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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2018-2019

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Deron E. Slay

v.

Stephanie C. Slay

**Appeal from Mobile Circuit Court
(DR-16-901654)**

DONALDSON, Judge.

Deron E. Slay ("the husband") appeals from a judgment of the Mobile Circuit Court ("the trial court"). Because we do not have jurisdiction over the husband's appeal, we dismiss the appeal.

Facts and Procedural History

In December 2016, the husband filed a complaint for a divorce from Stephanie C. Slay ("the wife") and for other relief in the trial court. The wife filed an answer and counterclaim. The issues were tried on March 15-16, 2018. On March 23, 2018, the trial court entered a judgment divorcing the parties and addressing all pending claims. On March 23 and March 28, 2018, the trial court entered orders correcting clerical errors in the March 23, 2018, judgment.

The husband and the wife each filed various motions after the entry of the judgment. Some of the motions were directed to the husband's attempts to obtain postjudgment discovery from third parties. The following motions and rulings are pertinent to our disposition of this appeal.

On April 20, 2018, the husband filed a motion to alter, amend, or vacate the March 23, 2018, judgment or in the alternative, for a new trial, pursuant to Rule 59, Ala. R. Civ. P. On May 2, 2018, the trial court set the husband's motion for a hearing to be held on May 30, 2018.

On May 3, 2018, the wife filed a motion to continue the May 30 hearing on the husband's postjudgment motion. On May

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4, 2018, the trial court entered an order granting the wife's motion to continue without resetting the hearing date. On May 8, 2018, the trial court entered an order setting June 25, 2018, as the new hearing date for the husband's postjudgment motion. On June 27, 2018, the trial court entered an order setting the hearing for the husband's postjudgment motion on July 23, 2018. Later that same day, the trial court entered an order setting the hearing on July 16, 2018.

On July 13, 2018, the husband's counsel and the wife's counsel both signed and submitted to the trial court a "Joint Motion for Delay Specifically Extending Rule 59.1 90-Day Deadline." In their motion, the parties stated:

"Come now the parties, by and through respective counsel, and move this court for a delay of the July 16, 2018, hearing date.

"The parties expressly consent to a delay beyond 90 days from the date of the filing of the post-judgment motion that is presently scheduled to be heard on the date in question; said 90 days occurring on July 18, 2018.

"WHEREFORE, premises considered, the parties expressly request a delay pursuant to Rule 59.1[, Ala. R. Civ. P.]. They ask for any further and different relief to which they might be entitled."

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On July 16, 2018, the trial court entered an order that stated: "Motion to Continue filed by [the husband] is hereby Granted."

On July 17, 2018, the trial court entered an order setting August 15, 2018, as the hearing date for the husband's postjudgment motion. On August 16, 2018, the trial court entered an order purporting to deny the husband's postjudgment motion. The husband filed a notice of appeal to this court on September 11, 2018. The husband filed a brief on appeal, but the wife did not.

"It is well settled that jurisdictional matters are of such significance that an appellate court may take notice of them ex mero motu. Wallace v. Tee Jays Mfg. Co., 689 So. 2d 210, 211 (Ala. Civ. App. 1997); Nunn v. Baker, 518 So. 2d 711, 712 (Ala. 1987). 'The timely filing of [a] notice of appeal is a jurisdictional act.' Rudd v. Rudd, 467 So. 2d 964, 965 (Ala. Civ. App. 1985); see also Parker v. Parker, 946 So. 2d 480, 485 (Ala. Civ. App. 2006) ('an untimely filed notice of appeal results in a lack of appellate jurisdiction, which cannot be waived')."

Kennedy v. Merriman, 963 So. 2d 86, 87-88 (Ala. Civ. App. 2007).

