Revisions to the Advisory Committee Notes to Rules 56, 58, 59 and 60

By unanimous vote of the Supreme Court Advisory Committee on Rules on November 1, 2019, the Committee approved amendments to the Advisory Committee Notes to Rules 56, 58, 59 and 60. The revisions to the Advisory Committee Notes to Rule 56 are independent from any proposed revisions to Rule 56. The revisions are set forth below.

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counter-claim, or cross-claim, or to obtain a declaratory judgment may, at any time after the expiration of thirty days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counter-claim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least ten days before the time fixed for the hearing. The adverse party prior to the day of the hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone, although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered on the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matter stated therein. Sworn or certified copies of all papers or parts thereof

referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(h) Costs to Prevailing Party When Summary Judgment Denied. If summary judgment is denied the court shall award to the prevailing party the reasonable expenses incurred in attending the hearing of the motion and may, if it finds that the motion is without reasonable cause, award attorneys' fees.

Advisory Committee Notes

It is important to distinguish between a Rule 56 motion for summary judgment, a Rule 12(b)(6) motion to dismiss for failure to state a claim, and a Rule 12(c) motion for judgment on the pleadings. When ruling on a Rule 56 motion for summary judgment, the trial court may "pierce the pleadings" and consider extrinsic evidence, such as affidavits, depositions, answers to interrogatories, and admissions. When ruling on a Rule 12(b)(6) motion to dismiss for failure to state a claim, the trial court may not "pierce the pleadings" and shall only consider the allegations contained in the pleading asserting the claim. Similarly, when ruling on a Rule 12(c) motion on the pleadings, the trial court shall only consider the allegations within the pleadings. If matters outside the pleadings are presented to and considered by the trial court in connection with a motion for judgment on the pleadings or a motion to dismiss for failure to state a claim, the trial court must treat the motion as one for summary judgment and give all parties a reasonable opportunity to ~~respond accordingly~~ present pertinent material. See M.R.C.P. 12(b) and (c).~~; Huff-Cook, Inc. v. Dale, 913 So. 2d 988, 992 (Miss. 2005). If the trial court converts a Rule 12 motion into a Rule 56 motion, the trial court must give the parties notice of the motion's changed~~

~~*status and at least ten days' notice of its intent to conduct a summary judgment hearing on a date certain. See Dale, 913 So. 2d at 988. A trial court's failure to give proper notice constitutes reversible error. See Palmer v. Biloxi Reg'l Med. Ctr., Inc., 649 So. 2d 179, 183 (Miss. 1994).*~~

A trial court need not make findings of fact when ruling on a motion for summary judgment because "a Rule 56 summary judgment hearing is not an action 'tried upon the facts without a jury' so as to trigger Rule 52 applicability." See Harmon v. Regions Bank, 961 So. 2d 693, 700 (Miss. 2007). See also Uniform Rules of Circuit and County Court Practice. ~~*Movant must do more than simply state a meritorious defense.*~~

~~*Pursuant to Rule 78, oral hearing on a motion for summary judgment is not necessary where such hearing is dispensed with by court order or rule.*~~

Although the Court has held that an affidavit is not always required to obtain relief under Rule 56(f), a party must "present specific facts why he cannot oppose the motion" and must specifically demonstrate "how postponement of a ruling on the motion will enable him, by discovery or other means, to rebut the movant's showing." Howarth v. M & H Ventures, LLC, 237 So. 3d 107, 113 (Miss. 2007).

[Advisory Committee Note adopted effective July 1, 2014; amended effective _____.]

Rule 58. Entry of Judgment

Every judgment shall be set forth on a separate document which bears the title of "Judgment." However, a judgment which fully adjudicates the claim as to all parties and which has been entered as provided in M.R.C.P. 79(a) shall, in the absence of prejudice to a party, have the force and finality of a judgment even if it is not properly titled. A judgment shall be effective only when entered as provided in M.R.C.P. 79(a).

[Amended effective July 1, 2001; amended effective May 27, 2004 to address finality of improperly titled judgment.]

Advisory Committee Historical Note

Effective July 1, 1994, a new Rule 58 was adopted. 632-635 So.2d XXXII-XXXIII (West Miss. Cases 1994).

Advisory Committee Notes

The "entry" of the judgment is the ministerial notation of the judgment by the clerk of the court pursuant to Rules ~~*38*~~ *58 and 79(a); however, it is crucial to the effectiveness of the judgment and for measuring time periods for appeal and the filing of various motions.*

The date of entry of judgment is significant because certain post-trial motions must be filed within 10 days after entry of judgment. They include: (i) a motion for j.n.o.v. pursuant to M.R.C.P.

