A PRACTITIONER'S GUIDE TO POST-JUDGMENT MOTIONS[1]

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A post-judgment motion can accomplish several purposes. At best, it changes the trial result in your favor, either by overturning the previous decision or by reopening the case. In some instances, a post-judgment motion is required to preserve issues for appeal. Even where denied, the post-trial motion can aid the cause by forcing the trial court to explain its decisions, thereby establishing a better record for appeal.

This paper will provide an overview of the weapons in the post-judgment arsenal and discuss some of the traps that can result in dismissed or lost appeals.

In order to utilize post-judgment motions effectively, one must first understand the event which starts the running of the deadlines to file these motions. The entry of judgment starts the running of the deadlines for post-judgment motions.[2] See, e.g., Rule 59(b) ("A motion for new trial must be filed not later than thirty (30) days after the entry of judgment"). Entry of judgment means the "[n]otation of a judgment or order on separately maintained bench notes or in the civil docket or the filing of a separate judgment or order." Rule 58(c), Ala. R. Civ. P. Judgment is not always entered on the day a jury verdict is returned. The court

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[1] Susan S. Wagner of Baker, Donaldson, Bearman, Caldwell & Berkowitz, PC in Birmingham, presented this seminar topic last year and prepared comprehensive seminar materials. With her permission, I updated and supplemented those materials in preparing this paper, but it remains, in large measure, her work product. Thank you, Susan.

[2] The date of entry of judgment also is the date post-judgment interest begins accruing and the date that begins the running of the time period for filing an appeal.

may render judgment by separate order or by announcing the judgment from the bench, but the date that begins the running of the time for an appeal is the date the judgment is entered. *See Smith v. Jackson*, 770 So. 2d 1068, 1071-1072 (Ala. 2000) (Rule 58(c) "preserves the distinction between rendition and entry of judgment when the trial judge renders judgment 'by executing a separate written document,' Rule 58(a), Ala. R. Civ. P."); *Lyman v. Lyman*, 753 So. 2d 1159, 1160 (Ala. Civ. App. 1999).

I. Rule 50 - Motion for Judgment as a Matter of Law

In 1991, Fed. R. Civ. P. 50 was amended to reflect a change in terminology from "directed verdict" and "judgment notwithstanding the verdict" to "judgment as a matter of law" and "renewed judgment as a matter of law." Ala. R. Civ. P. 50 was amended in 1995 to incorporate this change in terminology. As a result, Rule 50(a), Ala. R. Civ. P., now designates a motion for a directed verdict as a motion for a judgment as a matter of law ("JML"), and Rule 50(b) now designates a motion for JNOV as a renewed motion for a JML. The change in terminology is technical and not one of substance. The standard for granting a motion for judgment as a matter of law is the same as that previously applied to motions for directed verdict and JNOV. As a result, authorities that predate the name change remain valid except for the references to obsolete terminology. C. Lyons, *Alabama Rules of Civil Procedure* ¶50.1.

A. Purpose of Rule 50 motions

The motion for judgment as a matter of law tests the sufficiency of the opposing party's evidence to have its claims or defenses submitted to the jury. *Carter v. Henderson*, 598

So.2d 1350 (Ala. 1992). Pursuant to a motion for JML, the court may determine an issue as a matter of law if, "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." Rule 50(a)(1). A party can also move for JML on issues as to which that party bears the burden of proof, i.e., a plaintiff can move the court to enter JML in the plaintiff's favor on its claims, and a defendant can move the court to enter JML in the defendant's favor based on an affirmative defense.

The standards applied by the trial court for a motion for JML are the same whether made at the close of evidence or renewed after the verdict. In fact, the standards are the same as those applied to a motion for summary judgment. In order to withstand a motion for JML, the plaintiff must present "substantial evidence" in support of each required element of the plaintiff's claim. Ala. Code § 12-21-12(a); *Carter v. Henderson*, 598 So.2d 1350, 1353 (Ala. 1992). In considering a motion for JML, the court does not exercise discretion or weigh the evidence but instead makes an objective, legal determination, viewing the evidence in the light most favorable to the nonmovant. *Id.* In moving for a JML as to the movant's own claims or defenses, the moving party must show that its claim or defense is established by unimpeached testimony, that there is no substantial evidence supporting the nonmovant's position, and that reasonable persons must draw the same conclusion, in favor of the movant. *See Lowe's Home Centers v. Laxson*, 655 So.2d 943, 945-46 (Ala. 1994). Stated differently, the movant must show that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law.

The standard for judgment as a matter of law is much higher than for a new trial under Rule 59(a). A renewed motion for judgment as a matter of law seeks to overturn an adverse verdict, to turn victory into defeat. In seeking a new trial, the movant asks only for a second chance with a new jury and an error-free trial. Consequently, the court has somewhat wider latitude in weighing the evidence when ruling on a new trial motion. If a sufficiency issue has been properly raised and preserved, the standard of review applicable to a Rule 50 motion is *de novo*. *Teague v. Adams*, 638 So. 2d 836, 837 (Ala. 1994).

B. Necessity of Rule 50 motions to Preserve Sufficiency of Evidence Issues for Appeal

In order to preserve issues of evidentiary sufficiency for appeal, parties must comply with a two-step procedure under Ala. R. Civ. P. 50. First, a motion for JML must be made under Rule 50(a) "at the close of all the evidence," that is, after the defendant has rested and the plaintiff has presented any rebuttal evidence. Rule 50(b) provides that if the motion is denied, "the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion." Once the court enters judgment on the verdict, the party must then timely renew its motion under Rule 50(b) within 30 days after entry of judgment (10 days in federal court).[3] Renewal of the motion gives the trial court a "second look at the 'insufficiency' ground as a prerequisite for appellate review of the issue." *Barnes v. Dale*, 530 So.2d 770, 776-77 (Ala. 1988). The two-step procedure also

[3] Pursuant to Federal and Alabama Rule 6(b), trial courts lack authority to enlarge this time period and are without jurisdiction to grant an untimely motion. Moreover, an untimely motion does not suspend the time for filing an appeal.

applies to motions seeking entry of JML in the movant's favor on the movant's claims or defenses.

There are, however, exceptions to the two-step procedure. Although issues relating to the sufficiency of the evidence require a motion at the conclusion of all the evidence, issues relating to pure questions of law do not. *See A.T. Stephens Enterprises, Inc. v. Johns,* 757 So.2d 416, 419 (Ala. 2000)*; Barnes v. Dale*, 530 So.2d 770 (Ala. 1988). In *Barnes*, the court reasoned that "if the motion for [judgment as a matter of law] at the close of plaintiff's evidence provides the opposing party and the court with notice of the question of law, renewal of the motion at the close of evidence is redundant and nonessential." *Id.* at 778.

