

# The Requirement of a Second Motion To Correct Errors as a Prerequisite to Appeal

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## I. STATEMENT OF THE PROBLEM

The requirement that a motion to correct errors be filed as a condition precedent to appeal follows from the operation of several of the Indiana Rules of Procedure. The most explicit statement of the requirement is contained in Appellate Rule 4(A). Embodying the familiar principle that appeals be taken from final judgments,<sup>1</sup> Appellate Rule 4(A) provides: "A ruling or order by the trial court granting or denying a motion to correct errors shall be deemed a final judgment, and an appeal may be taken therefrom." Moreover, Appellate Rule 2(A) states that an appeal must be initiated "within thirty [30] days after the court's ruling on the Motion to Correct Errors or the right to appeal will be forfeited." The requirement also emerges, although in different terms, from certain provisions of Trial Rule 59 which is titled "Motion To Correct Errors":

(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. 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.<sup>2</sup>

A complementary provision is set forth in Appellate Rule 7.2 (A)(1)(a): "In all appeals from a final judgment, a certified copy of the

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<sup>1</sup>See, e.g., 28 U.S.C. § 1291 (1974): "The courts of appeal shall have jurisdiction of appeals from all final decisions of the district courts . . . ."

<sup>2</sup>IND. R. TR. P. 59(G). Although the rule states that the 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," the requirement would seem to be applicable in all other actions which are civil in nature. E.g., *O.Q. v. L.R.*, 328 N.E.2d 233 (Ind. Ct. App. 1975), in which the court held that a statutory requirement for filing a petition for rehearing as a condition precedent to appeal has been superseded by the requirement of a motion to correct errors.

motion to correct errors filed with the trial court shall constitute for all purposes the assignment of errors. No assignment of error other than the motion to correct errors shall be included in the record." Taken together, these rules, and the interpretation given them by the courts,<sup>3</sup> make it clear that in the absence of a motion to correct errors there can be no ruling constituting a final judgment from which an appeal can be taken and, stated otherwise, no error can be preserved or presented for review on appeal.

At the same time, the provisions of these rules are not entirely congruent. The primary tension is created by the language of Appellate Rule 4(A) in which the trial court's ruling on a motion to correct errors is "deemed" to be the "final judgment" from which an appeal may be taken, and the statement in Trial Rule 59(C) that "[a] motion to correct errors shall be filed not later than sixty [60] days after the entry of judgment."<sup>4</sup> Consider the following situation: Following the trial court's entry of judgment, one of the parties files a timely motion to correct errors; in the course of its ruling on the motion, the trial court enters a new judgment. Should a second motion to correct errors addressed to the new judgment be required as a prerequisite to appeal? According to Appellate Rules 4(A) and 2(A) the answer would seem to be "no": the ruling on the motion is "deemed" to be the "final judgment" from which a timely appeal may be perfected. Trial Rule 59(C), however, suggests the necessity of a motion to correct errors directed to the new "entry of judgment." Reading Trial Rule 59(G) and Appellate Rule 7.2(A)(1)(a) together with Trial Rule 59(C), it is plausible to conclude that any error occurring prior to the time when a motion addressed to the new judgment could be filed must be specified in such motion, including error already set forth in the motion to correct errors directed to the original judgment.

## II. EVOLUTION OF THE REQUIREMENT

Whether, in the situation described, a second motion to correct errors is a prerequisite to appeal was first considered in *Davis v. Davis*.<sup>5</sup> After the trial court entered judgment granting defendant wife's counterclaim for divorce, defendant filed a motion to correct

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<sup>3</sup>Not long after the current Indiana Rules of Procedure became effective on January 1, 1970, the Indiana Court of Appeals held that "the appealing party must file in the trial court a motion to correct errors as a condition precedent to appeal." *Bradburn v. County Dep't of Pub. Welfare*, 148 Ind. App. 387, 390, 266 N.E.2d 805, 806 (1971).

<sup>4</sup>IND. R. TR. P. 59(C) (emphasis supplied).

<sup>5</sup>295 N.E.2d 837 (Ind. Ct. App. 1973) [hereinafter cited as *Davis I*], *rev'd on petition for rehearing*, 306 N.E.2d 377 (Ind. Ct. App. 1974) [hereinafter cited as *Davis II*].

errors. The motion was granted and a new judgment was entered which altered the division of property previously ordered. Thereafter, plaintiff husband filed an appeal challenging "the trial court's granting of defendant wife's motion to correct errors,"<sup>6</sup> but was met with appellee's contention that his failure to file a motion to correct errors "alleging as error the trial court's sustaining of the prior motion"<sup>7</sup> precluded review on appeal. Relying upon the plain wording of Appellate Rules 4(A) and 2(A), the court of appeals rejected the contention. Once the trial court has been given the opportunity to correct its errors, if any, "the party aggrieved by the court's ruling should have the immediate right to appeal the court's ruling."<sup>8</sup> In so holding, however, the appellate court focused on the possible distinction between a ruling which grants the motion to correct errors and one which denies it. Manifestly, the rules make no such distinction, and the practical basis upon which the court repudiated any such distinction is worth quoting at some length.