50(b); (ii) a motion to amend findings or make additional findings of fact pursuant to M.R.C.P. 52(b); (iii) a motion for new trial pursuant to M.R.C.P. 59; and (iv) a motion to alter or amend the judgment pursuant to M.R.C.P. 59(e). The trial court may not extend the 10-day period in which to file these post-trial motions. M.R.C.P. 6 (b). The time in which certain Rule 60(b) motions must be made also begins after entry of judgment.

In addition, M.R.A.P. 4(a) provides that a notice of appeal from a final judgment in chancery court or circuit court (one that resolves all claims among all parties) shall be filed within 30 days after entry of judgment. If a party files: (i) a motion for j.n.o.v. pursuant to M.R.C.P. 50(b); (ii) a motion to amend findings or make additional findings of fact pursuant to M.R.C.P. 52(b); (iii) a motion for new trial pursuant to M.R.C.P. 59; ~~and~~ (iv) a motion to alter or amend the judgment pursuant to M.R.C.P. 59(e); or (v) a motion for relief pursuant to M.R.C.P. 60 within 10 days after entry of judgment, the time for appeal runs from the entry of the order disposing of the last such outstanding motion rather than the entry of judgment. See M.R.A.P. 4(d).

[Advisory Committee Note adopted effective July 1, 2014, amended effective _____.]

Rule 59. New Trials; Amendments of Judgment

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of Mississippi; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of Mississippi.

On a motion for a new trial in an action without a jury, the court may open the judgment if one has been entered, 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.

(b) Time for Motion. A motion for a new trial shall be filed not later than ten days after the entry of judgment.

(c) Time for Serving Affidavits. When a motion for new trial is based upon affidavits they shall be filed with the motion. The opposing party has ten days after service to file opposing affidavits, which period may be extended for up to twenty days either by the court for good cause shown or by the parties' written stipulation. The court may permit reply affidavits.

(d) On Initiative of Court. Not later than ten days after entry of judgment the court may on its own initiative order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a timely motion for a new trial for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be filed not later than ten days after entry of the judgment.

[Amended effective July 1, 1997.]

Advisory Committee Historical Note

Effective July 1, 1997, Rule 59(b), (c) and (e) were amended to clarify that motions for a new trial and accompanying affidavits, and motions to alter or amend a judgment, must be filed not later than ten days after entry of judgment. 689 So. 2d XLIX (West Miss. Cases).

Advisory Committee Notes

In jury trials, the trial court may grant a new trial based upon a prejudicial error by the court in the admission or exclusion of evidence, an error in the jury instructions, prejudicial comments by the judge or attorneys, a finding that the verdict is against the great weight of the evidence, a finding that the jury's verdict is the result of passion, prejudice or bias, or any grounds upon which new trials were granted in actions at law prior to the adoption of these rules. A trial court's ruling on a motion for new trial is reviewed for abuse of discretion.

Although "[i]t is clearly better practice to include all potential assignments of error in a motion for new trial,...when the assignment of error is based on an issue which has been decided by the trial court and duly recorded in the court reporter's transcript, such as the omission or exclusion of evidence, [the appellate court] may consider it regardless of whether it was raised in the motion for new trial." See Kiddy v. Lipscomb*, 628 So. 2d 1355, 1359 (Miss. 1993).*

The rule does not authorize a motion for reconsideration after entry of judgment. If a motion is mislabeled as a motion for reconsideration and was filed within ten days after the entry of judgment, the trial court should treat such motion as a post-trial motion to alter or amend the judgment pursuant to M.R.C.P. 59(e). Boyles v. Schlumberger Tech. Corp.*, 792 So. 2d 262, 265 (Miss. 2001). A party moving to alter or amend the judgment "must show: (i) an intervening change in controlling law, (ii) availability of new evidence not previously available, or (iii) need to correct a clear error of law to prevent manifest injustice."* See Brooks v. Robertson*, 882 So. 2d 229, 233 (Miss. 2004). A motion to alter or amend the judgment is within the trial court's discretion. When a motion is mislabeled as a motion for reconsideration, does not state that it was brought pursuant to Rule 59, and was filed more than ten days after the entry of the final judgment in the case, the trial court should treat such motion as one for relief from a judgment pursuant to Rule 60(b).* See Carlisle v. Allen*, 40 So. 3d 1252, 1260 (Miss. 2010).*

A motion for new trial or a motion to alter or amend the judgment made pursuant to M.R.C.P. 59 must be filed within 10 days after entry of the judgment. The trial court has no authority or discretion to extend the 10-day time period. M.R.C.P. 6(b). A timely Rule 59 motion for a new trial or to alter or amend the judgment tolls the time in which to file a notice of appeal; the thirty-day time period in which to file a notice of appeal runs from the entry of the order disposing of the post-trial motion. M.R.A.P. 4(c). If not filed within ten days after entry of the judgment, a Rule 59 motion for a new trial, to alter or amend the judgment, or for reconsideration does not toll the time period in which to file a notice of appeal. M.R.A.P. 4(d); but see Wilburn v. Wilburn*, 991 So. 2d 1185, 1190-191 (Miss. 2008) (Court refused to address the timeliness of appellant's notice of appeal even though appellant filed a motion to reconsider more than ten days*

after entry of judgment and did not file a notice of appeal within thirty days after the entry of judgment, noting that the appellee did not object to the untimely motion to reconsider.)