Another exception to the two-step procedure relates to punitive damages. "The issue of whether an award of punitive damages is supported by clear and convincing evidence necessarily does not arise either until a party requests an instruction on punitive damages or until after the jury renders a verdict and the trial court enters a judgment, so it is permissible to raise the issue for the first time in a post-judgment motion. *Sears, Roebuck & Co. v. Harris*, 630 So.2d 1018 (Ala. 1993), *cert. denied*, 511 U.S. 1128 (1994).

Finally, the verdict-winner need not file a post-judgment motion for judgment as a matter of law in order to preserve the sufficiency of evidence issue for appeal. *See K.S. v. Carr*, 618 So.2d 707 (Ala. 1993).

C. Form and Substance of Rule 50 motions

Both the Rule 50(a) and Rule 50(b) motions must state the specific grounds on which they are based. While the grounds need not be stated with technical precision, the motion

must adequately apprise the court of the movant's position. It is important that the motion state all the grounds relied on, because appellate review of the trial court's ruling on the motion will be limited to those grounds stated in the motion. Furthermore, since a post-judgment motion for judgment as a matter of law is "nothing more than a renewal of the earlier motion made at the close of the presentation of the evidence, it cannot assert a ground that was not included in the earlier motion." 9A Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2537, at 344-45 (2d ed. 1995).

Motions lacking the necessary specificity can and do result in waiver. *See, e.g., Cone Builders, Inc. v. Kulesus*, 585 So.2d 1284 (Ala. 1991); *Sears, Roebuck & Co. v. Harris*, 630 So. 2d 1018, 1027 (Ala. 1993)(defendant's 50(b) motion which failed to contain any grounds related to sufficiency of the evidence waived appellate review of the issue). As a result, it is recommended that a defendant's motion for JML assert that there is no legally sufficient evidentiary basis for a reasonable jury to find for the plaintiff on each count of the complaint, each claim, each element of each claim, each material factual allegation, and each item of damages sought. *See infra*, section I.B. The motion should further assert that the evidence establishes each of the defendant's affirmative defenses and each element thereof. The motion should also cite supporting legal authority where appropriate.

Although the Rule 50(a) motion may be made orally in open court (with a court reporter present), "better practice dictates a written motion for the sake of clarity and to prevent misunderstanding." *Pettway v. Pepsi Cola Bottling Co.*, 337 So.2d 757, 759 (Ala.1976).

The renewed motion for judgment as a matter of law under Rule 50(b) must be in writing and filed by the deadline.

In preparing a renewed motion for judgment as a matter of law, the movant should bear in mind that the judge will be the same one who denied the movant's motion at the close of evidence and let the case go to the jury. Consequently, counsel's job is to show the merit of the movant's factual position without insulting the judge's intelligence for failing to realize this at an earlier juncture. To minimize this problem, counsel should make extensive and pinpointed use of the trial record to highlight critical evidence and explain why the non-movant's evidence did not create a fact issue even though the confused or unreasonable jurors concluded that it did. In the motion papers and at oral argument, counsel also should stress favorable law, giving the court the "out" of realizing too late that the legal standard prevented a jury determination.

The renewed motion for judgment as a matter of law may be made alone or in combination with a motion for a new trial. When the motions are made in combination, the court should rule conditionally on the new trial motion if the renewed motion for judgment as a matter of law is granted. Rule 50(c). In this way, the appellate court can review both rulings and avoid a second round of post-judgment motions.

Motions for judgment as a matter of law are granted cautiously and sparingly because a losing party is deprived of a jury determination on the merits. Even where such a motion is due to be granted, judges often will withhold ruling on the motion until after the verdict is returned. That way, if the jury finds in the movant's favor, the motion becomes moot; the

trial court will have saved the effort of considering the motion and reduced the risk of reversal. If the jury finds in the nonmovant's favor on the issue, the trial court can grant the renewed motion, confident that if the appellate court disagrees with its assessment of sufficiency of the evidence, the case will not have to be retried.

As a practical matter, renewed motions for judgment as a matter of law are seldom successful. They must be made, however, so as to build the record for appeal.

D. Good count/Bad count rule

The specificity of the motion for JML has critical significance in the situation where the court submits several claims to the jury, one or more of which is unsupported by the evidence. If the jury then returns a general verdict for the plaintiff, it is impossible to know upon which of the multiple theories the jury based its verdict. On appeal, the reviewing court must determine whether the plaintiff presented substantial evidence in support of each of the claims. *See Palm Harbor Homes, Inc. v. Crawford*, 689 So.2d 3, 8 (Ala.1997). If the court determines that one (or more) of several claims is not supported by the evidence, the specificity of defendant's motion for judgment as a matter of law determines whether the judgment will be affirmed or reversed. Where the defendant does not challenge the "bad counts" (i.e., those not supported by substantial evidence) with specificity in his motion for JML, the appellate court will presume that the verdict was returned on a "good count" (i.e. one supported by sufficient evidence) and affirm the judgment. However, where the defendant challenges the "bad counts" with specificity in a motion for judgment as a matter of law, the appellate court will not presume that the general verdict was returned on a "good

count." "If a verdict should have been directed as to one or more of the claims, then the judgment based on those claims must be reversed." *Id.* *See Goodyear Tire & Rubber Co. v. Washington*, 719 So.2d 774, 778 (Ala.1998); *Aspinwall v. Gowens*, 405 So.2d 134, 138 (Ala.1981). Thus, it is important that the motion for JML be specifically addressed to individual counts and claims and each of their factual and legal elements, rather than being addressed to the case as a whole.

II. Rule 52(b)- Motion for Amended or Additional Findings of Fact

Fed. R. Civ. P. 52(a) requires that in actions tried upon the facts without a jury or with an advisory jury, the court must "find the facts specially and state separately its conclusions of law thereon . . . ." The Alabama Rule does not require such findings of fact or conclusions of law unless required by statute, but provides that the court "may" enter findings and conclusions "upon written request."

Rule 52(b) permits a motion to amend findings, make additional findings, and amend the judgment accordingly. Such a motion must be filed within 10 business days after entry of judgment in federal court and 30 days after entry of judgment in state court. This time period cannot be extended pursuant to Rule 6(b). A Rule 52(b) motion may accompany a motion for new trial. A Rule 52(b) motion is appropriate in nonjury trials to correct findings based on factual error.

