REL: June 4, 2021

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2020-2021

1190660

Raymon Means, Jr.

v.

Donnie Glover, Matt Brown, Miguel Pizzuto, Bart Sanders, Kelley Grenon, and Mitchell Jones

Appeal from Pike Circuit Court
(CV-17-900069)

MITCHELL, Justice.

Raymon Means, Jr., an employee of Sanders Lead Company, Inc., was burned in a workplace accident when molten lead splashed out of a

kettle following an explosion. In an effort to recover outside Alabama's Workers' Compensation Act, Means sued, among others, several of his co-employees and an independent contractor, alleging that they had engaged in willful conduct that caused his injuries. The trial court entered summary judgment in favor of those defendants, leading to this appeal. We affirm the judgment.

Facts and Procedural History

Sanders Lead operates a facility in Troy that recycles used automotive batteries. As part of the recycling process, Sanders Lead extracts lead plates from batteries, melts those plates down, refines the molten metal to remove impurities, and pours the refined lead into ingot molds. The company then sells these lead ingots back to battery manufacturers.

A. Sanders Lead implements a new method to reclaim more lead from the recycled materials

During the recycling process, a powdery material consisting of lead, aluminum, and other metals is produced. This material, known as aluminum dross, is then subjected to further processing to reclaim as

much lead as possible. At the time of Means's accident, Sanders Lead was implementing a new method of processing aluminum dross by diluting the dross in a kettle of molten lead and then slowly adding sodium hydroxide to the mixture, causing a reaction in which the aluminum and other undesired metals would rise to the top. Those metals were then drawn off, allowing Sanders Lead to reclaim the lead that had been in the dross.

This new method of processing aluminum dross was introduced to Sanders Lead by Miguel Pizzuto, a chemical engineer and metallurgist who owns a lead-processing business in Mexico and who acts as a consultant to businesses in the industry.[1] About a week before Means's accident, Pizzuto discussed the new method in a meeting with Sanders Lead's vice president of operations, Bart Sanders, and the company's casting and alloy manager, Kelley Grenon. Sanders ultimately approved a trial of the method suggested by Pizzuto. By the time of Means's

[1]Pizzuto first began working with Sanders Lead in 2005. At the time of Means's accident, Sanders Lead had been paying him a flat monthly retainer for about five years.

accident, the company had successfully processed seven batches of aluminum dross using Pizzuto's method.

B. Means is injured while using the new method

When Means arrived for his afternoon shift on July 8, 2015, his supervisor, Mitchell Jones, instructed him to begin processing another batch of aluminum dross. Means began doing so, and, when it came time to add sodium hydroxide to the batch, he used a forklift with a squeeze attachment to pour sodium hydroxide from 55-gallon barrels into the kettle. It appears, however, that the sodium hydroxide was added to the kettle too quickly and that, as it reacted with the aluminum in the mixture, flammable hydrogen gas began to build up. That hydrogen gas exploded, splashing molten lead out of the kettle and onto Means where he sat in the forklift. Means was wearing some protective gear but suffered second-degree burns and had to be transported to a Birmingham hospital for treatment.

As required by federal law, Sanders Lead submitted an accident notice to the Occupational Safety and Health Administration ("OSHA"). That notice indicated that Means was injured while recovering lead from

aluminum dross through a process "developed with a metallurgist; Vice President of Operations, Bart Sanders; Kelley Grenon and staff from the Casting and Alloying Department." It further identified Grenon as "Casting and Alloying Department Supervisor" and Jones as "Casting and Alloying Shift Supervisor." OSHA later conducted an investigation of Means's accident, and, as part of that investigation, Grenon and Jones submitted statements in which they denied knowing that adding sodium hydroxide to a mixture containing aluminum could cause an accident like the one that injured Means. Grenon further stated that he had been told about the new method of processing aluminum dross by the company's "advisor," and that he had learned that they were going to try it and had been instructed on the method at a meeting not long before the accident. Grenon also said that the company's "metallurgical consultant" did not mention that adding too much sodium hydroxide too quickly to a mixture containing aluminum was dangerous. It is undisputed that the references to the company's "metallurgist," "advisor," and "metallurgical consultant" refer to Pizzuto. The OSHA investigation resulted in two citations being

given to Sanders Lead; the case was closed in November 2015 after Sanders Lead changed its procedures and paid a fine.[2]

