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# ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2016

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**Kevin Venturi**

v.

**Miranda Venturi**

**Appeal from Lauderdale Circuit Court  
(DR-15-86)**

THOMAS, Judge.

In March 2015, Miranda Venturi ("the mother") filed a protection-from-abuse ("PFA") petition in the Lauderdale Circuit Court ("the trial court"). On May 13, 2015, the trial court entered a judgment in the PFA action. On June 11, 2015,

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Kevin Venturi ("the father") filed a postjudgment motion directed to the May 13, 2015, judgment. On July 28, 2015, the trial court entered the following order: "The Motion to Alter, Amend or Vacate filed by the [father] is granted in part. The issue of supervised visitation between the father ... and the minor child is set for a hearing on the 24th day of August, 2015, at 8:30 a.m." The trial court continued the hearing three times; the hearing was ultimately held on December 7, 2015. The trial court's December 7, 2015, order purporting to deny the relief requested in the father's postjudgment motion, entered after that hearing, indicates that the hearing was not an evidentiary hearing and states plainly that the trial court was considering the father's postjudgment motion.<sup>1</sup> The father filed his notice of appeal on December 21, 2015.

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<sup>1</sup>The December 7, 2015, order states, in pertinent part:

"This cause comes before the Court on a Motion to Alter, Amend or Vacate filed by the [father] and the Court having granted the motion in part and having set the visitation of the minor child for a hearing and the Court having listened to the arguments of the attorneys and having considered the same ...."

In addition, the transcript of the December 7, 2015, hearing indicates that no witnesses testified and that the trial court heard only arguments of counsel.

"Although neither party has questioned this court's appellate jurisdiction, a lack of appellate jurisdiction resulting from a party's failure to timely file a notice of appeal 'cannot be waived'; indeed, 'this court can raise the issue ex mero motu.' Carter v. Hilliard, 838 So. 2d 1062, 1063 (Ala. Civ. App. 2002), and Moragne v. Moragne, 888 So. 2d 1280, 1283 (Ala. Civ. App. 2004); see also Rule 2(a)(1), Ala. R. App. P. (stating that an appeal shall be dismissed if the notice of appeal is not timely filed to invoke the jurisdiction of the appellate court)."

Smith v. Smith, 4 So. 3d 1178, 1180-81 (Ala. Civ. App. 2008).

We have held that an order that does nothing more than indicate that a trial court intends to hold a hearing on an issue raised in a postjudgment motion is not sufficient under Rule 59.1, Ala. R. Civ. P., to amount to a ruling on the motion and does not toll the running of the 90-day period to rule on the motion. Smith, 4 So. 3d at 1181. The order entered on the postjudgment motion at issue in Smith read as follows: "'Motion for new trial filed by [the father] is hereby granted in part. Set for a hearing.'" Smith, 4 So. 3d at 1180. We explained in Smith that, in order to toll the 90-day period for ruling on a postjudgment motion provided in Rule 59.1, a trial court's order must either grant or deny that motion. Id. at 1181.

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"As stated in Ex parte Johnson Land Co., "the ruling that Rule 59.1 requires to be entered within ninety days is one which (1) denies the motion, or (2) grants the motion." 561 So. 2d [506,] 508 [(Ala. 1990)] (quoting French v. Steel, Inc., 445 So. 2d 561, 563 (Ala. 1984)). Thus, the trial court's order ostensibly 'granting' the father's postjudgment motion 'in part' but actually only setting the postjudgment motion for a hearing was not a ruling on the merits."

Id.; see also Eight Mile Auto Sales, Inc. v. Fair, 25 So. 3d 459, 462 (Ala. Civ. App. 2009) (determining that a district court's order granting a postjudgment motion "in part" was ineffective to toll the running of the 14-day period for the district court to rule on the postjudgment motion, see Rule 59.1(dc), Ala. R. Civ. P., (providing that the time for a district court to rule on a postjudgment motion is shortened to 14 days), because the district court's order "did not grant any substantive relief or rule on the merits of the motion" and instead only set the matter for a hearing).

Because the July 28, 2015, order "granting" the father's postjudgment motion "in part," like the order at issue in Smith, did no more than set the supervised-visitation issue raised in the father's postjudgment motion for a later hearing, we conclude that the trial court's July 28, 2015, order was not effective to toll the running of the 90-day

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period in Rule 59.1. Thus, the father's postjudgment motion was denied by operation of law on September 9, 2015, see Rule 59.1, the trial court lost jurisdiction over the action at that time, and its December 7, 2015, order is a nullity. See Robinson v. Robinson, 840 So. 2d 180, 183 (Ala. Civ. App. 2002).

