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ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2016

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Aaron Christopher Mitchell

v.

Shauna Lee Campbell

**Appeal from Autauga Circuit Court
(DR-14-900204)**

DONALDSON, Judge.

Aaron Christopher Mitchell ("the husband") appeals from the judgment of the Autauga Circuit Court ("the trial court") divorcing him from Shauna Lee Campbell ("the wife"), dividing the parties' property, and awarding alimony to the wife.

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Because the husband's notice of appeal was not timely filed, this court has no jurisdiction to consider the husband's appeal.

On March 28, 2011, the wife and the husband were married in Texas. The parties lived in various places during their marriage. In February 2014, the parties moved to North Dakota, where they separated in July 2014. On September 2, 2014, the wife filed a complaint for a divorce in the trial court. The husband was served on October 21, 2014.

On November 4, 2014, a pendente lite hearing was held by a special master appointed by the trial court. The wife, her attorney, and the husband's attorney were present. The special master heard testimony and determined that the wife was a resident of Alabama. The special master also recommended that the husband pay \$1,500 per month in pendente lite alimony to the wife. These findings were adopted by the trial court.

On December 31, 2014, the husband filed an answer and a counterclaim for a divorce. On January 5, 2015, the wife filed a motion to hold the husband in contempt for his failure to pay alimony as ordered by the court on November 4, 2014. The trial court entered an order on January 9, 2015, in which it

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stated that the wife's contempt motion was required to be filed as a new petition with a new filing fee.

On January 5, 2015, the wife served the husband with a request for discovery. On February 20, 2015, the wife filed a motion to compel the husband to submit his discovery responses and a motion to set a final hearing. On February 20, 2015, counsel for the husband filed a motion to withdraw.

On February 23, 2015, the trial court entered an order allowing the husband's counsel to withdraw and admonishing the husband to either retain counsel or to be prepared to proceed without counsel. On February 23, 2015, the trial court also entered an order in which it compelled the husband to respond to the wife's discovery requests within 10 days, ordered the husband to pay \$350 for the wife's attorney's fees for his failure to comply with the outstanding discovery requests, and warned the husband that failure to comply could result in the entry of a default judgment and the imposition of additional attorney fees. The trial court also entered an order setting the case for a final hearing on May 28, 2015, and ordered the parties to attend mediation.

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On March 12, 2015, the wife filed a motion for contempt in which she asserted that the husband had failed to respond to the discovery requests as compelled by the trial court's February 23, 2015, order, had failed to pay alimony, and had failed to otherwise comply with any requirements set out by the trial court in the divorce proceedings. On March 19, 2015, the trial court entered an order requiring the husband to fully comply with the court's previous orders within seven days and allowing the wife to apply for the entry of a default judgment upon the husband's failure to comply. On March 30, 2015, the wife filed a motion for the entry of a default judgment. On April 3, 2015, the trial court granted the wife's motion, finding the husband in default but setting a hearing to be held on May 14, 2015, on the issues of the division of property and debt, alimony, and contempt of court. On May 11, 2015, the wife's attorney filed a request to delay the hearing or, in the alternative, to allow the wife to submit an affidavit containing her testimony because she had a conflict on that date. On May 14, 2015, the trial court granted the wife's motion by indefinitely postponing the hearing and allowing the wife to submit testimony by affidavit. On May 14,

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2015, the wife filed a motion to allow her to submit an affidavit containing her testimony in lieu of a hearing and attached to it her affidavit. On May 17, 2015, the trial court ordered the wife to submit an amended motion for the entry of a default judgment, supported by her affidavit, and a proposed order.

On May 20, 2015, the wife filed an amended motion for the entry of a default judgment, her affidavit, a proposed qualified domestic relations order ("QDRO"), and a proposed final judgment. On May 30, 2015, the trial court entered a final divorce judgment. In its judgment, the trial court granted the divorce on the grounds of adultery and physical abuse; ordered the husband to pay, among other things, \$3,000 per month in periodic alimony, \$10,500 for an alimony arrearage, \$10,718 toward the wife's automobile loan, \$6,440.27 for outstanding debts and liabilities, and \$5,600 toward the wife's attorney's fees; and awarded the wife 50% of the husband's retirement account.