C. Sanders Lead initiates a workers' compensation action to determine the benefits Means is entitled to receive

The following month, Sanders Lead initiated an action in the Pike Circuit Court to determine the workers' compensation benefits Means was entitled to recover under the Alabama Workers' Compensation Act ("the Act"), § 25-5-1 et seq., Ala. Code 1975. That same month, OSHA records indicate that Means requested a copy of the report on his accident. It is not clear exactly when Means received a copy of the OSHA report, but discovery requests that Means served upon Sanders Lead during the course of the workers' compensation action indicate that he was in possession of that report by August 2016. Those discovery requests sought information from Sanders Lead about the decision to implement the new method of processing aluminum dross, including information about who

[2]Sanders Lead now sends the aluminum dross created during its recycling process to another company for processing.

had participated in any meeting at which the method was discussed and what those participants knew about the hazards the method entailed.

Sanders Lead objected to those discovery requests, arguing that it had already conceded that Means's injury was compensable under the Act and that the only issues to be decided involved the extent of Means's impairment and the benefits he was therefore due. Citing the OSHA report, Means responded by noting that the requested discovery would help him determine if additional claims against co-employees should be added to the action under § 25-5-11, Ala. Code 1975, which provides an exception to the exclusive-remedy provisions of the Act when an employee's injuries are caused by a co-employee's "willful conduct."

In October 2016, the trial court ruled that Means was not entitled to the requested discovery, explaining that it was not relevant to the pending action, which had been initiated solely to determine the workers' compensation benefits to which Means was entitled. See Rule 26(b)(1)(i), Ala. R. Civ. P. (setting forth a party's general right to obtain discovery "relevant to the subject matter involved in the pending action").

D. Means initiates a separate action seeking to recover damages from his co-employees for alleged willful conduct

It is not clear from the record how or when the workers' compensation action initiated by Sanders Lead was resolved, but on June 2, 2017, Means initiated a separate action in the Pike Circuit Court against two Sanders Lead employees -- safety manager Donnie Glover and safety engineer Matt Brown -- and fictitiously named parties, alleging, among other things, that their conduct had been willful and had caused his accident and injuries. As later amended, Means specifically alleged (1) that Glover and Brown knew or should have known that pouring sodium hydroxide into a kettle of molten lead and aluminum had the potential to cause an explosion and serious injury or death, and that they therefore had a duty to stop Sanders Lead from implementing that process, and (2) that Glover and Brown had failed to install a safety windshield on the forklift he was operating at the time of his accident, which constituted willful conduct subjecting them to liability under § 25-5-11.

At the same time that he filed his complaint, Means served interrogatories on Glover and Brown requesting, among other things, that

they identify (1) any Sanders Lead employees who had known that adding sodium hydroxide to aluminum dross could create flammable hydrogen gas and (2) who had attended the meeting at which the new method of processing aluminum dross was discussed. In answering the interrogatories on November 29, 2017, Glover and Brown indicated that, to the best of their knowledge, no one at Sanders Lead had known that adding sodium hydroxide to aluminum dross could result in an explosion and that, if there had been any meeting discussing a new process that involved mixing sodium hydroxide with molten lead containing aluminum, they were not part of that meeting and were unaware of it.

Means's counsel deposed Glover on September 13, 2018. Means states that it was at this deposition that he learned for the first time that Pizzuto, Sanders, Grenon, and Jones were defendants who had previously been fictitiously named. Accordingly, on September 27, 2018, Means amended his complaint to substitute those individuals ("the substituted defendants") for previously identified fictitiously named defendants and to assert claims against them under § 25-5-11 based on (1) their roles in implementing the process that injured him and (2) their alleged failure to

install a safety windshield on the forklift he was operating at the time of his accident. Means also asserted a separate negligence and wantonness claim against the independent contractor Pizzuto.