Assuming, *arguendo*, the Supreme Court had adopted a rule permitting appeals only from the denial of a motion to correct errors, then in this case, after the court granted the appellee's motion to correct errors, the appellant would have been required to have filed a second motion to correct errors, alleging as error the trial court's granting of the appellee's prior motion, and he would not be permitted to appeal unless and until the trial court denied his motion. As a further extension of this illustration, if the trial court granted the second filed motion to correct errors, then, under appellee's argument, the appellee-wife would have to file the third motion to correct errors before she could appeal the granting of the second motion. Given a difficult or complicated question, or a vacillating trial judge, it is conceivable that the parties could see-saw indefinitely on their motions to correct errors and never progress from the trial court to an appellate level court.<sup>9</sup>

Nevertheless, and quite apart from the matter of a *second* motion to correct errors, it is important to recognize that the situation created by denial of the motion differs from that which obtains when the motion is granted. The party adversely affected by denial of the motion will be the one who has made the motion and asserted errors therein. In the absence of a new judgment, those same errors can be

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<sup>6</sup>295 N.E.2d at 838.

<sup>7</sup>*Id.*

<sup>8</sup>*Id.* at 839.

<sup>9</sup>*Id.*

presented to the appellate court through that motion to correct errors, which constitutes the assignment of errors on appeal. Hence, by virtue of the motion, the trial court has been given an opportunity to correct any perceived error, and such error will be preserved for presentation to the appellate court in proper form. These twin functions of the motion are hereby served.<sup>10</sup> Indeed, should the trial court enter a new judgment in connection with its denial of the motion, still it is arguable that the errors occurring prior to, and included in, the motion should be cognizable on appeal: the trial court has considered them and the motion constitutes the assignment of those errors for appeal purposes. When the motion to correct errors is granted, however, the party seeking appeal from that ruling will not have filed a motion to correct errors. Even in the absence of a new judgment it is difficult to see how, consistent with Trial Rule 59(G) and Appellate Rule 7.2(A)(1)(a), the error relied upon by the appellant can be preserved and presented to the appellate court. The appellant can hardly offer the other party's motion to correct errors as the assignment of errors, for the errors specified therein will not be the errors relied upon for purposes of appeal. As further discussion will reveal, however, this logical trap has not in itself troubled the Indiana appellate courts. Although in *Bradburn v. County Department of Public Welfare*<sup>11</sup> — the first decision to hold that the current rules require the filing of a motion to correct errors as a prerequisite to appeal—the court stated that “the appealing party” must file the motion, in theory either party is permitted to appeal so long as one of the parties has filed a timely motion to correct errors, the ruling on which results in a final judgment.<sup>12</sup>

The holding in *Davis I* remained the law in Indiana for eleven days—until the Indiana Supreme Court handed down its opinion in *State v. Deprez*.<sup>13</sup> *Deprez* was a condemnation proceeding originally brought by the state in 1959. After eleven years, during which the

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<sup>10</sup> In summary, it must be recognized that Trial Rule 59 is the bridge between the trial and appellate court systems.

Trial Rule 59(A) permits the trial court to correct error on its own initiative, and as such it is exclusively concerned with the trial court.

But equally clear is counsel's duty to make a motion under Rule 59, meaning that the provision is as concerned with the beginning of an appeal as it is correcting error in the trial court, in the sense that counsel's eye must rest on the appellate court as well as the trial court when the motion is made. Thus, it is observed that the Rule permits the court to correct error on its own motion and decision, but apparently it would still be counsel's duty to make the Motion to Correct Error in order to preserve the points for appeal.

4 W. HARVEY, INDIANA PRACTICE 129 (1971).

<sup>11</sup>148 Ind. App. 387, 266 N.E.2d 805 (1971).

<sup>12</sup>See note 19 *infra* and accompanying text.

<sup>13</sup>260 Ind. 413, 296 N.E.2d 120 (1973).

trial date had passed without any action or appearance by the state, the landowners filed a verified motion to dismiss for lack of prosecution pursuant to Trial Rule 41(E). On November 4, 1970, the trial court entered a judgment of dismissal. Thereafter, on January 4, 1971, the state filed a timely motion to correct errors which was subsequently denied. In ruling on the motion, however, the trial court set forth for the first time its special findings of fact and conclusions of law and entered a new judgment of dismissal. The state then appealed without filing a motion to correct errors addressed to the second entry of judgment, and appellee sought to have the appeal dismissed on the ground that a second motion to correct errors addressed to the new entry of judgment was a condition precedent to appeal. The Indiana Supreme Court accepted appellee's argument.