Rule 52(a) specifies that requests for findings are not necessary for purposes of review, and Rule 52(b) states that objections to the findings are not required in nonjury trials

in order to challenge the sufficiency of the evidence. In *Ex parte James,* however, a plurality of the Alabama Supreme Court determined that, if the judge makes no findings in a nonjury case, the losing party must file a motion for new trial in order to challenge the sufficiency of the evidence on appeal. 764 So. 2d 557 (Ala. 1999) (plurality opinion). This rule has been applied by the Alabama Court of Civil Appeals. *Cross v. Cross,* 853 So.2d 241 (Ala. Civ. App. 2002).

III. Rule 55(c)/Rule 60(b)- Motion to Set Aside Default Judgment

There are two procedural grounds in the Alabama Rules of Civil Procedure to support a request that a trial court set aside a default judgment - Rule 55(c) and Rule 60(b). Under Alabama law, the party challenging a default judgment must file a post-judgment motion under either Rule 55(c) or 60(b). *Wade v. Pridmore,* 361 So. 2d 511, 513 (Ala. 1978). Alabama appellate courts will not address the issue whether the trial court erred in dismissing an action if the appellant did not file such a motion. Such a motion should precede an appeal in all courts - otherwise, there will be no evidentiary support (i.e. affidavits) providing an excuse for the default.

When seeking relief from a default judgment, a Rule 55(c) motion should be filed if possible as the judge is afforded more discretion is setting aside the default judgment and a better standard of review is available on appeal. Under Ala. R. Civ. P. 55(c), motions to set aside default judgments must be filed within 30 days. If this deadline cannot be met, however, relief can be sought under Rule 60(b). Rule 60 motions must be filed "within a

reasonable time," except when based upon the enumerated reasons (1), (2) and (3), and then they must be filed within four months after the judgment.

Generally, motions to set aside a default judgment should be accompanied by one or more affidavits explaining the circumstances leading to the default. The motion, affidavits, or accompanying proposed answer should also establish that the defendant has a viable defense to the action, such as by controverting the factual allegations of the complaint, raising affirmative defenses, or establishing that discovery is needed.

Rule 55(c) provides no specific grounds that must be established to set aside a default judgment, but simply allows a court to do so in its discretion. Conversely, Rule 60(b) specifies that default judgments may be set aside for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud, misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reverse or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

In determining whether to set aside a default judgment, a trial court must apply the following three factors: (1) whether the defaulting party has a meritorious defense, (2) whether the nondefaulting party will be unfairly prejudiced if the default judgment is set aside, and (3) whether the default judgment was a result of the defaulting party's own

culpable conduct. *Kirtland v. Fort Morgan Auth. Sewer Serv., Inc.*, 524 So.2d 600, 604 (Ala. 1988)*; McCormick v. Congleton*, 860 So.2d 1275, 1278 (Ala. Civ. App. 2003). Where a trial court does not demonstrate that it has considered the mandatory *Kirtland* factors in denying a motion to set aside a default judgment, such as where a Rule 55(c) motion is denied by operation of law, the denial of the motion to set aside the default judgment will be reversed and the cause remanded for the trial court to address the *Kirtland* factors. *See e.g., Richardson v. Integrity Bible Church, Inc.*, 2004 WL 2009363, *3 -4 (Ala. Civ. App. 2004); *Cobb v. Loveless*, 807 So.2d 566, 567 (Ala. Civ. App. 2001). Furthermore, although *Kirtland* involved a Rule 55(c) motion to set aside a default judgment, Alabama courts also apply the *Kirtland* factors to Rule 60(b) motions to set aside default judgments. *Sampson v. Cansler*, 726 So.2d 632, 633 -634 (Ala. 1998). Thus, to be entitled to relief on a motion to set aside a default judgment under Rule 60(b), the movant must establish both the *Kirtland* factors and a Rule 60(b) ground for relief.

Presenting a meritorious defense for purposes of a motion to set aside a default judgment does not require that the movant satisfy the trial court that the movant would necessarily prevail at a trial on the merits, only that the movant show the court that the movant is prepared to present a plausible defense. *Kirtland*, 524 So.2d at 605. Furthermore, it should be noted that although trial judges must balance two competing policy interests--judicial economy and the litigant's right to defend on the merits--in determining whether to set aside a default judgment, "preserving a litigant's right to a trial on the merits is paramount and, therefore, outweighs the interest of promoting judicial economy." *Id.* at 604.

An order granting a motion to set aside a default judgment is interlocutory and not appealable. *Fisher v. Bush*, 377 So.2d 968 (Ala. 1979). Conversely, the denial of a motion to set aside a default judgment is appealable. *Leonard v. Leonard*, 560 So.2d 1080 (Ala. Civ. App. 1990). In considering the timing for an appeal, it should be noted that if a Rule 55(c) motion is not ruled upon within 90 days, it is automatically denied by operation of law pursuant to Rule 59.1. A Rule 60 motion is not subject to the 90 day limitation in Rule 59.1. However, on appeal from denial of a Rule 60(b), only the propriety of that ruling may be reviewed - not the propriety of the underlying judgment. The applicable standard of review in appeals stemming from a trial court's granting or denying a motion to set aside a default judgment under 55(c) is whether the trial court's decision constituted an abuse of discretion. *Id.* at 603.

IV. Rule 59(a) - Motion for New Trial

Under Rule 59(a), a new trial may be granted in both jury and nonjury cases with respect to all or any of the parties. A motion for a new trial is addressed to the inherent power of the trial court to reconsider the decision in the case and grant a new trial to prevent a miscarriage of justice. The purpose of a motion for a new trial is to point out to the trial court alleged error occurring at trial and, in the event the motion is not granted, to provide the appellate court with a record for review of the trial court's action.

Rule 59(a) provides that the grounds for a new trial are those sufficient for a new trial or rehearing under prior practice. In Alabama courts, in an action tried to a jury, a new trial can be granted for any of the reasons listed in Ala. Code § 12-13-11:

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

(2) Misconduct of the jury or prevailing party.

(3) Accident or surprise, which ordinary prudence could not have guarded against.

(4) Excessive or inadequate damages.

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

(6) The verdict or decision is not sustained by the great preponderance of the evidence or is contrary to law.

(7) Newly discovered evidence, material for the party applying, which the party could not, with reasonable diligence, have discovered and produced at trial.

(8) Error of law occurring at the trial and properly preserved by the party making the application.

Unlike the Rule 50 motions, the trial court exercises broad discretion in ruling on a motion for new trial, and its decision should not be disturbed on appeal unless some legal right was abused and the record plainly and palpably shows that the trial court erred. *Senn v. Alabama Gas Corp.*, 619 So.2d 1320, 1323 (Ala. 1993).