E. The substituted defendants argue that Means's claims against them are barred by the statute of limitations

The substituted defendants moved the trial court to dismiss the claims asserted against them, arguing that all the claims were subject to a two-year statute of limitations that had expired on July 8, 2017 -- two years after Means's accident. They further argued that Means could not rely on Rules 9(h) and 15(c), Ala. R. Civ. P., to avoid that time bar because, they alleged, he had failed to exercise due diligence to identify them. See, e.g., Ex parte McCoy, [Ms. 1190403, Jan. 22, 2021] ___ So. 3d ___, ___ (Ala. 2021) (explaining that a plaintiff can invoke Rules 9(h) and 15(c) to avoid the bar of a statute of limitations only when due diligence has been exercised to identify the defendant who was fictitiously named). Because the substituted defendants supported their motion with affidavits and other evidence, the trial court notified the parties that it would treat the filing as a summary-judgment motion and made no ruling at that

time. Meanwhile, Means amended his complaint again to assert claims against the companies that had manufactured and sold the sodium hydroxide he was pouring into the kettle when he was injured (these companies are collectively referred to as "the chemical defendants").

F. Glover, Brown, and the substituted defendants move for summary judgment

In April 2019, Glover, Brown, and the substituted defendants (collectively referred to as "the Sanders Lead defendants") filed a summary-judgment motion, not only asserting the previously raised statute-of-limitations defense on behalf of the substituted defendants but also arguing that Means could not produce substantial evidence to support his claims. In addition, the Sanders Lead defendants argued, for the first time, that Pizzuto should be considered a "special employee" of Sanders Lead and that, therefore, § 25-5-11 barred any claim against him that did not allege willful conduct. See generally G.UB.MK Constructors v. Garner, 44 So. 3d 479, 485-87 (Ala. 2010) (explaining the special-employment doctrine that applies in cases governed by the Act).

G. The trial court enters summary judgment in favor of the Sanders Lead defendants

On November 19, 2019, the trial court entered summary judgment in favor of the Sanders Lead defendants, holding (1) that Means had not exercised due diligence to identify the substituted defendants, which meant he could not rely on Rules 9(h) and 15(c) to avoid the statute of limitations, and (2) that Means had not produced substantial evidence that his injuries were caused by the willful conduct of his co-employees and, thus, any claims against them were barred by the Act.[3] The trial court did not certify this summary judgment as final under Rule 54(b), Ala. R. Civ. P., and Means's case against the chemical defendants proceeded.

[3]Because the trial court concluded that Means's claims against Pizzuto were time-barred, it was unnecessary for it to analyze whether Pizzuto was a special employee of Sanders Lead who was also protected by § 25-5-11. The court nevertheless stated in passing that Pizzuto appeared to be an independent contractor who would not be protected by § 25-5-11.

H. The trial court disposes of Means's remaining claims

The chemical defendants later filed their own summary-judgment motion. On February 13, 2020, Means filed a motion conceding that he had no viable claims against the chemical defendants and asking the trial court to dismiss his claims against them. The next day, Means filed a "further response" to the Sanders Lead defendants' summary-judgment motion, in which he submitted additional exhibits and essentially restated the arguments he had made in opposition to their summary-judgment motion. On February 16, 2020, Means filed a "motion for reconsideration" asking the trial court to reconsider the summary judgment entered in favor of the Sanders Lead defendants. The trial court gave the Sanders Lead defendants 14 days to respond to Means's "motion to vacate or modify."

On February 24, 2020, the trial court dismissed Means's claims against the chemical defendants. Because no other claims remained outstanding, the November 2019 summary judgment previously entered in favor of the Sanders Lead defendants became final at that time.

The Sanders Lead defendants still filed a response to Means's motion to reconsider, and, on March 6, 2020, the trial court set the matter for a hearing on March 19, 2020. Following that hearing, on April 15, 2020, the trial court denied Means's motion. In its order, the trial court stated that it lacked jurisdiction to consider the issues raised by Means because he had not filed a timely postjudgment motion after the summary judgment in favor of the Sanders Lead defendants became final on February 24. Nevertheless, the trial court concluded that, to the extent it might have jurisdiction, Means's motion was due to be denied on the merits. On May 20, 2020, Means filed his appeal to this Court.