The court began with the question of "what constituted the final judgment referred to"<sup>14</sup> in Appellate Rule 4(A), found that the initial entry of dismissal "would have been final"<sup>15</sup> absent the state's motion to correct errors, and concluded that, for purposes of Rule 4(A), the ruling on the state's motion would have constituted the final judgment "[i]f the trial court had simply either granted or denied"<sup>16</sup> the motion. But this analysis is both misleading and fallacious. The question was not "what" constituted the final judgment under Appellate Rule 4(A), for the rule clearly deems the ruling on the motion to correct errors to be the final judgment from which appeal may be taken. Rather, the question was whether "any" such final judgment had resulted in view of the state's failure to file a second motion directed to the new entry of judgment of dismissal. That is, because Trial Rule 59(C) calls for a motion to correct errors "after the entry of judgment," it is arguable that the state's failure to file a second motion resulted in a failure, pursuant to Trial Rule 59(G), to preserve any error for appeal. By no means could the initial entry of judgment itself have been "final" for purposes of Appellate Rule 4(A), as the court seems to have suggested,<sup>17</sup> and the difficulty created by

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<sup>14</sup>*Id.* at 420, 296 N.E.2d at 124.

<sup>15</sup>*Id.*

<sup>16</sup>*Id.*

<sup>17</sup>Elsewhere in its opinion the court referred to the second entry of judgment as the "final judgment," but the context suggests that the term "final judgment" was not being used in an Appellate Rule 4(A) sense. See 260 Ind. at 420, 296 N.E.2d at 124. Instead, the court was probably referring to the entry of judgment mentioned in Trial Rule 59(C). The general imprecision of the court's analysis is also evident from its statement that "there having been no Motion to Correct Errors directed to the February 3, 1971 entry, that entry has become the entry from which no appeal has been taken." *Id.* An appeal is taken not from "the entry of judgment" but from the ruling on the motion, if one is filed.

the absence of a second motion is attributable directly to the provisions of Trial Rule 59(C) and (G), rather than to the terms of the Appellate Rule.

The court's statement that the ruling on the state's motion would have constituted a final judgment "[i]f the trial court had simply either granted or denied the motion" was explained thusly:

However, because of the insufficiency of the November 4, 1970 entry in the light of the attack made upon it by the State's Motion To Correct Errors, the trial court entered a completely new entry of February 3, 1971, pursuant to Rule TR. 52(B), constituting new findings of fact and a new judgment as authorized further by Rule TR. 59(E). This new entry for the first time set forth the reasons in fact and in law upon which the trial court's dismissal was based. If they were in error, then a Motion To Correct Errors was clearly necessary.<sup>18</sup>

In other words, if the trial court committed error in its ruling on the motion which resulted in a new judgment, such error had to be specified in a second motion to correct errors. Presumably, therefore, if a trial court "simply" grants or denies the motion, without more, neither additional error nor a new judgment is possible. Still, it is difficult to imagine how a trial court could ever *grant* a motion to correct errors without making findings contrary to or in addition to those supporting the judgment. Certainly, a trial court can "simply" *deny* a motion to correct errors without making any findings or conclusions and, if it does so, denial of the motion will in no way affect the judgment. But how a trial court can, within the contemplation of *Deprez*, "simply" *grant* a motion to correct errors is not apparent, for the granting of *any* relief must be predicated on error which must first be "found." Moreover, the very correction of error will appear as error to the party adversely affected by the granting of the motion and the effect of the ruling necessarily will be to supersede the entry of judgment, irrespective of the relief granted. Nevertheless, as the opinion in *Davis I* demonstrates, there is no compelling reason to provide the trial court with an opportunity to review the corrections it has just made. Further, the appealing party's failure to file a motion which can serve as the assignment of errors on appeal has not been regarded as an independently significant basis for insisting on the motion. Indeed, the *Deprez* formulation purports to authorize direct appeal by a non-moving party when the motion is "simply" granted.<sup>19</sup>

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<sup>18</sup>260 Ind. at 420, 296 N.E.2d at 124.

<sup>19</sup>See *Easley v. Williams*, 314 N.E.2d 105 (Ind. Ct. App. 1974). In three other cases the non-moving party sought and was denied appeal; in each case, however,

Although the trial court in *Deprez* had formally entered a new judgment, the supreme court's analysis did not appear to make the requirement of a second motion contingent upon a second "formal" entry of judgment. The clear implication was that when the trial court does anything other than "simply" grant or deny the motion it creates a new final judgment to which a new motion to correct errors must be directed as a condition precedent to appeal. As subsequent cases reveal, this has become an exact statement of the rule.

While the holding in *Deprez* was the first such result under the current Indiana Rules of Procedure, it is clear that prior practice was marked by similar holdings with regard to the motion for new trial—the predecessor to the motion to correct errors. In *Hedworth v. Chapman*,<sup>20</sup> the appellant had filed a second motion for a new trial following an amendment of a prior judgment, and the appellate court stated: "The appellant's motion for new trial addressed to the last decision is the determining factor as to the questions presented to us in this appeal. We will consider the assignment of errors based upon the second motion for new trial."<sup>21</sup> No authority was cited for this procedure. The first case in which an appellant was penalized for failure to file a second motion for new trial was *Newton v. Board of Trustees for the Vincennes University*.<sup>22</sup> The defendant had filed a motion for new trial following the trial court's entry of judgment and while the motion was pending the plaintiff filed a motion to modify this judgment, which was granted. The trial court then overruled defendant's motion and defendant appealed. The appellate court ruled that appellant's first assignment of error—that the trial court erred in overruling appellant's motion for new trial—presented nothing for its consideration.