Rule 59.1, Ala. R. Civ. P., provides:

"No postjudgment 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

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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 render an order disposing of any pending postjudgment 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 husband's April 20, 2018, postjudgment motion could not remain pending in the trial court for more than 90 days unless the time for ruling on the motion was properly and timely extended pursuant to Rule 59.1. If the time for ruling on the motion was not properly extended, the husband's postjudgment motion was denied by the operation of law on July 19, 2018, because no ruling was rendered by the trial court disposing of the motion on or before that date, and the time for filing the husband's notice of appeal was due 42 days later, on or before August 30, 2018. Rule 4(a)(3), Ala. R. App. P.

We asked the parties to provide supplemental briefs "addressing whether the appeal is timely, and without limiting the response, addressing whether the July 13, 2018, joint motion of the parties and the July 16 and 17, 2018, orders of the [trial] court were effective to extend the time for the

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trial court to rule on any postjudgment motions." We provided citations to Rule 59.1 and to three cases for consideration. The wife did not respond. On May 15, 2019, the husband filed a response through appellate counsel without a citation to legal authority. In the response, the husband asserts that the intent of the parties in filing the July 13, 2018, motion was to extend the time for the trial court to rule on the postjudgment motion, and he contends that the trial court's orders granting the motion and resetting the hearing on the husband's postjudgment motion were "incorrectly styled" and constitute "harmless error."

In Traylor v. Traylor, 976 So. 2d 447 (Ala. Civ. App. 2007), the mother in that case filed a postjudgment motion in the trial court. The 90th day following the filing of the postjudgment motion was September 5, 2006. If no order was entered by the trial court disposing of the motion by that date, a notice of appeal was required to be filed within 42 days of September 5, or by October 17, 2006. A hearing on the motion was scheduled by the trial court to be held on August 7, 2006. No hearing was held on that date. On August 22, 2006, before the expiration of the 90-day period provided in Rule

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59.1, the parties jointly filed a document titled "Motion to Extend Time for Hearing on Motion for New Trial." 976 So. 2d at 449. The document was signed by counsel for both parties, and it stated that the parties "'file this their consent under Rule 59.1 of the Alabama Rules of Civil Procedure to extend the time for the hearing on the Motion For New Trial Or In The Alternative, To Alter, Amend or Vacate the court's [final judgment], from September 5, 2006, until September 29, 2006.'" Id. In response, the trial court entered an order on August 22, 2006, that provided:

"'The above consent of the parties having been presented to the court and the court having considered the same is of the opinion that the time for hearing the [mother's] motion for new trial filed under rule 59 of the Alabama Rules of Civil Procedure shall be extended in accordance with Rule 59.1 from September 5, 2006, until September 29, 2006.'" "

Id.

On September 27, 2006, the trial court in Traylor entered an order purportedly denying the postjudgment motion. The mother filed a notice of appeal on November 8, 2006, which was within 42 days of the entry of the order purportedly denying the postjudgment motion.

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On appeal, this court determined that the August 22, 2006, joint motion filed by the parties was not effective in extending the time for the trial court to rule on the postjudgment motion. This court stated:

"In the present case, the parties expressly consented on the record to extend the time for a hearing on the mother's postjudgment motion. Our Supreme Court, however, has held that 'consent to extend the time for a hearing on a postjudgment motion does not equate to consent to extend the pendency of the postjudgment motion beyond the 90-day period prescribed by Rule 59.1, Ala. R. Civ. P.' Ex parte Bodenhamer, 904 So. 2d 294, 295 (Ala. 2004); see also Burge v. Hayes, 964 So. 2d 672, 675 (Ala. Civ. App. 2006). Accordingly, the joint motion to extend the time for a hearing on the mother's postjudgment motion did not extend the 90-day period for the motion to remain pending as provided in Rule 59.1, and the trial court had 90 days from June 7, 2006, the date the mother filed her postjudgment motion, to rule on that motion. Burge, 964 So. 2d at 675. At the expiration of 90 days, i.e., on September 5, 2006, the mother's postjudgment motion was denied by operation of law. Burge, 964 So. 2d at 675."

Id. at 449-50. Accordingly, this court determined that the appeal was untimely and dismissed the appeal.