Standard of Review

Means appeals the summary judgment entered in favor of the Sanders Lead defendants. When a party "appeals from a summary judgment, our review is de novo." Nationwide Prop. & Cas. Ins. Co. v. DPF Architects, P.C., 792 So. 2d 369, 372 (Ala. 2000). We therefore apply the same standard the trial court used -- we must determine whether there is substantial evidence establishing the existence of a genuine issue of material fact that must be resolved by the fact-finder. Id. "Substantial

evidence" is "evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved." West v. Founders Life Assurance Co. of Florida, 547 So. 2d 870, 871 (Ala. 1989). We further note that, in reviewing a summary judgment, we view the evidence in the light most favorable to the nonmovant and entertain such reasonable inferences as the jury would have been free to draw. Jefferson Cnty. Comm'n v. ECO Pres. Servs., L.L.C., 788 So. 2d 121, 127 (Ala. 2000).

Analysis

Means has asserted a claim against each of the Sanders Lead defendants based on (1) the implementation of the new method of processing aluminum dross and (2) the absence of a safety windshield on the forklift he was using at the time of his accident. We therefore consider whether summary judgment was appropriately granted to each of the Sanders Lead defendants for both of those alleged acts.

A. Means's claims based on the adoption of a new method for processing aluminum dross

The trial court held that the Sanders Lead defendants were entitled to summary judgment on these claims based on (1) the statute of limitations or (2) Means's failure to produce substantial evidence demonstrating that his claims were permitted under § 25-5-11. Some of the defendants, the trial court held, were entitled to summary judgment on both grounds. The trial court in its order, and the parties in their briefs, address the statute-of-limitations issue first. We do the same here.

1. The substituted defendants

The trial court held that the claims Means asserted against the substituted defendants were barred by the statute of limitations because, it concluded, Means did not diligently try to identify the substituted defendants. Means disputes that conclusion and says that he acted with due diligence at all times and that, under Rules 9(h) and 15(c), his claims against the substituted defendants related back to the date of his initial complaint. We disagree with Means.

Rule 9(h) permits a plaintiff who "is ignorant of the name of an opposing party" to identify a defendant by a fictitious name and, provides that "when that party's true name is discovered, the process and all pleadings and proceedings in the action may be amended by substituting the true name." Rule 15(c)(4) further provides that an amendment substituting an individual or entity for a fictitiously named defendant under Rule 9(h) "relates back to the date of the original pleading" if relation back is consistent with "principles applicable to fictitious party practice." This Court summarized those principles in Ex parte Noland Hospital Montgomery, LLC, 127 So. 3d 1160, 1167 (Ala. 2012):

> "In order to avoid the bar of a statute of limitations when a plaintiff amends a complaint to identify a fictitiously named defendant on the original complaint, the plaintiff: (1) must have adequately described the fictitiously named defendant in the original complaint; (2) must have stated a cause of action against the fictitiously named defendant in the body of the original complaint; (3) must have been ignorant of the true identity of the fictitiously named defendant; and (4) must have used due diligence in attempting to discover the true identity of the fictitiously named defendant. Ex parte Tate & Lyle Sucralose[, Inc.], 81 So. 3d [1217,] 1220-21 [(Ala. 2011)]."

With respect to the fourth requirement, we have further explained that "[t]he test for determining whether a plaintiff has exercised due diligence

to obtain the identities of fictitiously named defendants is 'whether the plaintiff knew, or should have known, or was on notice, that the substituted defendants were in fact the parties described fictitiously.' Davis v. Mims, 510 So. 2d 227, 229 (Ala. 1987)." Ex parte American Sweeping, Inc., 272 So. 3d 640, 644 (Ala. 2018).