The appellate court decided two subsequent cases, *Hunter v. Hunter*<sup>23</sup> and *Eilts v. Hines*,<sup>24</sup> by application of the rule announced in *Newton*. In each of these cases the only assignment of error was the overruling of appellant's motion for a new trial which had been presented to the trial court prior to its entry of a modified judgment. Judges White and Sullivan both dissented from the majority's dismissal of the appeals in these cases. The principal thrust of their dissents was that the motion for new trial was directed not at the

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appeal was frustrated by appellant's failure to file a motion directed to the new entry of judgment, rather than by failure to file *any* motion. *Davis II*, 306 N.E.2d 377 (Ind. Ct. App. 1974), see notes 28 and 29 *infra* and accompanying text; *State v. Kushner*, 312 N.E.2d 523 (Ind. Ct. App. 1974); *Miller v. Mansfield*, 330 N.E.2d 113 (Ind. Ct. App. 1975).

<sup>20</sup>135 Ind. App. 129, 192 N.E.2d 649 (1963).

<sup>21</sup>*Id.* at 132, 192 N.E.2d at 650.

<sup>22</sup>142 Ind. App. 391, 235 N.E.2d 84 (1968).

<sup>23</sup>247 N.E.2d 236 (Ind. Ct. App. 1969).

<sup>24</sup>146 Ind. App. 197, 257 N.E.2d 683 (1970).

actual entry of judgment, but at the verdict or decision; therefore, unless there had been a change in that verdict or decision, even if the judgment itself was modified, there was no need for a second motion. While this reasoning is no longer applicable under the current rules—the motion to correct errors is clearly directed to the entry of judgment—some of the observations contained in these dissents are currently relevant. In *Hunter*, Judge White stated:

It would seem to me a more practical rule and a more logical rule to hold that the first motion for new trial is mooted by the subsequent modification of the findings or decision only to the extent that the modification renders moot the grounds for new trial stated in the first 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?

In my opinion a second motion for new trial is never necessary to preserve on appeal such error as was properly asserted in an earlier timely motion for new trial and not cured by a subsequent modification of the Court's decision.<sup>25</sup>

Similar observations were made by Judge Sullivan in his dissent in *Eilts*.<sup>26</sup> Obviously, both judges were disturbed by the harshness of a rule which was utilized to foreclose appeal without adequate justification. It is equally disturbing that a wholesale revision of Indiana's Rules of Procedure failed to remedy this problem.

### III. APPLICATION OF THE REQUIREMENT

Following the supreme court's decision in *Deprez*, the court of appeals considered appellee's petition for rehearing in *Davis v. Davis* and, in *Davis II*,<sup>27</sup> overruled its earlier decision. Although Judge Buchanan's opinion observed that the appellate court "could not be made aware of the alleged errors asserted on appeal"<sup>28</sup> since the appellant had not filed any motion to correct errors, it was appellant's failure to file a motion directed to the new entry of judgment, rather than his failure to file *any* motion, which was decisive.<sup>29</sup> The

<sup>25</sup>247 N.E.2d at 242-43 (White, J., dissenting).

<sup>26</sup>146 Ind. App. at 200-04, 257 N.E.2d at 684-86 (Sullivan, J., dissenting).

<sup>27</sup>306 N.E.2d 377 (Ind. Ct. App. 1974).

<sup>28</sup>*Id.* at 380.

<sup>29</sup>As discussed at note 12 *supra* and accompanying text, it is difficult to see how an appellant who has filed no motion to correct errors can preserve error under Trial Rule 59(G) or present error to the appellate court pursuant to Appellate Rule



principal rationale for regarding the absence of a subsequent motion as fatal was explained by the court. "The trial court was never afforded the opportunity to correct these alleged errors associated with its amendment of the prior judgment. It is this opportunity to correct error which is the paramount purpose underlying the requirement of filing a motion to correct errors in the trial court."<sup>30</sup> Assuming the validity of this purpose, still it would appear that the trial court in *Davis* was given ample opportunity, when it considered and granted appellee's motion, to consider the very matter which appellant sought to raise on appeal—that is, whether the trial court committed error in amending the judgment. To insist that the trial court be afforded a chance to correct error allegedly resulting from its correction of error raises the spectre of a potentially endless series of motions. Justification for such a result follows only from a mechanical application of Trial Rule 59(G). It is particularly suspect in light of the assumption that a party who has filed no motion can appeal if only the ruling on appellee's motion did not amount to a new entry of judgment under Trial Rule 59(C),<sup>31</sup> for in this situation the non-moving party has specified no error to the trial court and, according to Appellate Rule 7.2(A)(1)(a), has no vehicle for presenting the error on appeal.