A. Form and Timing of a Rule 59(b) motion

Rule 59 contains no specific requirements as to the form or substance of a motion for new trial, but Alabama courts hold that "[t]he grounds set out in a motion for a new trial must sufficiently specify the precise error that is alleged to have occurred," thus requiring some degree of precision in stating the basis for the motion. *See e.g., Trotter v. Sumner*, 319

S0.2d 284, 286 (Ala. 1975)(holding that a 59(a) motion averring that the verdict is "contrary to the law" and "contrary to the facts" was too general to preserve any error). As a general rule, trial transcripts should be liberally but wisely employed in preparing a new trial motion. The written record can pinpoint the erroneous ruling or jury instruction, prejudicial outburst, subtle misconduct of opposing counsel during closing, or evidence that casts the jury verdict into doubt. Where the new trial motion is based on matters outside the trial record, such as jury misconduct, lawyer or judge misconduct outside of court, or newly discovered evidence, affidavits must be submitted to prove these allegations. Where the gravaman of the new trial motion is an argument of legal error or new developments in the law, the new trial motion should contain a detailed memorandum of law citing cases, explaining them, and furnishing copies of essential cases to the court.

Rule 4(a)(3) Ala. R. App. P. expressly provides that "[a]ny error or ground of reversal or modification of a judgment or order which was asserted in the trial court may be asserted on appeal without regard to whether such error or ground has been raised by motion in the trial court under . . . Rule 59 of the ARCP." The Committee Comments to Appellate Rule 4 caution, however, that the rule "does not . . . extend the right to raise for the first time on appeal new matter not presented to the trial court or upon which the trial court had no opportunity to pass." The rule also recognizes that "matters which can only be asserted by post-trial motion, must be so asserted." Such matters generally involve defects in the jury's verdict, which do not occur until the verdict is rendered, and thus cannot be addressed earlier. Examples of verdict problems include: a verdict that is against the weight and

preponderance of the evidence, inconsistency of the verdict, inadequate damages, excessive compensatory damages and excessive punitive damages.

Ala. R. Civ. P. 59(b) requires that a motion for new trial be filed within 30 days after entry of the judgment (10 days in federal court). The time for filing the motion cannot be extended by stipulation of the parties or by order of the court. Affidavits must be filed with the motion.[4] A motion for a new trial may be joined with a motion to set aside the verdict or judgment or with a motion for judgment notwithstanding the verdict. See Rule 50(b). The time period for filing the motion begins to run when judgment is entered, not when the jury returns a verdict, or the judge rules from the bench. Also, when a party obtains a verdict and judgment in its favor, but the trial court then grants the opposing party's motion for JML, Rule 50(c)(2) gives the verdict-winner another 30 days (10 days in federal court) to file a motion for new trial, running from the date of entry of the judgment as a matter of law.

In order to preserve further rights of review as to the sufficiency of evidence, a party must either (a) make a motion for judgment as a matter of law under Rule 50(a) "at the close of all the evidence" and timely file a renewed motion under Rule 50(b) (within 10 business days in federal court or 30 days in Alabama courts after entry of the judgment) or (b) file a timely motion for new trial on the same basis. *S & W Props., Inc. v. American Motorists Ins. Co.,* 668 So. 2d 529 (Ala. 1995). Although the insufficiency of the evidence can be raised in

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[4] "Hearsay evidence is not admissible in support of a motion for a new trial, and a new trial will not be granted on the basis of such evidence. Affidavits in support of a motion for new trial should be based on the knowledge of the affiant, and not on hearsay or information and belief." *See Jefferson County v. Kellum*, 630 So. 2d 426, 427-28 (Ala. 1993).

either motion, there are two disadvantages to raising the issue only in a motion for new trial. First, if the appellate court finds the evidence insufficient under a Rule 59(a) motion, it can only order a new trial, it cannot order a judgment as a matter of law. *King Mines Report, Inc. v. Malachi Mining & Minerals*, 518 So.2d 714, 716 (Ala. 1987). Second, while the standard of review of an order granting or denying a Rule 50 motion is de novo, an appellate court reviews the trial court's ruling on a Rule 59(a) motion only for an abuse of discretion. *Hill v. Cherry*, 379 So.2d 590, 592 (Ala. 1980).

A new trial may be sought on the basis that the verdict is against the great preponderance of the evidence on behalf of a party who has not filed motions challenging the sufficiency of the evidence during the trial. *Shadwrick v. State Farm Fire & Cas. Co.,* 578 So. 2d 1075, 1077 (Ala. 1991); *Independent Life & Acc. Ins. Co. v. Parker,* 449 So. 2d 233, 236 (Ala. 1984).

B. Grounds

A new trial may be granted where: the trial was not fair; the verdict or finding was against the weight of the evidence; there exists newly discovered evidence that would probably have changed the result at trial; the amount of the verdict is either excessive or inadequate; irregularity in the proceedings precluded a fair trial; or the jury's consideration or deliberation was improper.

1. Unfair Trial

In arguing that the trial was not fair, the movant will usually point to an erroneous legal ruling that prejudiced the fact finder against the movant.

Where a jury verdict is based on erroneous or misleading instructions, the trial court's error in instructing the jury is a proper ground for granting a motion for a new trial, provided prejudice is shown. Where the defects in the court's instructions did not result in a verdict based on misapplication of controlling law, there are insufficient grounds on which to grant a new trial motion.

2. Weight of the Evidence

The court may grant a motion for a new trial where a jury verdict is against the great weight and preponderance of evidence. The court may not, however, set aside a verdict merely because the evidence is in conflict or because the judge would have reached a different result. New trials based on weight of the evidence are closely scrutinized on appeal. *Scott v. Farnell,* 775 So. 2d 789 (Ala. 2000).

Although the new trial motion based on the weight of the evidence is also available in bench trials, it is usually fruitless as the judge considering the motion has already expressed his or her view of the evidence, which is unlikely to change.

3. Newly Discovered Evidence

New trial motions may also be granted to permit presentation of newly discovered evidence. The moving party bears the heavy burden of showing that the evidence was in existence at the time of trial and that he or she was excusably ignorant of the existence of the evidence, which was not or could not have been discovered by the exercise of due diligence prior to or at the time of the trial. In practical terms, the requirement that the evidence could not have been discovered in time to be considered at trial, when coupled with the 10 or 30-

day deadline, means that in order to move for a new trial on the basis of newly discovered evidence, the evidence must be discovered within the 10 or 30-day period after judgment is entered. Clearly, this reduces the instances in which newly discovered evidence will provide the basis for a new trial motion. When new evidence is discovered after the deadline for a new trial motion, a motion should be made under Rule 60(b)(2), which provides for relief from a final judgment on the basis of newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial. A motion under Rule 60(b)(2) must be made within a "reasonable time" and not more than one year in federal court or four months in state court after judgment is entered.