The trial court concluded that Means should have known that the substituted defendants were fictitiously named defendants when he initiated this action. Means disputes this, stating that he could not have known that the substituted defendants were the defendants he identified with fictitious names in his initial complaint at the time he filed it. He says that he diligently tried to uncover those fictitiously named parties' identities even before he initiated this action, as evidenced by the discovery requests he served in the workers' compensation action initiated by Sanders Lead that sought information about who had been involved in the decision to implement the new method of processing aluminum dross. But, according to Means, Sanders Lead resisted that discovery and the trial court ultimately did not allow it. Finally, he notes that he served discovery requests on Glover and Brown when he filed his initial

complaint in this case, which, he states, should have revealed the substituted defendants' identities; but Means says those responses were not received for almost six months and ultimately did not identify who had been in the meeting at which the new method was discussed.[4]

The flaw in Means's argument is that -- regardless of how unfruitful his attempts at discovery were -- he was already in possession of materials that should have put him on notice that the substituted defendants were the fictitiously named defendants. In fact, he had that information well before he filed his complaint in June 2017 and the limitations period

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[4]Means also argues that the substituted defendants waived their right to invoke the statute of limitations because they failed to assert it as an affirmative defense in their answer. The general proposition upon which Means bases that argument is correct. See, e.g., State ex rel. State of Ohio v. E.B.M., 718 So. 2d 669, 670 (Ala. 1998) ("The defense of the statute of limitations must be affirmatively pleaded, and if an answer does not include an affirmative defense, that defense is deemed to have been waived."). But an exception to this rule exists when an affirmative defense is raised in a motion filed before an answer is filed. See Wallace v. Alabama Ass'n of Classified Sch. Emps., 463 So. 2d 135, 137 (Ala. 1984) ("To be sure, if a defendant moves for summary judgment before he files an answer, the court may recognize an affirmative defense argued in support of the summary judgment motion because, in that instance, it has not been waived."). That is what happened here. Therefore, the substituted defendants' statute-of-limitations argument was properly before the trial court.

expired in July 2017. Specifically, the OSHA report that Means received no later than August 2016 contains the accident notice that Sanders Lead submitted to OSHA following his accident. That notice expressly states that the process Means was undertaking when he was injured "was developed with a metallurgist; Vice President of Operations, Bart Sanders; Kelley Grenon and staff from the Casting and Alloying Department." Means also acknowledged in his own deposition that Jones -- identified in the OSHA report as "Casting and Alloying Shift Supervisor" -- was the person who had told him to begin processing aluminum dross on the date of his accident and who had given him instructions about how to complete that process. Thus, Means was in possession of information that revealed the roles Sanders, Grenon, and Jones had in implementing the process that injured him before he filed suit and before the limitations period expired.

Pizzuto's situation is admittedly different because the OSHA report did not identify him by name. But the evidence indicates that Pizzuto was often at Sanders Lead's Troy facility, and the OSHA report clearly indicated that someone identified as the company's "advisor," "the

metallurgical consultant," and the "metallurgist" was involved in the development and adoption of the process Means was completing at the time of his injury. In spite of this evidence, there is nothing in the record indicating that Means sought to uncover the identity of this individual through either formal or informal means before the limitations period expired. This failure to investigate is fatal to Means's attempt to rely on Rules 9(h) and 15(c).

This Court's opinion in Ex parte Mobile Infirmary Ass'n, 74 So. 3d 424 (Ala. 2011), a wrongful-death case, is instructive. In that case, the plaintiff had records in his possession well before he filed suit informing him which hospital -- Mobile Infirmary Medical Center -- had treated the decedent, but he did not know the hospital's legal name. 74 So. 3d at 426. After using a fictitious name for the hospital in his complaint, the plaintiff sought discovery from other defendants about the treatment and care the decedent had received; but he did not seek information about the legal name of the hospital. Id. at 427. Only after the limitations period had expired did the plaintiff finally issue discovery specifically requesting the legal name of the hospital. Id. Once he received a response, the plaintiff,

over the hospital's objection, amended his complaint to substitute the hospital for a fictitiously named defendant. Id.

The hospital sought mandamus relief, arguing that the claim against it was barred by the statute of limitations. Id. This Court held that a reasonably diligent person possessing the records the plaintiff had "should have at least attempted to identify the corporation doing business as Mobile Infirmary Medical Center and include it as a defendant." Id. at 429. Therefore, this Court granted the petition and directed the trial court to dismiss the claim against the hospital because the plaintiff had "failed to use due diligence in determining the true identity of Mobile Infirmary as the fictitiously named defendant." Id. at 428.