On July 2, 2015, new counsel filed a notice of appearance on behalf of the husband. That same day, the husband filed a motion, pursuant to Rule 59, Ala. R. Civ. P., seeking to set

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aside, alter, amend, or vacate the final judgment and a new trial. In his motion, the husband asserted that he had been unaware that his previous counsel had withdrawn or that he had missed any hearings, and he specifically asked the trial court to set aside the default divorce judgment. On July 14, 2015, the wife filed a response to the husband's postjudgment motion in which she asserted that the motion had not been filed within 30 days of the entry of the judgment and was therefore due to be denied. On July 22, 2015, the husband filed a reply to wife's response to his postjudgment motion in which he asserted that a June 10, 2015, notation by the trial-court clerk on the case-action summary reflects the entry of the final judgment and that his motion was filed within 30 days of the date of that notation on the case-action summary.

On August 31, 2015, after a hearing, the trial court entered an order purporting to deny the husband's postjudgment motion. The record contains no testimony from the hearing. On August 31, 2015, the wife filed a motion seeking the entry of her previously submitted proposed QDRO. On September 4, 2015, the trial court entered a QDRO. On September 24, 2015, the wife filed a motion to amend the QDRO to reflect the proper

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account from which she sought to have the husband's income withheld, and on September 28, 2015, the trial court entered the amended QDRO.

On September 28, 2015, another new counsel filed a notice of appearance on behalf of the husband. That same day, the husband filed a motion to vacate the QDRO entered on September 4, 2015. In that motion, the husband asserted that the division of retirement benefits contained in the divorce judgment was precluded by statute. On September 28, 2015, the husband filed his notice of appeal from the trial court's May 30, 2015, divorce judgment.

On September 30, 2015, the husband filed in the trial court a "verified motion for relief from judgment." In that motion, the husband alleged, among other things, that the divorce judgment was void for lack of subject-matter jurisdiction because, he asserted, the wife had not been a resident of Alabama for six months preceding the filing of her complaint. See § 30-2-5, Ala. Code 1975. The trial court set the husband's motion to vacate the QDRO and his verified motion for relief from the judgment for a hearing on October 29, 2015.

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On October 29, 2015, the trial court entered an "order on [the husband's] motion to alter, vacat[e] or amend" in which it found that it was without jurisdiction to enter any orders because this court had taken jurisdiction of the case on appeal.

On appeal, the husband challenges the divorce judgment entered on May 30, 2015. The husband first asserts that the judgment is void for lack of subject-matter jurisdiction. The husband asserts that the wife had not been a resident of Alabama for at least six months at the time she filed the complaint for a divorce. The husband also argues that the trial court's award to the wife of half of the husband's retirement account is precluded by statute, and, thus, is void because the parties had not been married for at least 10 years. See § 30-2-51(b), Ala. Code 1975. Finally, the husband challenges the trial court's property division and award of alimony and its award of attorney's fees to the wife. The husband does not challenge the trial court's order declining to rule on his verified motion for relief from the judgment filed after he had filed his notice of appeal. The husband states in his appellate brief that, "even though the trial court did not consider the Husband's Rule 60 Verified Motion

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for Relief from Judgment, such is of no consequence as 'challenges to subject-matter jurisdiction may be raised for the first time on appeal'"

Although we agree that subject-matter jurisdiction may be challenged for the first time on appeal, see, e.g., Ex parte Smith, 438 So. 2d 766, 768 (Ala. 1983), we must first determine whether this court has jurisdiction to consider the husband's appeal. The wife asserts that this court lacks jurisdiction because, she asserts, the husband did not timely file his notice of appeal.

The trial court electronically rendered the divorce judgment and transmitted it to the court's electronic-filing system on May 30, 2015. "An order or a judgment rendered electronically by the judge under subdivision (a)(5) of this rule shall be deemed 'entered' ... as of the date the order or judgment is electronically transmitted by the judge to the electronic-filing system." Rule 58(c), Ala. R. Civ. P. The case-action summary sheet contains a notation by the trial-court clerk, dated June 10, 2015, listing the entry of the final judgment; however, the judgment electronically rendered by the trial court on May 30, 2015, shows that it was transmitted to the electronic-filing system that same date.