In a case tried without a jury, a party may move the court to amend its findings of fact or make additional findings of fact pursuant to M.R.C.P. 52(b). The motion must be filed within ten days after entry of judgment. Upon a timely motion, the court may amend its findings or make additional findings and amend its judgment accordingly.

A motion for relief from a final judgment pursuant to M.R.C.P. 60(b) is different from a motion to alter or amend the judgment pursuant to M.R.C.P. 59(e) in that a change in the law after entry of final judgment is not an "extraordinary or compelling circumstance" warranting relief pursuant to M.R.C.P. 60(b). See Regan v. S. Cent. Reg'l Med. Ctr.*, 47 So. 3d 651, 655 (Miss. 2010). Relief pursuant to Rule 60(b)(6) is reserved for cases involving "exceptional and compelling circumstances" in light of the desire to achieve finality in* litigation. See id.

[Advisory Committee Note adopted effective July 1, 2014, amended effective _____.]

Rule 60. Relief from Judgment or Order

(a) Clerical Mistakes. Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time on its own initiative or on the motion of any party and after such notice, if any, as the court orders up until the time the record is transmitted by the clerk of the trial court to the appellate court and the action remains pending therein. Thereafter, such mistakes may be so corrected only with leave of the appellate court.

(b) Mistakes; Inadvertence; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) fraud, misrepresentation, or other misconduct of an adverse party;

(2) accident or mistake;

(3) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);

(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 reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application;

(6) any other reason justifying relief from the judgment.

The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than six months after the judgment, order, or proceeding was entered or taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. Leave to make the motion need not be obtained from the appellate court unless the record has been transmitted to the appellate court and the action remains pending therein. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action and not otherwise.

(c) Reconsideration of transfer order. An order transferring a case to another court will become effective ten (10) days following the date of entry of the order. Any motion for reconsideration of the transfer order must be filed prior to the expiration of the 10-day period, for which no extensions may be granted. If a motion for reconsideration is filed, all proceedings will be stayed until such time as the motion is ruled upon; however, if the transferor court fails to rule on the motion for reconsideration within thirty (30) days of the date of filing, the motion shall be deemed denied.

[Amended effective July 1, 2008, to provide for reconsideration of transfer orders entered on or after that date.]

Advisory Committee Notes

The trial court may grant relief from a judgment or order to correct clerical errors pursuant to Rule 60(a), or for other reasons enumerated in Rule 60(b). The trial court may correct clerical errors at any time, but if the case is on appeal and the trial court clerk has transmitted the record to the appellate court, the trial court must obtain leave from the appellate court before correcting any clerical mistakes. Motions for relief from a judgment or order based upon one of the reasons enumerated in Rule 60(b) must be made within a reasonable time, and in some cases, not more than six months after the judgment or order was entered.

Rule 60(a) only authorizes the trial court to correct clerical errors; it does not authorize any changes to the judgment that are substantive and change the effect or intent of the original judgment. See Whitney Nat'l Bank v. Smith, 613 So. 2d 312, 316 (Miss. 1993).

When ruling upon a Rule 60(b) motion, the trial court should balance the litigant's interest in a resolution on the merits of the motion with the desire to achieve finality in litigation. See Stringfellow v. Stringfellow, 451 So. 2d 219, 221 (Miss. 1984). Rule 60(b) motions that attempt to merely relitigate the case should be denied. Id.

A party moving for relief pursuant to Rule 60(b)(1) based upon fraud, misrepresentation or other misconduct of an adverse party must do so within six months after entry of the judgment and must prove the fraud, misrepresentation or other misconduct by clear and convincing evidence. See Stringfellow, 451 So. 2d at 221. Relief from a final judgment based upon fraud upon the court may be sought pursuant to Rule 60(b)(6). See In re Estate of Pearson, 25 So. 3d 392, 395

(Miss. Ct. App. 2009). "[R]elief based on 'fraud upon the court' is reserved for only the most egregious misconduct, and requires a showing of 'an unconscionable plan or scheme which is designed to improperly influence the court in its decision.'" Id. (citing Wilson v. Johns-Manville Sales Corp., 873 F.2d 869, 872 (5th Cir. 1989)).