Like the plaintiff in Mobile Infirmary, Means seeks to establish due diligence by emphasizing that he served discovery requests and did not receive timely responses to those requests. Id. at 429-30. This Court rejected that argument in Mobile Infirmary, explaining that, while "a lack of formal discovery will often indicate a lack of due diligence," the converse is not true -- the serving of discovery requests does not automatically establish due diligence. Id. at 429. Rather, it is the

substance of those requests that is important. Because the plaintiff in Mobile Infirmary failed to include "any inquiry" about the legal name of the defendant hospital in his initial discovery requests, those requests were ineffective to show that he had exercised due diligence to uncover the identity of the fictitiously named defendant. Id. at 430. Moreover, any delay in receiving those responses was ultimately inconsequential -- even if the discovery responses had been received "in a timely manner, [the plaintiff] would not have had any new information on which to amend his complaint to add [the substituted defendant hospital] ... in place of one of the fictitiously named defendants." Id.

Similarly, Means possessed records informing him of the involvement of an advisor/metallurgical consultant/metallurgist in implementing the process that injured him, but the record contains no evidence showing that he sought to discover the identity of that individual at any time before the limitations period expired. Because Means "possesse[d] sufficient facts to lead to the discovery of [Pizzuto's] identity at the time of the filing of the complaint, relation back under fictitious party practice is not permitted and the running of the limitations period

is not tolled." Clay v. Walden Joint Venture, 611 So. 2d 254, 256 (Ala. 1992).[5]

2. Glover and Brown

The trial court held that Glover and Brown were entitled to summary judgment on Means's claims against them because Means did not produce substantial evidence showing that they had engaged in willful conduct that caused his injuries. Section 25-5-11(b) provides that an injured employee shall have a cause of action against an "employee of the same employer" if his or her injury is the result of that co-employee's "willful conduct, as defined in subsection (c)." Relevant to these claims, § 25-5-11(c)(1) defines "willful conduct" as "[a] purpose or intent or design to injure another; and if a person, with knowledge of the danger or peril to another, consciously pursues a course of conduct with a design, intent, and purpose of inflicting injury, then he or she is guilty of 'willful conduct.' " This Court has further emphasized that an injured employee

[5]Means's failure to timely name Pizzuto as a defendant bars both the negligence and wantonness claims asserted against him and the claims asserted against him under § 25-5-11 if he was determined to be a special employee of Sanders Lead.

bears the burden of establishing more than negligence or wantonness by a co-employee; rather, the injured employee must show either

> 1) "the reason why the co-employee defendant would want to intentionally injure the plaintiff, or someone else," or
>
> 2) "that a reasonable man in the position of the defendant would have known that a particular result (i.e., injury or death) was substantially certain to follow from his actions."

Reed v. Brunson, 527 So. 2d 102, 120 (Ala. 1988).

Means argues that Glover and Brown knew that injury or death was substantially certain to occur when sodium hydroxide was introduced into a mixture containing aluminum and that his suit against them is therefore permitted by § 25-5-11(c)(1). The problem for Means is that he brought forward no evidence -- much less substantial evidence -- to back up this allegation.

In their interrogatory responses, both Glover and Brown denied having any knowledge that adding sodium hydroxide to aluminum dross could cause an explosion, and they indicated that they were unaware of any Sanders Lead employees who had such knowledge before Means's accident. Means emphasizes that Glover nevertheless later testified that

"[e]verybody involved" knew there was a material safety data sheet for sodium hydroxide.[6] This six-page document notes, among other things, that sodium hydroxide is incompatible with aluminum and that contact between them "generates explosive hydrogen." But this testimony that the employees were generally aware of the existence of a material safety data sheet for sodium hydroxide, even when viewed in the light most favorable to Means, is insufficient to support an inference that any of those employees -- much less Glover or Brown -- were substantially certain that serious injury would result if those materials were mixed.