In Ex parte Bodenhamer, 904 So. 2d 294 (Ala. 2004), a party filed a motion asking the trial court to extend the time for ruling on that party's postjudgment motion. Attached to the motion was a letter from counsel for the opposing party

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that stated: "'I agree to extend the ninety (90) day period for the hearing on your motion in the above-referenced matter.'" 904 So. 2d at 295. The trial court entered an order "grant[ing]" the motion "'until such time as the court may set the same for a hearing and may thereafter be ruled upon by the court.'" Id. The trial court later entered a ruling on the postjudgment motion more than 90 days after it had been filed. A notice of appeal was filed within 42 days of the ruling on the postjudgment motion, but beyond the time for filing a notice of appeal if the time for a ruling had not been properly extended. The supreme court dismissed the appeal as untimely because the parties had consented only to extending the time for a hearing on the postjudgment motion.

Similarly, in the present case, the parties requested a "delay of the ... hearing date" in their July 13, 2018, joint motion and did not state that they expressly consented to extending the time for the trial court to rule on the husband's postjudgment motion. Therefore, under the current interpretation of Rule 59.1, the joint motion was ineffective to extend the 90-day period provided in Rule 59.1 and the notice of appeal is untimely.

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The interpretation of Rule 59.1 in this manner has been subject to criticism and calls for a change. See, e.g., Harrison v. Alabama Power Co., 371 So. 2d 19, 21 (Ala. 1979) (Maddox, J., dissenting, joined by Jones, J.); Ex parte Bodenhamer, 904 So. 2d at 296 and 297 (Johnstone, J., concurring in the result; and Harwood, J., concurring in the result, joined by See, J.); Traylor v. Traylor, 976 So. 2d at 450 (Bryan, J., concurring in the result, joined by Thomas, J.; and Thompson, P.J., dissenting); and Higgins v. Higgins, 952 So. 2d 1144, 1148 and 1149 (Ala. Civ. App. 2006) (Murdock, J., concurring in the result; and Bryan, J., concurring in the result, joined by Thompson, J.). Rule 59.1 has not, however, been amended in response to these and other protests. We have no authority to overrule or modify any opinions of our supreme court interpreting Rule 59.1. See § 12-3-16, Ala. Code 1975. In the present case, we have not been asked to overrule or modify any of our decisions applying Rule 59.1, nor have we been provided with arguments to distinguish any existing cases. Therefore, because the parties' July 13, 2018, joint motion was ineffective to extend the time for the trial court to rule on the husband's postjudgment motion, the notice of

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appeal was filed more than 42 days from the date the postjudgment motion was deemed denied. Accordingly, we have no jurisdiction over the appeal, and the appeal is dismissed.

APPEAL DISMISSED.

Moore, J., concurs.

Edwards, J., concurs in the result, with writing.

Hanson, J., concurs in the result, without writing.

Thompson, P.J., dissents, with writing.

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EDWARDS, Judge, concurring in the result.

Although I personally agree with Presiding Judge Thompson that the parties' joint consent¹ in the present case, which referred not only to Rule 59.1, Ala. R. Civ. P., but mentioned the "90-day deadline," should be sufficient to convey an express consent of the parties to extend the 90-day deadline for ruling on the postjudgment motion, I am constrained by our supreme court's holding in Ex parte Bodenhamer, 904 So. 2d 294, 295 (Ala. 2004), to concur in the result reached by the main opinion to dismiss the appeal. In Ex parte Bodenhamer, a husband in a divorce action moved for an extension of the time to rule on his postjudgment motion, and the wife indicated the following in a statement attached to the husband's motion: "'I agree to extend the ninety (90) day period for the hearing on your motion in the above-referenced matter.'" Ex parte Bodenhamer, 904 So. 2d at 295. The supreme court concluded in Ex parte Bodenhamer that the wife

¹I note that, like many attorneys, the attorneys in the present case styled their express consent as a motion. However, Rule 59.1 does not require that a trial court take any action to effectuate an express consent of the parties to extend the 90-day period to rule on a postjudgment motion. The only requirement to extend that period is that the express consent of all the parties appear of record.