Further applications of the *Deprez* doctrine have not been in short supply, and of all the subsequent cases in which a second motion was not filed, only one survived for appellate consideration on its merits.<sup>32</sup>

In *Wyss v. Wyss*,<sup>33</sup> the trial court granted summary judgment in favor of defendant based upon plaintiffs' failure properly to verify their complaint in proceedings contesting the validity of a will. In denying plaintiffs' timely motion to correct errors, the trial court supplemented its reason for granting summary judgment; it found that any request that plaintiffs may have made to amend the verification had not been in writing and was, therefore, improper. It further found that plaintiffs' applications to amend the original complaint by supplying proper verification were made at times after the applicable statute of limitations had expired and were, therefore, properly denied. To the court of appeals it was "readily apparent that the Court altered and amended its original findings by making new and additional findings,"<sup>34</sup> and the court held that "a subsequent motion to correct errors directed to this ruling was required to have

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7.2(A)(1)(a). Nevertheless, *Deprez* would permit an appeal in such circumstances if the trial court has "simply" granted appellee's motion.

<sup>30</sup>306 N.E.2d at 380-81.

<sup>31</sup>See note 19 *supra* and accompanying text.

<sup>32</sup>*Easley v. Williams*, 314 N.E.2d 105 (Ind. Ct. App. 1974).

<sup>33</sup>311 N.E.2d 621 (Ind. Ct. App. 1974).

<sup>34</sup>*Id.* at 625.

been filed in order to preserve any error on appeal.”<sup>35</sup> That the effect of the trial court’s ruling was the same as its original judgment was apparently inconsequential, just as it had been in *Deprez*.

In *State v. Kushner*,<sup>36</sup> a condemnation action, defendant land-owners were awarded a jury verdict in the amount of \$19,000 and the trial court entered judgment on the verdict. Dissatisfied with the amount of damages awarded, defendants filed a motion to correct errors. In ruling on the motion, the trial court found that the damages occasioned by the condemnation were insufficient in view of the reduction in value to other land owned by defendants. Thus, the court granted the motion to correct errors and ordered a new trial subject to additur. The court of appeals ruled that the trial court’s disposition of the motion to correct errors involved “new and additional findings of fact and altered and amended the original judgment.”<sup>37</sup> Because the condemnor had failed to present a motion to correct errors addressed to the trial court’s ruling on the motion to correct errors, no appeal was permitted.

A different result obtained, however, in *Easley v. Williams*.<sup>38</sup> In this action for personal injuries, the jury returned a verdict for defendants and judgment was entered accordingly. In granting plaintiff’s motion to correct errors, the trial court agreed that it had committed error in giving certain instructions and ordered a new trial. Defendant Easley filed a motion to correct errors directed to this ruling, while the other defendants did not. All defendants appealed and plaintiff moved the appellate court to dismiss the appeal of those defendants who had failed to file a motion to correct errors addressed to the court’s ruling on plaintiff’s motion to correct errors. In denying the motion to dismiss the appeal, the appellate court distinguished this case from previous cases in which a second motion to correct errors had been required. “[I]n each of those earlier cases, a new judgment resulted from the trial court’s ruling on the original Motion to Correct Errors. However, in this case, the court’s ruling on the Motion to Correct Errors abolished the original judgment by granting a new trial, and no new judgment resulted. Therefore, no subsequent Motion to Correct Errors was required.”<sup>39</sup> The court apparently believed that the trial court’s ruling on plaintiff’s motion to correct errors did not involve new findings of fact or conclusions of law although its obvious effect was to abolish—and, to that extent, alter and amend—the original judgment. Rather, the trial court had, in the words of *Deprez*, “simply” granted the motion

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<sup>35</sup>*Id.* at 626.

<sup>36</sup>312 N.E.2d 523 (Ind. Ct. App. 1974).

<sup>37</sup>*Id.* at 526.

<sup>38</sup>314 N.E.2d 105 (Ind. Ct. App. 1974).

<sup>39</sup>*Id.* at 108.

to correct errors, which action "constituted the final judgment from which this appeal could have been taken."<sup>40</sup> Thus, parties who filed no motion to correct errors were allowed to appeal. That one appellant had filed a motion, however, might explain how the errors relied upon were included in the record on appeal.

The requirement of a second motion to correct errors was imposed once again in *Koziol v. Lake County Plan Commission*.<sup>41</sup> Following the trial court's entry of judgment, appellants filed their motion to correct errors. As in *Deprez and Wyss*, the ruling on the motion did not change the result reflected in the original judgment. Still, having found that the trial court "did make several new and additional findings not contained in his original judgment,"<sup>42</sup> the court of appeals concluded that a second motion to correct errors was required and dismissed the appeal.