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The husband was required to file his Rule 59 postjudgment motion within 30 days of when the judgment was entered on May 30, 2015. See Rule 59(b), Ala. R. Civ. P. Pursuant to Rules 59(b) and Rule 6, Ala. R. Civ. P., the time to file such a motion began to run on May 31, 2015, and ended on Monday, June 29, 2015. On July 2, 2015, which was 33 days after the entry of the judgment, the husband filed a motion that he specifically described as being filed pursuant to Rule 59, Ala. R. Civ. P. The husband never contended in the trial court that his July 2, 2015, motion should have been construed as being filed pursuant to Rule 60, Ala. R. Civ. P., and he does not make that contention in his brief to this court. In her brief to this court, the wife specifically argues that the husband's appeal should be dismissed because his July 2, 2015, motion was an untimely filed Rule 59 motion that did not toll the time for taking an appeal from the May 30, 2015, judgment. The husband did not file a reply brief and, thus, has not refuted that assertion.

Although, generally, appellate courts "look[] to the essence of a motion, rather than its title, to determine how that motion is to be considered under" the Alabama Rules of Civil Procedure, Ex parte Alfa Mut. Gen. Ins. Co., 684 So. 2d

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1281, 1282 (Ala. 1996), appellate courts should not construe a motion in a manner that helps a party's position or changes the outcome of a case when the party has not argued for that construction in either the trial court or the appellate court. "Rule 28(a)(10), Ala. R. App. P., requires an appellant to present arguments in its brief supported by adequate legal authority. Spradlin v. Spradlin, 601 So. 2d 76, 79 (Ala. 1992). It is not the duty of the appellate court to make arguments for the parties, nor is it the appellate court's duty to conduct the parties' legal research." Woods v. Federated Mut. Ins. Co., 31 So. 3d 701, 706 (Ala. Civ. App. 2009).

Because the husband failed to timely file his postjudgment motion, the 42-day window in which to file his notice of appeal was not tolled pursuant to Rule 4(a)(3), Ala. R. App. P. Marsh v. Marsh, 852 So. 2d 161, 163 (Ala. Civ. App. 2002) ("Although a timely postjudgment motion will toll the 42-day time period for filing a notice of appeal, an untimely filed postjudgment motion will not do so."). The husband was therefore required to file his notice of appeal by July 13,

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2015.¹ The husband did not file his notice of appeal until September 28, 2015. The "[t]imely filing of a notice of appeal is necessary to invoke the jurisdiction of the appellate court and cannot be waived." Asam v. City of Tuscaloosa, 585 So. 2d 60, 60 (Ala. Civ. App. 1991) (citing Rule 2(a)(1), Ala. R. App. P.). Therefore, this appeal is dismissed. Rule 2(a)(1), Ala. R. App. P. ("An appeal shall be dismissed if the notice of appeal was not timely filed to invoke the jurisdiction of the appellate court.").

APPEAL DISMISSED.

Pittman, J., concurs.

Thompson, P.J., concurs in the result, without writing.

Thomas, J., dissents, with writing, which Moore, J., joins.

¹The 42d day following the entry of the divorce judgment on May 30, 2015, was July 11, 2015, a Saturday. Therefore, pursuant to Rule 26(a), Ala. R. App. P., the husband had until Monday, July 13, 2015, to timely file his notice of appeal.

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THOMAS, Judge, dissenting.

I respectfully dissent. I cannot agree that the notice of appeal filed by Aaron Christopher Mitchell ("the husband") was untimely filed. Because, based on my reading of the motion, I would construe the husband's July 2, 2015, motion as a Rule 60(b), Ala. R. Civ. P., motion, I conclude that the husband's appeal was timely filed from the denial of that motion.

The husband's July 2, 2015, motion directed to the trial court's May 30, 2015, default judgment divorcing him from Shauna Lee Campbell ("the wife") was filed more than 30 days after the entry of the judgment.² Thus, the husband's motion could not have been a timely postjudgment motion under Rule

²The trial court acted within its discretionary authority to enter a default judgment against the husband based on his failure to answer the discovery propounded by the wife after the trial court entered an order compelling discovery. See Rule 37(b)(2)(C), Ala. R. Civ. P.; Johnson v. Johnson, 168 So. 3d 61, 63 (Ala. Civ. App. 2014) (noting that, when "a party fails to obey an order to provide or permit discovery," Rule 37(b)(2), "Rule 37(b)(2)(C) ... authorizes a sanctioning court to enter '[a]n order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party'").