And it is undisputed that neither Glover nor Brown had any knowledge that the new method suggested by Pizzuto was even being considered or implemented until after Means's accident. Neither of them were in the meeting at which the new method was discussed, and the evidence in the record indicates that their involvement in operations was

[6]A material safety data sheet ("MSDS") is a document providing information about the properties and potential hazards of a chemical substance. OSHA requires employers to have an MSDS in the workplace for all potentially hazardous chemicals that they use. See, generally, 29 C.F.R. § 1910.1200.

limited to providing general safety programs and ensuring compliance with OSHA regulations. In fact, when Brown was deposed, Means's attorney specifically asked him about Sanders Lead's use of sodium hydroxide, and Brown explained that "I wouldn't know. I don't work on the operations side." He later explained that he and Glover had no involvement in operations other than on the "compliance side," explaining that "[w]e look for machine guards and things like that to make sure that those are in place, to make sure employees aren't getting injured."

In sum, Means's brief fails to identify any evidence in the record that would support a finding that either Glover or Brown would have known that his injury was substantially certain to follow any course of conduct they consciously pursued, see § 25-5-11(c)(1), related to Sanders Lead's processing of aluminum dross. The summary judgment entered in their favor on these claims is therefore due to be affirmed.

B. Means's claims based on the absence of a safety windshield on the forklift he was operating at the time of his accident

Section 25-5-11(c)(2) alternately provides that "[t]he willful and intentional removal from a machine of a safety guard or safety device

provided by the manufacturer of the machine with knowledge that injury or death would likely or probably result from the removal" is also considered "willful conduct" for purposes of § 25-5-11. Citing this subsection, Means asserted claims against the Sanders Lead defendants[7] alleging that the failure to install a safety windshield on the forklift he was operating at the time of his accident constituted willful conduct subjecting them to liability. But the evidence is undisputed that the forklift Means was using when he was injured was manufactured and sold to Sanders Lead without a safety windshield.

While Sanders Lead sometimes added aftermarket safety windshields to forklifts after they were purchased, the forklift Means used at the time of his accident was not in that group. By its terms, § 25-5-

[7]In his opening brief to this Court, Means begins his argument by stating that, "[i]n this case, Sanders, Grenon, and Jones were responsible for the failure to repair or install a safety shield on [Means's] forklift." Means's brief at 55. Means does not specifically discuss the other Sanders Lead defendants in relation to his forklift-based claim; it is thus unclear if he is conceding the propriety of the summary judgment entered as to the other Sanders Lead defendants on his forklift-based claim. Nevertheless, because the analysis would be the same for all these defendants, we continue to refer to them collectively as the Sanders Lead defendants throughout our discussion of this issue.

11(c)(2) is implicated only when there has been a "removal from a machine of a safety guard or safety device provided by the manufacturer of the machine" (emphasis added) -- and there is no evidence that any such removal occurred here. See also Mallisham v. Kiker, 630 So. 2d 420, 423-24 (Ala. 1993) ("The legislature has retained a limited right of action against a co-employee under § 25-5-11(c)(2) for the removal of a manufacturer's safety device from a machine, not the removal or omission of any safety device from any workplace environment." (emphasis and footnote omitted)).[8]

[8]Means argues that, because Sanders Lead had conducted extensive maintenance and repairs on the forklift in the five-year period before his accident, it should be considered to have "re-manufactured" the forklift and to have replaced the original manufacturer for the purpose of applying § 25-5-11(c)(2). See, e.g., Harris v. Gill, 585 So. 2d 831, 836 (Ala. 1991) (holding that "the term 'manufacturer' may include not only the original manufacturer (one who produces articles for use or trade), but also a subsequent entity that substantially modifies or materially alters the product through the use of different components and/or methods of assembly"). Even if we accepted this argument, Means still would not prevail. Regardless of who is considered to be the manufacturer of the forklift in question, there is no evidence that this forklift ever had a safety windshield that was removed, as § 25-5-11(c)(2) requires.

Section 25-5-11(c)(2) does not provide an injured employee with a cause of action against a co-employee simply because that co-employee did not install a safety device that was available. Rather, § 25-5-11(c)(2) requires the co-employee to have willfully and intentionally removed a manufacturer-provided safety device before liability can be found. Means did not produce any evidence that a Sanders Lead defendant removed or caused to have removed a safety windshield on the forklift he was operating at the time of his accident. Therefore, the summary judgment entered in their favor must be affirmed.