*Weber v. Penn-Harris-Madison School Corp.*,<sup>43</sup> like *Kushner*, was a condemnation action in which judgment was entered on the jury's verdict in favor of the condemnees. Thereafter, the parties on both sides of the action filed motions to correct errors. The trial court denied the condemnor's motion but granted the condemnees' motion pursuant to two specifications of error. It determined that the condemnees were entitled to interest on the jury's verdict and entered judgment for the condemnees reflecting a damage award greater than that found by the jury. In so doing, the trial court expressly vacated and set aside the original judgment on the verdict. No motion to correct errors was directed to the trial court's action. The court of appeals dismissed, because "if the trial court, in ruling on the motion to correct errors, does anything 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."<sup>44</sup>

In *Hansbrough v. Indiana Review Board*,<sup>45</sup> the trial court sustained defendant's motion to dismiss. In response to plaintiff's motion to correct errors addressed to the dismissal, the court, for the first time, entered findings of fact and conclusions of law, and denied the motion. Plaintiff did not file a motion to correct errors addressed to the court's disposition of the motion. Although the trial court at no point explicitly ordered entry of judgment, the court of appeals found that the ruling on plaintiff's motion to correct errors was sufficiently

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<sup>40</sup>260 Ind. at 420, 296 N.E.2d at 124.

<sup>41</sup>315 N.E.2d 374 (Ind. Ct. App. 1974).

<sup>42</sup>*Id.* at 375.

<sup>43</sup>317 N.E.2d 811 (Ind. Ct. App. 1974).

<sup>44</sup>*Id.* at 813 (emphasis by the court).

<sup>45</sup>326 N.E.2d 599 (Ind. Ct. App. 1975).

final to be regarded as a final judgment. Plaintiff's failure to present a second motion to correct errors directed to this judgment was considered fatal for purposes of appeal and the appeal was, therefore, dismissed. Judge Sullivan concurred in the result but detected a different problem. In his view, the appeal was properly dismissed, not because a second motion to correct errors had not been made, but because the trial court had never entered a judgment to which a motion to correct errors could have been filed.<sup>46</sup>

Of the cases just rehearsed, all but *Easley* were dismissed on appeal because appellants failed to file a motion to correct errors addressed to the trial court's disposition of the motion to correct errors which had been presented. Dismissal of the appeal in each of these cases can be justified on the authority of *Deprez*. In each case the court of appeals properly found that the trial court had made new findings of fact and/or conclusions which either altered the basis for the original judgment or, for the first time, explained the rationale for the judgment. Such being the case, it was of no moment that the rulings in *Wyss*, *Koziol*, and *Hansbrough* produced the same results as the original judgments. Indeed, *Deprez* itself was such a case. In addition, that no new judgment was formally entered in either *Wyss* or *Kushner* was unimportant since the new or additional findings and/or conclusions themselves constituted new judgments.

The decision in *Easley*, however, is consistent with *Deprez* only if the court of appeals was correct in its view that the trial court made no additional findings on the motion to correct errors, but rather merely granted the motion. How this magic was performed is not apparent. In fact, it appears that in granting a new trial based upon the findings of error in giving certain instructions, the trial court did indeed make new findings.

In *Miller v. Mansfield*,<sup>47</sup> an action for injuries sustained in an automobile collision, a jury verdict was returned in favor of defendants, and plaintiffs thereafter filed a timely motion to correct errors. The trial court overruled plaintiffs' motion in part, and sustained it in part, granting them a new trial. In the entry embodying its ruling on the motion, the court specified the errors supporting its grant of a new trial. From this ruling defendants took a timely appeal, without filing a subsequent motion to correct errors. The court of appeals, presumably upon its own motion, dismissed the appeal, holding that the trial court's ruling on plaintiffs' motion to correct errors constituted a new final judgment, thus necessitating the filing of a second motion to correct errors as a prerequisite to appeal. The question as framed by the appellate court all but answered itself: "The sole question . . . is whether, *following the entry*

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<sup>46</sup>*Id.* at 603-05.

<sup>47</sup>330 N.E.2d 113 (Ind. Ct. App. 1975).

of judgment by the trial court granting, in part, appellees' motion to correct errors and ordering a new trial, it was necessary that appellants file a motion to correct errors."<sup>48</sup> Of course, if a new entry of judgment resulted from the trial court's ruling, as assumed in the court's statement of the question, then on the authority of *Depez* a subsequent motion to correct errors was necessary as a prerequisite to the appeal. But the court did not analyze the trial court's ruling on the motion to correct errors to determine whether, in fact, it constituted a new judgment. Rather, it simply found that the ruling was "deemed" a final judgment by operation of Appellate Rule 4(A).<sup>49</sup> Thus, the very provision which arguably dispenses with the need for filing a subsequent motion to correct errors was seized upon as the basis for application of the *Depez* rule requiring a second motion to correct errors. Judge Garrard dissented, stating that though he approved of the *Depez* rule, he felt that it had been misapplied by the majority. He argued that no new judgment had been created, and that the error which the majority required to be presented in a second motion to correct errors had already been considered by the trial court in ruling on appellees' motion. Further evidence of what Judge Garrard termed a "blind application"<sup>50</sup> of the rule was the majority's citation of *Easley v. Williams*<sup>51</sup> as authority for its holding in *Miller*. However, in *Easley*, a case whose facts are indistinguishable from those in *Miller*, the court held that no second motion to correct errors was required, and thus refused to dismiss the appeal.