In order for a new trial motion on the basis of newly discovered evidence to be successful, the evidence must be material and must not simply impeach testimony given at trial, but must be such as probably would require a different result. *See Rozier v. Ford Motor Co.,* 573 F.2d 1332 (5th Cir. 1978). A new trial motion will not be granted to relitigate old matters, and newly discovered evidence that merely tends to affect the weight and credibility of evidence does not constitute a proper basis for a new trial.

4. Excessive or Inadequate Damages

The issue of excessiveness or inadequacy of damages is properly raised on a motion for a new trial. Ala. R. Civ. P. 59(f) expressly provides that "[t]he court may, on motion for new trial, require a remittitur as a condition to the overruling of the motion for new trial." Although the federal rule is silent with respect to remittitur, the federal district courts have

the same ability under case law to condition denial of a new trial on acceptance of a remittitur.

Under *Hammond v. City of Gadsden,* 493 So. 2d 1374 (Ala. 1986), and *Green Oil Co. v. Hornsby,* 539 So. 2d 218 (Ala. 1989), the trial court is required to conduct an evidentiary hearing if requested and must state specifically his or her reasons for granting or denying any request for remittitur. These same requirements apply in federal district courts in Alabama, at least in diversity cases. *American Employers Ins. Co. v. Southern Seeding Servs., Inc.,* 931 F.2d 1453 (11th Cir. 1991).

The parties may wish to conduct discovery upon the filing of a motion seeking remittitur, particularly as to issues not previously discoverable. In filing or opposing such a motion, you may wish to request a scheduling order as to discovery and the evidentiary hearing. In doing so, the parties and the Court must be mindful of the 90-day deadline under Ala. R. Civ. P. 59.1 for the court to rule on post-judgment motions.

Generally, the trial court may not simply reduce the award, but must provide the plaintiff the option of a new trial in lieu of the remittitur. Where a punitive damages award is held to be excessive on due process grounds, however, the court should simply enter the reduced award without the plaintiff's consent and without the option of a new trial. *Johansen v. Combustion Eng'g, Inc.,* 170 F.3d 1320 (11th Cir. 1999).

Finally, where damages are determined to be inadequate, the court may, in lieu of a new trial and with the consent of the defendant, increase the damages, where the amount to

be added is certain. *City of Birmingham v. Business Realty Inv. Co.*, 722 So.2d 747, 752 (Ala.1998).

5. Irregularity in Proceedings Precluded Fair Trial

New trials are also permitted where the irregularity in trial proceedings results in prejudice to one of the parties. Such irregularity may involve misconduct of counsel or other persons participating in the trial. This misconduct may include improper argument, reference to evidence determined at pretrial conference to be inadmissible, or making remarks indicating that the outcome of the case should depend on the relative financial status of the parties. The irregularity may also involve misconduct by the trial judge, including out-of-court statements that a party is likely to prevail, making light of a party and the party's witnesses in the presence of the jury, or asking leading questions of witnesses. It could also include misconduct by witnesses, such as drawing the jury's attention to improper and irrelevant matters, or testifying falsely.

Trial irregularity as a basis for a new trial motion may involve various circumstances other than misconduct, including errors of law which affect the outcome of the case, error in the admission or exclusion of evidence, error in denying a request for a continuance, unfair surprise to a party resulting from the opposing party's failure to disclose a claim or defense prior to trial, or error in instructing the jury.

In order to succeed on a motion for a new trial, the moving party must establish not only that the proceedings were irregular, but also that this irregularity prejudiced the party's

right to a fair trial. Where circumstances render trial errors nonprejudicial, a new trial is improper.

6. Jury Misconduct

A new trial may be granted where misconduct by or with respect to the jury is established. The circumstances that may justify a new trial include: jurors' untruthful answer during voir dire; jury confusion; jury prejudice; failure of the jury to follow the court's instructions; an unauthorized view of premises by a juror; jurors introducing extraneous information into the jury room, jury receiving advice from person not on the jury; jury conducting home experiments; quotient or compromise verdicts; and coercion of jurors by bribe or threats directed against jurors.

The party moving for a new trial has the burden of establishing that such misconduct was prejudicial. A juror may testify as to whether extraneous prejudicial information was introduced to the jury or whether any outside influence was improperly brought to bear on any juror. Fed. R. Evid. 606(b); Ala. R. Evid. 606(b). Jurors may not, however, testify to any other statement or matter that occurred during the course of deliberations, nor to the effect that anything had upon any of the jurors' minds or emotions as influencing the verdict or the jurors' mental processes. *Id.*

As a practical matter, the attorney may find it almost impossible to prove juror confusion or jury prejudice, since the best evidence of this would be the deliberations of the jury as to which jurors are incompetent to testify.

7. Cumulative Error

The trial court may grant a new trial based upon the cumulative effect of multiple errors, even if no one alleged error would be sufficient by itself to support the granting of a new trial. *See Bekins Van Lines v. Beal*, 418 So.2d 81 (Ala. 1982).

8. Comparison of State and Federal Rule

Alabama Rule 59(a) does not authorize a new trial on part of the issues in a jury action, while the federal rule allows a partial new trial. Also, the federal rule has no subsection (g) counterpart. The requirement of a hearing set forth in Alabama Rule 59(g) must be observed if a hearing has been requested. *Lambert v. Alabama Real Estate Comm'n,* 479 So. 2d 68 (Ala. Civ. App. 1985).

Orders granting a new trial are appealable in Alabama courts, Ala. Code § 12-22-10; *Ex parte Mutual Sav. Life Ins. Co.,* 765 So. 2d 649 (Ala. 1998), but not in federal courts, *Deas v. PACCAR, Inc.,* 775 F.2d 1498 (11th Cir. 1985), *cert. denied,* 475 U.S. 1129 (1986).

V. Rule 59(e)- Motion to Alter or Amend a Judgment

Under Rule 59(e), the trial court has the power to alter, amend, or vacate a judgment after its entry. Such motions may be used to seek reconsideration of a judgment in a nonjury case or a judgment entered without trial, such as a summary judgment or judgment entered as a sanction for failure to comply with a court order. A Rule 59(e) motion may also be used to present newly discovered evidence in a nonjury case or a case decided on a summary

judgment motion. Furthermore, a Rule 59(e) motion is not proper as to interlocutory orders. *Bowater Inc. v. Zager*, 2004 WL 2135126, *5 (Ala. 2004).