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55(c), Ala. R. Civ. P., which requires that a motion seeking to have a default judgment set aside be filed within 30 days of the entry of the default judgment. Thus, although it erroneously construes the husband's motion as one pursuant to Rule 59, Ala. R. Civ. P., rather than Rule 55(c), the majority reasons that the husband's motion was not timely filed and did not toll the time for taking an appeal from the May 30, 2015, default divorce judgment.³

It is well settled that an appellate court "looks to the essence of a motion, rather than its title, to determine how that motion is to be considered under" the Alabama Rules of

³Although, as I will explain, infra, I construe the husband's motion as a Rule 60(b) motion, I note that the majority opinion improperly construes the husband's motion as a Rule 59, Ala. R. Civ. P., motion. The proper vehicle for requesting that a default judgment be set aside is Rule 55(c) motion, and the husband titled his motion as both a "motion to set aside" and as a "motion to alter, amend or vacate" the default judgment. See B.E.H. v. State ex rel. M.E.C., 71 So. 3d 689, 692 n.1 (Ala. Civ. App. 2011) ("Although the father titled his motion as one seeking 'reconsideration' of the judgment pursuant to Rule 59, Ala. R. Civ. P., the substance of the motion indicates that the father was seeking to set aside the default judgment pursuant to Rule 55(c), Ala. R. Civ. P."); see also Austin v. Austin, 159 So. 3d 753, 756 n.2 (Ala. Civ. App. 2013), and R.J.G. v. S.S.W., 42 So. 3d 747, 753 (Ala. Civ. App. 2009). As the main opinion correctly notes, a Rule 59 motion also must be filed within 30 days of the judgment to which it is directed. See ___ So. 3d at ___; Rule 59(b).

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Civil Procedure. Ex parte Alfa Mut. Gen. Ins. Co., 684 So. 2d 1281, 1282 (Ala. 1996); see also Union Springs Tel. Co. v. Green, 285 Ala. 114, 117, 229 So. 2d 503, 505 (1969) (explaining that "the character of a pleading is determined and interpreted from its essential substance, and not from its descriptive name or title"). Our supreme court has construed a motion indicating that it was an amendment to a Rule 55(c) motion seeking to set aside a default judgment as a Rule 60(b) (1) motion based on the language contained in the motion alleging "'mistake, inadvertence, surprise, or excusable neglect.'" Ex parte Lang, 500 So. 2d 3, 4 (Ala. 1986). The court explained:

"It is clear that under our Rules of Civil Procedure the nomenclature of a motion is not controlling. Ex parte Hartford Ins. Co., 394 So. 2d 933 (Ala. 1981). Notwithstanding the designation in its title, the document filed on October 7, 1985, was clearly a Rule 60(b) motion ... seeking relief under grounds (1) and (6)"

Ex parte Lang, 500 So. 2d at 4.

The allegations in the husband's motion are, to my mind, allegations invoking Rule 60(b) (1). Rule 60(b) provides: "On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final

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judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect." The husband alleges in his motion that he had been unaware that his former counsel withdrew from representation, that he had believed that he was being competently represented by that counsel during the course of the proceedings, and that he had not been made aware of certain orders of the trial court. He then requests that the trial court set aside the default judgment based, at least in part, on his excusable neglect. Thus, the husband's motion seeks relief under Rule 60(b)(1).⁴

⁴I note that "[a] party seeking to set aside a default judgment under Rule 60(b)(1) not only must prove excusable neglect, but also must satisfy the trial court that the factors enunciated in Kirtland v. Fort Morgan Authority Sewer Service, Inc., 524 So. 2d 600 (Ala. 1988), weigh in favor of setting aside the judgment. See generally DaLee v. Crosby Lumber Co., 561 So. 2d 1086 (Ala. 1990)." Marks v. Marks, 181 So. 3d 361, 364 (Ala. Civ. App. 2015). In fact, we have held that, "in order to trigger the mandatory requirement that the trial court consider the Kirtland factors, the party filing a motion to set aside a default judgment must allege and provide arguments and evidence regarding all three of the Kirtland factors." Brantley v. Glover, 84 So. 3d 77, 81 (Ala. Civ. App. 2011). Although the husband's Rule 60(b)(1) motion at least asserts generally that he might have a meritorious defense, it does not mention the second or the third of the Kirtland factors, which are "whether the plaintiff will be unfairly prejudiced if the default judgment is set aside" and "whether the default judgment was a result of the defendant's own culpable conduct." Kirtland, 524 So. 2d at 605. However, the husband's failure to properly argue the Kirtland factors