In *Minnette v. Lloyd*<sup>52</sup> the controversy centered on the question of which municipal agency had authority to promulgate rules and regulations concerning appointment of members to the Evansville Fire Department. Plaintiffs sought an injunction to restrain the Board of Public Safety from retaining a certain employee as a member of the Fire Department. Defendants counterclaimed for a declaratory judgment that the Board of Public Safety has sole authority in this area. The trial court found against the plaintiffs on their complaint and against defendants on their counterclaim; judgment was entered accordingly. Both plaintiffs and defendants filed motions to correct errors directed to the judgment. The trial court overruled both motions but, in so doing, entered a corrected judgment to the effect that it found for defendants on their counterclaim. Plaintiffs appealed without filing a motion to correct errors directed to the corrected judgment. The court of appeals dismissed the appeal on defendants-appellees' motion, holding that

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<sup>48</sup>*Id.* at 114 (emphasis supplied).

<sup>49</sup>*Id.* at 115.

<sup>50</sup>*Id.* (Garrard, J., dissenting).

<sup>51</sup>314 N.E.2d 105 (Ind. Ct. App. 1974).

<sup>52</sup>333 N.E.2d 791 (Ind. Ct. App. 1975).

"[a]bsent a motion to correct errors directed at the final judgment and a ruling either granting or denying the motion, this court is without jurisdiction to entertain plaintiffs' appeal."<sup>53</sup> The court's analysis of the lower court's ruling provides convincing support for application of the *Depez* rule in this case. "In the original judgment the court left the parties where it found them, with no direction as to which body had authority to promulgate the rules in question. The corrected entry granted that authority to the defendant Board of Public Safety thereby declaring the respective privileges and responsibilities of the parties for the first time."<sup>54</sup>

In *Lake County Title Co. v. Root Enterprises, Inc.*,<sup>55</sup> appellant took the precaution of filing a second motion to correct errors only to be met with appellee's contention that such motion was unnecessary and that, therefore, failure to have perfected the appeal within the allotted time following the ruling on the initial motion called for dismissal of the appeal. After the trial court gave judgment for plaintiff on its complaint for damages, defendant filed a timely motion to correct errors which alleged, in part, that the trial court erred in its findings on the issue of damages. The trial court granted the motion in this respect, reducing the award, while overruling defendant's motion in all other respects. Defendant then filed its second motion to correct errors directed at the trial court's ruling on the initial motion. The trial court overruled this second motion, and defendant perfected its appeal. The court of appeals agreed with appellee that if the second motion were not required the appeal would have to be dismissed as untimely. Moreover, the court acknowledged that "[i]t might be contended that the present case is distinguishable from . . . [prior] cases because in the present case the first judgment was not expressly vacated and no new or additional findings of fact or conclusions of law were entered when the judgment was modified."<sup>56</sup> Nevertheless, the court refused to dismiss the appeal. Therefore, the rule to be derived from *Lake County Title* is that any amendment or other alteration of a judgment produces a new judgment which requires a second motion to correct errors as a prerequisite to appeal.

*Wireman v. Wireman*,<sup>57</sup> like *Lake County Title*, reached the appellate court following the filing of a second motion to correct errors. Unlike the earlier case, however, in *Wireman* each of the two motions was made by different and opposing parties. This was a divorce action in which the petitioner-wife was granted a divorce and custody of the children, with visitation rights in the respondent-

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<sup>53</sup>*Id.* at 792.

<sup>54</sup>*Id.*

<sup>55</sup>339 N.E.2d 103 (Ind. Ct. App. 1975).

<sup>56</sup>*Id.* at 107.

<sup>57</sup>343 N.E.2d 292 (Ind. Ct. App. 1976).

husband. The respondent was ordered to pay child support and alimony in the form of a property settlement which was contingent on petitioner's compliance with respondent's visitation rights. Petitioner then filed a motion to correct errors, alleging error in the trial court's determination of the value of the parties' total assets, and in its imposition of the contingency. In ruling on petitioner's motion, the trial court ordered respondent to pay support arrearage and alimony in a lump sum payment. Respondent then filed a motion to correct errors contesting the change in the method of payment of alimony and the removal of the contingency. Eventually the trial court overruled respondent's motion and this appeal followed. Presumably, the court of appeals approved of respondent's action in filing the subsequent motion to correct errors; though the court did not discuss the necessity of the motion, it entertained the appeal on its merits.

The final case in this area is *Campbell v. Mattingly*.<sup>58</sup> This was an action by a father and son for personal injuries sustained by the son. The jury awarded damages to both father and son and the trial court entered judgment on the verdict. Defendants then filed their motion to correct errors asserting, in part, that the award to the father was not supported by the evidence. The trial court agreed with this assertion, ordered a remittitur, and entered a modified judgment. Defendants appealed without filing a second motion directed to this modified judgment. The court of appeals dismissed the appeal due to the absence of a second motion. Consider, however, the likely sequence of events at the trial court level had the defendants satisfied this so-called jurisdictional requirement. After the trial court granted remittitur defendants would have filed another motion to correct errors. This second motion would have been substantially identical to the original motion; only allegations of error in the amount of the award to the father would have been omitted. Indeed, even these allegations would have been included had defendants felt that the father's award, as modified, was still unsupported by the evidence. Thus the trial court would have been considering the same allegations a second time. Such an approach is an unconscionable waste of everyone's time, including that of the trial court. And when this approach is not followed, the unfairness in denying appellant the opportunity to appeal is manifest.

