procedure;[130] in addition, the legislature empaneled a code study division of the Judicial Study Commission.[131] These bodies are to work together to study the rules of procedure and recommend changes in them. Each group is specificially directed by its enabling provision to solicit and

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127. J. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES 150-52 (1977).

128. In Castle v. Fleenor, 262 Ind. 503, 318 N.E.2d 567 (1974), the court was careful to justify its creation of a new practice when it found a gap in Rule 79. The court stated:

> Great effort is expended to make [trial] rules wholly prospective in order that trials may proceed in an orderly fashion. To effect such purpose, we are reluctant to adopt or amend rules, except in accordance with the established procedure.

Id. Only after finding a "hiatus" in the procedure which had "thwarted the progress of the trial," did the court fill the gap in the trial rule. No such compelling purpose was present to justify the revisions effected in *P-M Gas.* In fact, the court created a gap by its rule revisions in *P-M Gas.*

129. IND. CODE § 34-5-2-1 (1976) (Acts 1937, ch. 91, § 1, p. 459), *aff'd by General Assembly,* IND. CODE § 34-5-1-2 (1976), (Acts 1969, ch. 191, § 2, p. 715). *See* Note, *The Court v. The Legislature: Rule-Making Power in Indiana,* 36 IND. L.J. 87 (1960).

130. IND. R. TR. P. 80.

131. IND. CODE § 2-5-8-1 (1976). This commission apparently replaced the Civil Code Study Commission, which was created by 1967 Ind. Acts, ch. 169. The Judicial Study Commission itself has been abolished effective in 1983, pending legislative evaluation of all state agencies. IND. CODE § 4-26-3-18(a) (1976).

receive input from bench and bar. The revisions thus generated would presumably take into account the impact of any change more carefully than can the court itself in any given opinion.

In light of the unclear and unsatisfactory changes made by the *P-M Gas* opinion, the established machinery for rule revision should be activated. Thoughtful revision of Rule 59, carefully designed to clear up the confusion generated by *P-M Gas*, is essential.