A party moving for relief pursuant to Rule 60(b)(2) based upon accident or mistake must do so within six months after entry of the judgment. A Rule 60(b)(2) motion will only be granted upon a showing of exceptional circumstances. Generally, "neither ignorance nor carelessness on the part of an attorney will provide grounds for relief." See Stringfellow, 451 So. 2d at 221.

A party may move to set aside a default judgment pursuant to Rule 60(b)(2). When ruling on such a motion, the trial court may consider: (1) whether the default was caused by excusable neglect or a bona fide technical error; (2) whether the claimant will suffer prejudice if the default judgment is set aside; and (3) whether the defaulting party has a colorable defense to the merits. See State Highway Comm'n of Miss. v. Hyman, 592 So. 2d 952, 955 (Miss. 1991). ~~*Movant must show the specific facts of the meritorious defenses by affidavit or other sworn form of evidence. American Cable Corp. v. Trilogy Communications, Inc., 754 So. 2d 545 (Miss. 2000).*~~

A party moving for relief pursuant to Rule 60(b)(3) based upon newly discovered evidence must do so within six months after entry of the judgment. To justify relief, the evidence: (i) must have been in existence at the time of trial; (ii) could not have been discovered by due diligence prior to the expiration of the ten-day period in which a Rule 59 motion for new trial could have been filed; (iii) must be material and not cumulative; and (iv) must be of such character as to probably produce a different result in the event of a new trial or be of such character as to require a different ruling on summary judgment. See January v. Barnes, 621 So. 2d 915, 920 (Miss. 1992).

A party may move to set aside a void judgment pursuant to Rule 60(b)(4) more than six months after entry of the judgment if the delay in moving for relief was reasonable. See Ladner v. Logan, 857 So. 2d 764, 770 (Miss. 2003). A judgment is void if the trial court lacked jurisdiction over the subject matter or the parties or acted in a manner inconsistent with due process of law. See Bryant, Inc. v. Walters, 493 So. 2d 933, 938 (Miss. 1986).

A party may move to set aside the judgment pursuant to Rule 60(b)(5) if the judgment has been satisfied, released or discharged or a prior judgment upon which it is based has been reversed or otherwise vacated. Rule 60(b)(5), however, "does not authorize relief from a judgment on the ground that the law applied by the court in making its adjudication has been subsequently overruled or declared erroneous in another and unrelated proceeding." See Regan v. S. Cent. Reg'l Med. Ctr., 47 So. 3d 651, 655 (Miss. 2010).

A party may move to set aside the judgment pursuant to Rule 60(b)(6) if there are "extraordinary and compelling" circumstances justifying relief. When ruling on a Rule 60(b)(6) motion, the trial court may consider the following factors: "(1) [t]hat final judgments should not lightly be disturbed; (2) that the Rule 60(b) motion is not to be used as a substitute for appeal; (3) that the rule should be liberally construed in order to achieve substantial justice; (4) whether the motion was made within a reasonable time; (5) [omitted factor relevant only to default judgments]; (6) whether if the judgment was rendered after a trial on the merits-the movant had a fair

opportunity to present his claim or defense; (7) whether there are intervening equities that would make it inequitable to grant relief; and (8) any other factors relevant to the justice of the judgment under attack." See Carpenter v. Berry, 58 So. 3d 1158, 1162 (Miss. 2011).

The trial court has discretion to grant or deny a Rule 60(b) motion, unless the judgment is void, in which case the court is required to set aside the judgment. See Sartain v. White, 588 So. 2d 204, 211 (Miss. 1991).

Motions for relief under this rule are filed in the original action, rather than as an independent action.

Rule 60 motions for relief from a judgment filed no later than ten days after entry of judgment toll the time period in which an appeal may be taken. M.R.A.P. 4(d). Rule 60 motions filed more than ten days after entry of judgment do not toll the time period in which an appeal may be taken. A Rule 60(b) motion for relief from a judgment does not automatically stay execution upon the judgment. The trial court has discretion to stay execution upon the judgment while a Rule 60(b) motion is pending. M.R.C.P. 62(b).

Ordinarily, the filing of a notice of appeal transfers jurisdiction from the trial court to the appellate court. Rule 60, however, confers limited concurrent jurisdiction to the trial court to grant relief under Rule 60(a) and (b) even if a notice of appeal has been filed. If the record on appeal has been transmitted to the appellate court, then leave must be obtained from the appellate court to make corrections to a judgment or order pursuant to Rule 60(a) or to move for relief under Rule 60(b). McNeese v, McNeese, 129 So. 3d 125, 128 (Miss. 2013); Griffin v. Armana 679 So. 2d 1049, 1050 (Miss. 1996); Ward v. Foster, 517 So. 2d 513 (Miss. 1987).

[Advisory Committee Note adopted effective July 1, 2014; amended effective_____.]