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had agreed to extend only the time for a hearing, despite the fact that she had specifically referenced the 90-day period in her "consent." Id.

The 90-day period to which the wife in Bodenhamer referred and to which the parties in the present case refer is the period during which a postjudgment motion may remain pending in a circuit court under Rule 59.1 before that motion is denied by operation of law. That rule does not provide that a trial court must hold a hearing on a postjudgment motion. In fact, unless requested, a hearing is not required to be held before a circuit court can rule on a postjudgment motion.² See, e.g., R.W.S. v. C.B.D., 244 So. 3d 987, 998 (Ala. Civ. App. 2017) (explaining that a hearing on a postjudgment motion is required only when one is requested); Antoine v. Oxmoor Preservation/One, LLC, 130 So. 3d 1204, 1212 (Ala. Civ. App. 2012) (same).

As has been expressed numerous times by both supreme court justices and by judges on this court, the approach taken

²Furthermore, even when a hearing is requested, the failure to hold a hearing is not always reversible error. See, e.g., Fermin v. Lewis, 77 So. 3d 164, 173 (Ala. Civ. App. 2011).

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in Ex parte Bodenhamer is unnecessarily hypertechnical and lays quite the trap for the unwary, in clear violation of Rule 1, Ala. R. Civ. P. See, e.g., State v. Redtop Market, Inc., 937 So. 2d 1013, 1016 (Ala. 2006) (Bolin, J., concurring specially, joined by Nabers, C.J., and Smith, J.); Higgins v. Higgins, 952 So. 2d 1144, 1148 and 1149 (Ala. Civ. App. 2006) (Murdock, J., concurring in the result; and Bryan, J., concurring in the result, joined by Thompson, J.). In fact, such an approach creates an incentive for those attorneys savvy enough to understand that extremely precise language must be used to extend the 90-day period for ruling on a postjudgment motion to agree to an opposing attorney's request that clearly envisions an extension of the 90-day period to rule on a postjudgment motion but does not quite clearly express that intention and then to later move to dismiss any resulting appeal, citing Ex parte Bodenhamer and its progeny. As recognized by Justice Johnstone in his opinion concurring in the result in Ex parte Bodenhamer, an agreement

"'to extend the ninety (90) day period for the hearing' on [a] postjudgment motion, reasonably interpreted in terms of the obvious intent of the parties, [i]s synonymous with an agreement to extend the 90-day period for the pendency of the postjudgment motion through the date of [any]

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hearing, since no lawyer would, in a good faith response to a request for an extension of the time for the pendency of a motion, contemplate a hearing on the motion while he simultaneously contemplated the denial of that motion by operation of law after his response but before the hearing."

904 So. 2d at 297 (emphasis added).

Because I am bound by the opinions of our supreme court, see Ala. Code 1975, § 12-3-16, I concur in the result reached by the main opinion in the present matter. However, I, like several learned jurists before me, urge the supreme court to reconsider what I, too, believe to be the unjust holding in Ex parte Bodenhamer.

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THOMPSON, Presiding Judge, dissenting.

I disagree with the main opinion's dismissal of the appeal on the basis that the parties did not agree to extend the time for the trial court to rule on the husband's postjudgment motion. The parties filed a motion they called a "Joint Motion for Delay Specifically Extending Rule 59.1 90-Day Deadline." The parties requested a "delay pursuant to Rule 59.1." Rule 59.1, Ala. R. Civ. P., does not provide for the extension of the time for a trial court to conduct a hearing on a party's postjudgment motion. Rather, that rule provides in pertinent part, that "[n]o postjudgment motion ... 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" "Rule 59.1 provides a means for the extension of the 90-day period that a postjudgment motion may remain pending before the trial court. By express reference to Rule 59.1, I believe that the parties clearly stated their consent and intent to extend the pendency of the postjudgment motion pursuant to that rule." Traylor v. Traylor, 976 So. 2d 447, 451 (Ala. Civ. App. 2007) (Thompson, P.J., dissenting).