The father's appeal was filed more than 42 days after the denial of the father's postjudgment motion as a matter of law. His appeal is therefore an untimely appeal from the May 13, 2015, judgment. An untimely appeal does not properly invoke this court's appellate jurisdiction. Smith, 4 So. 3d at 1181. Accordingly, we dismiss the father's appeal.

APPEAL DISMISSED.

Thompson, P.J., and Pittman and Moore, JJ., concur.

Donaldson, J., concurs specially.

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DONALDSON, Judge, concurring specially.

A final judgment was entered May 13, 2015, in favor of Miranda Venturi ("the mother") and against Kevin Venturi ("the father"). On June 11, 2015, the father filed a timely postjudgment motion titled "Motion to Alter, Amend, or Vacate," pursuant to Rule 59, Ala. R. Civ. P. The motion challenged the sufficiency of the evidence to support the judgment and evidentiary rulings made by the trial court during the trial. The motion sought the following relief: "[The father] prays that this Honorable Court will alter, amend, or vacate this Honorable Court's order of May 13, 2015. Should this Honorable Court elect to vacate this Honorable Court's order of May 13, 2015, [the father] respectfully requests that a new trial be scheduled as soon as possible."

On June 12, 2015, the father submitted two affidavits in support of his postjudgment motion. On June 19, 2015, the trial court set the father's postjudgment motion for a hearing to be held on July 20, 2015.

On July 28, 2015, the trial court entered the following order: "The Motion to Alter, Amend or Vacate filed by the [father] is GRANTED in part. The issue of supervised

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visitation between the father ... and the minor child is set for a hearing on the 24th day of August, 2015, at 8:30 a.m." (Capitalization in original.)

On August 18, 2015, the mother filed a motion to stay further proceedings in the trial court based on the pendency of another case involving the parties that was scheduled for trial on September 17, 2015. The father filed a response in opposition to the motion to stay. In that response, the father stated: "The upcoming hearing, set for this case on August 24, 2015, at 8:30 a.m. before this Honorable Court, has been set to address a post-trial motion filed by the [father]."

The motion to stay was granted. The hearing contemplated in the July 28, 2015, order was not held until December 7, 2015. No testimony was taken at the hearing. On December 7, 2015, the trial court entered an order that provides, in pertinent part:

"This cause comes before the Court on a Motion to Alter, Amend or Vacate filed by the [father], and the Court having granted the motion in part and having set the visitation of the minor child for a hearing and the Court having listened to the arguments of the attorneys and having considered the same hereby ORDERS, ADJUDGES and DECREES as follows:

1. After careful consideration of all the previous testimony, the Court orders that the

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[judgment] entered on May 13th, 2015, remains in full force and effect. ..."

(Capitalization in original.)

The father filed a notice of appeal on December 21, 2015. The notice of appeal lists May 13, 2015, as the date of the judgment and December 7, 2015, as the date of the order entered on the postjudgment motion.

The May 13, 2015, judgment was entered following a trial conducted without a jury. Rule 59(a), Ala. R. Civ. P., provides, in part:

"A new trial may be granted ... (2) on all or part of the issues in an action tried without a jury .... On a motion for a new trial in an action tried without a jury, the court may open the judgment ..., take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment."

The father's postjudgment motion sought to alter, amend, or vacate the judgment and a new trial. The July 28, 2015, order of the trial court "grant[ing] in part" the father's postjudgment motion could be construed as an order vacating a portion of the May 13, 2015, judgment and setting the issue addressed in that portion of the judgment for a new trial as provided in Rule 59(a). That is not, however, how the father



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construed the ruling, as is reflected in his August 21, 2015, response to the motion to stay and in his brief to this court, in which he states: "A final hearing on [the postjudgment motion] after several continuances, was conducted on the 7th day of December, 2015, with the [trial court] denying the requests for relief pertinent to this appeal." Likewise, the trial court's December 7, 2015, order does not appear to construe the July 28, 2015, order as granting the father any relief from the May 13, 2015, judgment. Therefore, I agree that the appeal is untimely because the July 28, 2015, order did not effectively rule on the postjudgment motion so as to affect the father's time to appeal. Smith v. Smith, 4 So. 3d 1178, 1180-81 (Ala. Civ. App. 2008).

Moreover, I write to observe that there could be confusion associated with the entry of an electronic order that contains the term "granted" and that is generated within the trial court's electronic-filing system when the electronic order pertains to a postjudgment motion, especially considering that a typical postjudgment motion seeks multiple forms of relief, including that the judgment be altered, amended, or vacated, and/or that a new trial be granted. To

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avoid confusion, a ruling by the trial court purporting to grant any requested relief in a timely filed postjudgment motion should, within the time provided by Rule 59.1, Ala. R. Civ. P., specifically alter or amend something in the judgment, specifically vacate all or a portion of the judgment, or specifically state that a new trial is ordered.