Generally, a Rule 59(e) motion is not a prerequisite to an appeal. In a summary judgment case, however, it may permit the injection of additional issues not previously addressed. For example, a party may seek vacatur of a summary judgment motion to enable the filing of an amended pleading to assert new claims or previously neglected affirmative defenses.

In addition, under Alabama law, if a case is dismissed for failure to prosecute, the appellate courts will not consider an appeal unless the trial court was given the opportunity to reconsider its decision. *Green v. Taylor,* 437 So. 2d 1259 (Ala. 1983).

VI. Rule 60 - Motion for Relief from Judgment or Order

A. Motion To Correct Clerical Error – Rule 60(a)

Courts have both the power and the duty to correct judgments that contain clerical errors or mistakes. *American Trucking Ass'ns, Inc. v. Frisco Transp. Co.,* 358 U.S. 133 (1958). This power is expressly recognized in Rule 60(a), which authorizes the trial court, of its own initiative or on the motion of any party, to correct clerical mistakes or errors in judgments, orders, or other parts of the record caused by oversight or omission.

Even where a notice of appeal has been filed, which would normally divest the court of jurisdiction, the court retains the authority to correct clerical errors until the appeal is docketed at the court of appeals. In federal court, the parties or the trial court may thereafter

seek, and usually readily obtain, leave of the court of appeals to correct a clerical error prior to decision on appeal. *See* 11 C. Wright, A. Miller, & M. Kane, *Federal Practice & Procedure* §§ 2856, 2871 (1995). In Alabama courts, such leave is not required.

If the trial court elects to make a correction *sua sponte,* there is no requirement that notice be given to the parties, nor that a hearing be held. Common practice calls for the court to give notice to all parties of any correction, especially if it is based on matters outside the record.

Although the rule regarding correction of clerical error is broad, issues may arise as to what constitutes "clerical error." It helps tremendously if a clerk is involved, but Rule 60(a) applies to more than mere technical or typographical errors. This Rule has been used to correct arithmetic mistakes, misnaming of parties, errors in taxation of costs, the rate and period for recovery of interest, and the entitlement to attorney fees.

Rule 60(a) cannot be stretched to permit relitigation of matters or to make substantive changes in the final order. It may be used only to make the order reflect what was actually intended when it was initially rendered. If a party seeks to change the substantive impact of the order or judgment, relief must be sought under Rule 59(e), 60(b), or, where appropriate, in a separate action.

Thus, the Rule 60(a) motion can be used only to make the judgment or record speak the truth and cannot be used to say something other than what was originally pronounced. *West Va. Oil & Gas Co. v. Breece Lumber Co.,* 213 F.2d 702 (5th Cir. 1954); *Michael v. Michael,* 454 So. 2d 1035 (Ala. Civ. App. 1984).

The term "clerical errors" is not limited solely to errors by the clerk in transcription, but also includes errors by others such as a jury foreman, counsel, a party, or the judge. For example, *see Continental Oil Co. v. Williams,* 370 So. 2d 953 (Ala. 1979), where the trial court judge was permitted to recast a prior order so as to permit rather than to deny the plaintiff the right to dismiss an action. When a correction is based upon the recollection of the court, it is not subject to contest. *Childress v. Nice,* 522 So. 2d 302 (Ala. Civ. App. 1988).

B. Mistakes, Inadvertence, Excusable Neglect, Newly Discovered Evidence, Fraud, etc. – Rule 60(b)

Rule 60(b) sets forth six grounds for obtaining relief from a final order, judgment or proceeding:

(1) mistake, inadvertence, surprise, and excusable neglect;

(2) newly discovered evidence;

(3) fraud, misrepresentation, or other misconduct of a party;

(4) a void judgment;

(5) satisfaction of the judgment or change in a judgment relied on by the court that rendered the judgment; and

(6) any other reason justifying relief.

A party seeking to avoid a judgment or final order on the grounds of mistake, inadvertence, surprise, or excusable neglect under Rule 60(b)(1) has to establish that the mistake was understandable, one that a reasonable person could make under the circumstances even if diligent, and that it was not a part of the party's tactical approach to the litigation. The court will not be interested in providing parties relief from strategic decisions that prove, in

retrospect, ill advised. Various illustrations from case law of the "excusable neglect" grounds include:

- misplaced summons and complaint, *Bailey Mortgage Co. V. Gobble-Fite Lumber Co. Inc.*, 565 So.2d 138 (Ala. 1990);

- where the nonmovant was unaware his attorney had withdrawn from the case, *Kirtland v. Fort Morgan Authority Sewer Service, Inc.*, 524 So. 2d 600 (Ala. 1988);

- an attorney responsible for a default had a "heavy workload" and 'serious illness in the family." *Ex Parte Lang*, 500 Sp.2d 3 (Ala. 1986);

- accidental loss of a file by a claims adjuster or attorney, *Lee v. Martin*, 533 So.2d 185 (Ala. 1988); *Storage Equities, Inc. v. Kidd*, 579 So. 2d 605 (Ala. 1991).

Rule 60(b)(2) permits the court to grant relief from a judgment or order on the basis of newly discovered evidence only if the evidence is such that it "by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)," *i.e.*, within 10 or 30 days of the order or judgment. In order to reopen a matter on these grounds, the movant must show:

· the existence of "new" evidence, not merely evidence that supplements that already in the record;

· that the evidence, if it had been presented to the court, would have been likely to affect the outcome of the case; and

· that this new evidence could not have been discovered in time through due diligence.

The evidence also must have been in existence at the time of the trial. *See Moody v. State ex rel. Payne,* 344 So. 2d 160 (Ala. 1977). The newly discovered evidence must be

material, not merely cumulative or impeaching, and "such as will probably change the result. . . " *Strange v. Gregerson's Foods, Inc.*, 608 So.2d 721, 722 (Ala. 1992).

Rule 60(b)(3) permits the court to relieve a party of the burden of an order or judgment where fraud, misrepresentation, or other misconduct exists. Even if relief is not available under Rule 60(b)(3), the court may entertain a separate action for relief on the grounds of the fraud. Fraud under this rule must be shown by clear and convincing evidence.

Rule 60(b)(4) provides a party relief from a void judgment. A void judgment is one entered by the court without authority or jurisdiction and results from the court's lack of personal or subject-matter jurisdiction or the exercise of jurisdiction in violation of constitutional requirements. *See* 11 C. Wright, A. Miller & M. Kane, *Federal Practice & Procedure* § 2862 (1995). A court has no discretion under this subsection; if a judgment is void, it is to be set aside, and if it is valid, it stands. *Fisher v. Amaraneni,* 565 So.2d 84, 87 (Ala. 1990); *Wonder v. Southbound Records, Inc.,* 364 So. 2d 1173 (Ala. 1978).