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Because I conclude that the husband's motion was a Rule 60(b)(1) motion, I further conclude that the motion was not untimely filed. A Rule 60(b)(1) motion is required to be filed within four months of the entry of judgment from which the party seeks relief. See Rule 60(b). The denial of a Rule 60(b)(1) motion is a judgment from which an appeal lies. See Williams v. Williams, 910 So. 2d 1284, 1286 (Ala. Civ. App. 2005). The husband's notice of appeal, which was filed on September 28, 2015, was filed within 42 days of the trial court's order denying his Rule 60(b)(1) motion, and, therefore, this court does not lack jurisdiction over the husband's appeal.

That being determined, I will now turn to the merits of the husband's appeal. "[T]he only matter reviewable in ... an appeal [from the denial of a Rule 60(b) motion] is the propriety of the denial." Williams, 910 So. 2d at 1286. On appeal, the husband argues first that the trial court lacked subject-matter jurisdiction over the wife's divorce complaint because the wife had not been a resident of the state for at

in his motion does not impact my conclusion that the motion is a Rule 60(b)(1) motion.

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least six months before she filed her divorce complaint. See Ala. Code 1975, § 30-2-5 ("When the defendant is a nonresident, the other party to the marriage must have been a bona fide resident of this state for six months next before the filing of the complaint, which must be alleged in the complaint and proved."). The husband then argues that the default divorce judgment improperly awarded the wife certain retirement moneys and that the trial court's award to the wife of certain property, alimony, and an attorney fee was an abuse of the trial court's discretion.

The husband's latter two arguments attack the propriety of the underlying default divorce judgment. However, "[a] Rule 60(b)(1) motion does not serve as a substitute for appeal, and therefore does not present for review the underlying judgment" Metropolitan Life Ins. Co. v. Akins, 388 So. 2d 999, 1000-01 (Ala. Civ. App. 1980); see also Hilbish v. Hilbish, 415 So. 2d 1114, 1115-16 (Ala. Civ. App. 1982) ("Initially, we note that the only matter reviewable on this appeal is the order overruling the defendant's motions and not the 1975 final judgment itself."). This court cannot consider the propriety of any aspect of the default divorce

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judgment; thus, those arguments cannot form the basis of a reversal of the order denying the husband's Rule 60(b)(1) motion.

The husband's other argument on appeal involves the subject-matter jurisdiction of the trial court. Although the husband's failure to make that argument to the trial court is typically not fatal to an appellate court's consideration of subject-matter jurisdiction on appeal, see Carter v. Hilliard, 838 So. 2d 1062, 1063 (Ala. Civ. App. 2002), this appeal is concerned only with the correctness of the order denying the husband's Rule 60(b)(1) motion, which did not assert the subject-matter-jurisdiction argument to the trial court, and the subject-matter-jurisdiction argument is therefore not within the scope of appellate review of that order. The argument on appeal is not that the trial court lacked jurisdiction over the Rule 60(b) motion but, instead, that the trial court lacked jurisdiction over the underlying divorce action. An appellate cannot entertain arguments directed to the underlying judgment, so, again, this court cannot reverse the order denying the Rule 60(b)(1) motion based on the husband's argument.

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In conclusion, in my opinion, the husband's July 2, 2015, motion was a Rule 60(b)(1) motion seeking relief from the May 30, 2015, default divorce judgment. Because I consider the husband's motion to be a Rule 60(b)(1) motion, I conclude that it was not untimely filed. Because I conclude that the husband's appeal from the August 31, 2015, denial of his Rule 60(b)(1) motion was timely, I further conclude that this court has jurisdiction to entertain the husband's appeal. However, because appellate review of an appeal from an order denying a Rule 60(b)(1) motion is limited to the propriety of the order denying that motion, this court cannot consider the arguments asserted by the husband on appeal, which attack the underlying default divorce judgment. I would, therefore, affirm the August 31, 2015, order denying the husband's motion.

Moore, J., concurs.