#### IV. CONCLUSION

The necessity of a second motion to correct errors as a prerequisite to appeal is the result of an internal procedural logic (or illogic) which ignores the needs and demands of litigants. It is the product of

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<sup>58</sup>344 N.E.2d 858 (Ind. Ct. App. 1976).

wooden adherence to the requirement that a motion to correct errors be filed after "the entry of judgment" pursuant to Trial Rule 59(C), and to the provisions of Trial Rule 59(G) which make preservation of errors for appeal contingent upon their inclusion in a motion to correct errors. But the requirement of a second motion virtually ignores that language in Appellate Rule 4(A) which authorizes appeal from a ruling granting or denying a motion to correct errors.

The most straightforward and most rational solution to the difficulties in this area would be to eliminate the motion to correct errors as a prerequisite to appeal, making it optional at the trial court level.<sup>59</sup> The motion would still be available as the vehicle for seeking relief from error at the trial court level and appropriate relief still could be given by the trial court sua sponte. Moreover, the errors asserted on appeal could easily be presented by means other than a motion to correct errors. Parties in federal court, where the motion to

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<sup>59</sup>The Indiana Civil Code Study Commission Comments to then-proposed Trial Rule 59 cites eleven reasons for elimination of the motion to correct errors as a condition to appeal. See 4 W. HARVEY, INDIANA PRACTICE 119-20 (1971):

Following are some of the important reasons for eliminating the motion to correct errors (replacing the prior motion for a new trial) as a condition to an appeal:

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.

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.

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.

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.

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.

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).

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



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.

Even if this solution is not adopted, still there is room for improvement, for the requirement does not take into account the waste of time involved in requiring that the trial court rule on the same allegations of error more than once. In most cases in which the motion is denied the second motion will merely repeat the allegations of error contained in the original, excepting those errors which were corrected by the trial court, and/or adding allegations of error, if any, made in connection with the ruling on the original motion. At the very least, those allegations of error which are unaffected by the ruling on the initial motion should be considered on appeal even without a second motion. Surely consideration of alleged errors by the trial court in its ruling on the initial motion should be sufficient to satisfy the requirement of Rule 59(G) and preserve those errors for appeal. If the appellant fails to file a subsequent motion, it would be simple enough to hold that only error connected with the trial court's ruling on the original motion is waived. Moreover, when the motion to correct errors is granted there is no real need to afford the trial court an opportunity to reconsider the matters it has already considered in making its ruling on the motion—that is, to correct errors the court has allegedly committed in correcting errors. Indeed that such opportunity is not critical is apparent from the *Deprez* formulation (as applied in *Easley*) which contemplates direct appeal by a party who has filed *no* motion so long as the court's ruling on the motion presented is a simple granting of the motion which produces a "final judgment." But, of course, in *granting* a motion a court will of necessity find error (as it did in *Easley*); nevertheless, absent a new judgment, the non-moving party may appeal from the ruling without asking the trial court to consider whether it committed error in correcting error.

Further, should the current doctrine persist, an alternative to dismissal of an appeal would be for the appellate court merely to

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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.

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.

Tenth: In view of the over-all ineffectiveness of the motion to correct error (formerly motion for a new trial), it presents, in final analysis, a

suspend the appeal, providing the appellant with an opportunity to perfect an appeal by the belated filing of a second motion to correct errors with the trial court.<sup>60</sup> Following the trial court's ruling on the belated motion, the appellate court could resume jurisdiction.

At the workaday level the impact of the *Deprez* doctrine and its application is obvious. A motion to correct errors should always be filed when the trial court, in ruling on a previous motion to correct errors, supports its disposition of the motion upon any rationale other than that marshalled in support of the original judgment. In such circumstances, a motion to correct errors addressed to that disposition should always be made in order to insure the availability of appellate review. Of course, the exercise of such caution will itself activate the need for further precaution. Since appellate counsel will have to guess at whether the appellate court will regard disposition of the second motion to correct errors as the final judgment, it will be necessary to perfect appeal from the disposition of the first motion to correct errors as well. Strict compliance with the other requirements for perfecting appeal, and with the timetables applicable thereto, should be made against the possibility that the appellate court will deem the ruling on the first motion as the final judgment. That such extraordinary protective measures are necessary, however, demonstrates the undesirability of utilizing the motion to correct errors as a prerequisite to appeal.

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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.

Reasons in support of alternative Rule 59(g) and in support of the old rule requiring a motion to correct error as a condition to appeal are not convincing. The new rule meets the argument that the judge below should be allowed to correct his errors, since the parties have the option of presenting a motion to correct errors and the judge may do so on his own motion. However, the Commission was divided upon the question, and therefore seeks assistance of the bar and public.

<sup>60</sup>See *Davis II*, 306 N.E.2d 377, 382 (1974) (Sullivan, J., concurring).