Rule 60(b)(5) permits the court to vacate judgments in cases of changed circumstances where the judgment attacked has been satisfied, released, or discharged or when the prospective application of the judgment is no longer equitable. Although the rationale for the discharge and change-in-relied-on-case grounds is sound, there are few reported cases involving these grounds. The most frequent ground for motions under Rule 60(b)(5) is a change in circumstances that makes continued prospective application of the judgment unfair. New legislation, change in case law, and change in the underlying facts are the most frequently successful bases for obtaining Rule 60(b)(5) relief.

Rule 60(b)(6) is a catchall provision that applies only if another section of Rule 60 does not provide relief. This rule gives courts the ability to grant post-judgment relief from a judgment or order, without time limitation, in the event that the movants establish circumstances justifying relief. Although the rule seems boundless in its scope, the courts have fortunately set limits on its use. Rule 60(b)(6) is mutually exclusive of the five specific grounds for attack previously listed. *United States v. Karahalias,* 205 F.2d 331 (2d Cir. 1953). Relief for "any other reason" under Rule 60(b)(6) is an extreme and powerful remedy that should be used only under extraordinary circumstances. *Gallups v. United States Steel Corp.,* 353 So. 2d 1169 (Ala. Civ. App. 1978). "Ineffective counsel" may be an example of a ground for setting aside a decree under Rule 60(b)(6). *Mashatt v. Mashatt,* 469 So. 2d 607 (Ala. Civ. App. 1985).

Rule 60(b)(6) relief is not usually available to one who has not sought to achieve a favorable result before the judgment becomes final. *Eason v. Bynon*, 862 So.2d 651, *658 (Ala. Civ. App. 2003)*; Patterson v. Hays*, 623 So.2d 1142, 1145 (Ala.1993). In *Patterson*, the Alabama Supreme Court explained the parameters of Rule 60(b)(6):

> [U]nder Rule 60(b)(6), relief is granted only in those extraordinary and compelling circumstances when the party can show the court sufficient equitable grounds to entitle him to relief, but relief should not be granted to a party who has failed to do everything reasonably within his power to achieve a favorable result before the judgment becomes final; otherwise, a motion for such relief from a final judgment would likely become a mere substitute for appeal and would subvert the principle of finality of judgments. See the Comment to Federal Rule of Civil Procedure 60(b). As the Court held in Nowlin v. Druid City Hosp. Bd., 475 So.2d 469 (Ala.1985), Rule 60 is no substitute for an appeal and is not available to relieve a party from his failure to exercise the right of appeal.

623 So.2d at 1145.

To succeed under Rule 60(b), the party must demonstrate a reason for failure to challenge the judgment on appeal or at an earlier time and must also establish inequity of the judgment attacked. Examples of successful motions under this section have involved egregious blunders by counsel, incarceration, incompetency, other factors preventing the party from taking earlier action, or a retrospective change of applicable law.

Rule 60(b) specifically provides that a motion for relief from a final judgment neither affects the finality of the judgment nor suspends its operation. Moreover, a Rule 60(b) motion does not toll the time within which a notice of appeal from the judgment must be filed, *Browder v. Director, Dept. of Corrections of Ill.,* 434 U.S. 257 (1978), except that a Rule 60(b) motion filed in federal court within 10 days after entry of judgment suspends the time to appeal, Fed. R. App. P. 4(a)(4)(A)(vi). In state court, a Rule 60(b) motion filed within 30 days of entry of judgment may be treated by the court as a Rule 59 motion.

Motions under Rule 60(b)(1), (2), or (3) (mistake, etc., newly discovered evidence, or fraud), must be made within a reasonable time and not more than four months after entry of the judgment in state court or a year in federal court. Motions under Rule 60(b)(4), (5), or (6) (judgment void, satisfied, released, or discharged, or "other reason justifying relief") must be made within a reasonable time, but have no fixed time limit. A void judgment can be vacated at any time. *See* Ala. R. Civ. P. 60 Committee Comments (citing *Sweeney v. Tritsch,* 151 Ala. 242, 44 So. 184 (1907)).

Under Alabama's Rule, while an appeal is pending, leave must be obtained from the appellate court to file a motion under Rule 60(b).

VII. Rule 62(b) - Motion for Stay of Enforcement of Judgment

Rule 62(a) provides for an automatic stay of execution and enforcement proceedings for 10 days in federal court and 30 days in Alabama courts. This automatic stay is intended to allow time to pay the judgment, prepare for appeal, or attack the judgment by motion before enforcement is commenced. The stay only prevents enforcement of the judgment. It does not affect appealability of the judgment, nor stop the time for appeal from running.

Under Rule 62(b), the court may extend this automatic stay pending disposition of a renewed motion for judgment as a matter of law under Rule 50(b), a motion for new trial or to alter, amend, or vacate a judgment under Rule 59, or a motion for relief from judgment under Rule 60.

A party seeking a stay under Rule 62(b) pending disposition of a post-trial motion should make a motion for such relief to the trial court. Typically, the motion will argue that a stay is necessary to preserve the status quo until a ruling is made on the motion for post-judgment relief. A motion for a stay is addressed to the discretion of the trial court, whose power to grant the relief derives from its authority to protect judgments, and preserve the status quo. When granting a motion for a stay pending disposition of a post-trial motion, the court may impose such conditions as are proper for the security of the nonmoving party.

A party seeking a stay pending disposition of a post-judgment motion should do so prior to the expiration of the automatic stay. Generally, the motion should be made at or before the time of filing the post-judgment motion.

Proceedings to enforce a money judgment may be further stayed pending appeal by posting a supersedeas bond in accordance with Rule 62(d).

With respect to injunction cases, the stay under Rule 62(a) does not apply unless so ordered by the trial court. Rule 62(c) governs suspension, modification, or granting of injunctions pending appeal.

Rule 62(h) permits a stay with respect to partial judgments made final under Rule 54(b) pending entry of judgments as to remaining claims or parties.

VII. Practice Pointers

A. Post-Judgment Motion Required to Preserve Appellate Issues

Post-judgment motions are sometimes required to preserve issues on appeal. Here are some examples:

1. Default Judgment

Under Alabama law, the party challenging a default judgment must file a post-judgment motion under either Rule 55(c) or 60(b). *Wade v. Pridmore,* 361 So. 2d 511, 513 (Ala. 1978).

2. Dismissal for Failure To Prosecute

The principle of *Wade v. Pridmore,* 361 So. 2d 511, 513 (Ala. 1978) (default judgment), also applies to dismissals for failure to prosecute. Thus, a party challenging a dismissal for failure to prosecute must file a post-judgment motion in order to challenge the dismissal on appeal. *Green v. Taylor,* 437 So. 2d 1259, 1260 (Ala. 1983).

3. Sufficiency of the Evidence

In order to preserve further rights of review as to the sufficiency of evidence, a party must either (a) make a motion for judgment as a matter of law under Rule 50(a) "at the close of all the evidence" and timely file a renewed motion under Rule 50(b) (within 10 business days in federal court or 30 days in Alabama courts after entry of the judgment) or (b) file a timely motion for new trial on the same basis. *S & W Props., Inc. v. American Motorists Ins. Co.,* 668 So. 2d 529 (Ala. 1995).

4. Trial Judge Makes No Written Findings of Fact in Nonjury Trial

In *Ex parte James,* a plurality of the Alabama Supreme Court determined that, if the judge makes no findings in a nonjury case, the losing party must file a motion for new trial in order to challenge the sufficiency of evidence on appeal. 764 So. 2d 557 (Ala. 1999) (plurality opinion). This rule has been applied by the Alabama Court of Civil Appeals. *Cross v. Cross,* 853 So. 2d 241 (Ala. Civ. App. 2002).

5. Excessive Damages

A party seeking to challenge a verdict as excessive on any of the grounds set forth in *Hammond v. City of Gadsden,* 493 So. 2d 1374 (Ala. 1986), and *Green Oil Co. v. Hornsby,* 539 So. 2d 218 (Ala. 1989), must file a motion for new trial seeking a remittitur.

B. Improper "Motion to Reconsider" Denial of Post-Judgment Motion

The Alabama appellate courts have held repeatedly that the Rules of Civil Procedure do not authorize a movant to file a motion to reconsider the trial judge's denial of a post-judgment motion. *E.g., Ex parte Dowling,* 477 So. 2d 400, 404 (Ala. 1985). This principal applies to motions to reconsider the denial of Rule 50, 52, 55, 59 and 60(b) motions. *Ex parte Jordan,* 779 So. 2d 183, 184 (Ala. 2000); *Ex parte Keith,* 771 So. 2d 1018, 1022 (Ala. 1998); *Richard v. State,* 850 So. 2d 349 (Ala. Civ. App.), *cert. denied* (Ala. 2002). Therefore, trial courts have no jurisdiction to entertain a motion to reconsider the denial of a post-judgment motion, and the time to appeal is not tolled by the filing of such a motion. If the trial court mistakenly *grants* a motion to reconsider the denial of a post-judgment motion, its order will be set aside on a mandamus petition.

C. Untimely Post-Judgment Motion Does Not Suspend Time to Appeal

Under Ala. R. App. P. 4(a)(3), the timely filing of a post-judgment motion under Rules 50, 52, 55, or 59 suspends the running of the time for filing of a notice of appeal. Fed. R. App. P. adds to this list motions under Rule 60(b) that are filed within 10 days after entry of the judgment.

Where a timely post-judgment motion has been filed, the time for appeal begins to run upon the disposition (by order or by operation of law under Ala. R. Civ. P. 59.1) of the last timely motion. If the post-judgment motion is not timely, however, the time for appeal will be calculated from the original judgment. *Boykin v. International Paper Co.,* 777 So. 2d 149, 150 (Ala. Civ. App. 2000).

If the trial court grants an untimely post-judgment motion, its order will be void and will be vacated if the other party files a mandamus petition.

D. Alabama's Deadline for Ruling on Post-Judgment Motions – Ala. R. Civ. P. 59.1

The importance of Ala. R. Civ. P. 59.1 cannot be overstated. That rule provides:

> No post-judgment motion filed pursuant to Rules 50, 52, 55, or 59 shall remain pending in the trial court for more than ninety (90) days, unless with the express consent of all the parties, which consent shall appear of record, or unless extended by the appellate court to which an appeal of the judgment would lie, and such time may be further extended for good cause shown. A failure by the trial court to dispose of any pending post-judgment motion within the time permitted hereunder, or any extension thereof, shall constitute a denial of such motion as of the date of the expiration of the period.

The time limit in Alabama district courts is 14 days, rather than 90.

Once the time limit expires under this Rule, the trial court loses jurisdiction, and the time for appeal begins to run. Thus, an untimely order granting a post-judgment motion is void, and the appellate courts will grant relief from an untimely order on writ of mandamus. *Watson v. Watson,* 696 So. 2d 1071 (Ala. Civ. App. 1996), *cert. dismissed* (Ala. 1997). If an appeal is filed more than 42 days after the post-judgment motion is deemed denied under

this rule, the appeal will be dismissed. *E.g., Bombardier Capital, Inc. v. Williams,* 850 So. 2d 353 (Ala. Civ. App. 2002).

If the trial court truly needs more time to hear or decide a motion, an extension may be obtained, but the trial court may not enter an order extending its own deadline. The parties may file a stipulation for more time, or the appropriate appellate court may enter an extension order. In either case, the extension must be entered before its expiration and not after the fact.

E. Rule 60 Motion Does Not Suspend Time to Appeal

With the exception of a Rule 60(b) motion filed in federal court within 10 business days after the judgment, Rule 60 motions do not suspend the time for an appeal. Appellate courts do not, however, consider themselves bound by the parties' designation of the rule under which a post-judgment motion is filed. Therefore, if a party files a post-judgment motion in state court within 30 days after the judgment and incorrectly states that it is filed under Rule 60(b), the appellate court may treat it as a motion under Rule 50, 52, 55, or 59 and calculate the time for appeal from its denial (or denial by operation of law under Rule 59.1).

F. Premature Post-judgment Motions

A premature post-judgment motion that, if it had been directed to a final judgment, would toll the time for filing a notice of appeal from a final judgment "quickens" on the day that the final judgment is entered. *See e.g., New Addition Club, Inc. v. Vaughn*, 2004 WL 1588103 (Ala.2004) (holding that "if a party moves for a judgment as a matter of law or, in

the alternative, for a new trial before the court has entered a judgment, the motion shall be treated as having been filed after the entry of the judgment and on the day thereof"); *Richardson v. Integrity Bible Church, Inc.*, 2004 WL 2009363, *2 (Ala. Civ. App. 2004)(holding that motion to set aside a default judgment pursuant to 55(c) entered before the final judgment was entered quickened on the day that the final judgment was actually entered).