Conclusion

While the Act generally bars an employee injured in a workplace accident from recovering damages from a co-employee who allegedly caused the accident, § 25-5-11 provides an exception when the accident was caused by the co-employee's willful conduct. Means sued the Sanders Lead defendants claiming that the § 25-5-11 exception applied to his case. The trial court entered a summary judgment against him, holding that his claims were all either barred by the statute of limitations or not supported

by substantial evidence of willful conduct. The trial court's judgment was correct and is therefore affirmed.

AFFIRMED.

Parker, C.J., and Wise and Bryan, JJ., concur.

Bolin and Mitchell, JJ., concur specially.

Sellers and Stewart, JJ., concur in the result.

Shaw and Mendheim, JJ., dissent.

MITCHELL, Justice (concurring specially).

As the author of the main opinion, I fully concur with it. I write separately to explain my view that this appeal was timely, thus vesting our Court with jurisdiction to consider the merits of the arguments raised by the appellant, Raymon Means, Jr.

In his dissenting opinion, Justice Shaw accurately notes that our courts have been inconsistent in the way they treat motions to reconsider that are pending when a final judgment is entered.[9] I share some of Justice Shaw's concerns about the "quickening" rule and believe it would be problematic to have a rule providing that every motion to reconsider that is pending when a final judgment is entered automatically becomes a postjudgment motion. But a rule providing that a motion to reconsider can never be converted into a postjudgment motion is at least equally

[9]The Rules of Civil Procedure do not expressly authorize a party's motion asking the trial court to reconsider a nonfinal judgment. In the absence of a rule defining such motions, they may, in practice, be filed under various names, including "motions to reconsider," "motions to set aside," or even, borrowing language from Rule 59, Ala. R. Civ. P., "motions to alter, amend, or vacate." For convenience, I refer to such motions as "motions to reconsider" in this writing.

problematic. Fortunately, these are not the only options. Caselaw from the Court of Civil Appeals points to a third alternative -- allowing a motion to reconsider to become a postjudgment motion when the trial court affirmatively elects to treat it as such.

In McIntyre v. Satch Realty, Inc., 961 So. 2d 135, 137 (Ala. Civ. App. 2006), the Court of Civil Appeals considered an appeal in which the appellants had moved the trial court to reconsider a nonfinal order but the trial court entered a final judgment before considering their motion. "Thereafter, [the trial court] took up and considered, for the first time, [that] motion," treating it as "a postjudgment motion." Id. at 138. Emphasizing that no party had objected to the trial court's action, the Court of Civil Appeals stated that "we must conclude that their motion to [reconsider] became a postjudgment motion, and therefore we, like the trial court, treat it as such." Id. The Court of Civil Appeals similarly affirmed a trial court's decision to treat a motion to reconsider as a postjudgment motion in Slocumb Law Firm, LLC v. Greenberger, [Ms. 2190038, July 24, 2020] ___ So. 3d ___, ___ (Ala. Civ. App. 2020) (explaining that "although the [appellant's] motion to reconsider was filed

before the final default judgment was entered, that motion was properly considered by the trial court as a postjudgment motion addressed to the trial court's final default judgment").

In both McIntyre and Slocumb Law Firm, the Court of Civil Appeals highlighted that there had been no objection to the trial court's decision to treat a motion to reconsider as a postjudgment motion -- the trial court and the parties were apparently all on board with that course of action. See, e.g., Slocumb Law Firm, ___ So. 3d at ___ (noting that "the trial court and the parties, without objection, ultimately treated the motion as though it were directed to the final default judgment").

That is precisely what occurred in this case. Here's the timeline:

> February 16, 2020 -- Means filed his motion to reconsider challenging the nonfinal judgment entered in favor of whom the main opinion refers to as the Sanders Lead defendants in November 2019.
>
> February 24, 2020 -- The trial court entered a final judgment dismissing Means's remaining claims against the other defendants.
>
> March 5, 2020 -- The Sanders Lead defendants filed a response opposing Means's motion. Notably, they did not argue that his motion was denied or otherwise disposed of by the final judgment entered on February 24.

> March 6, 2020 -- The trial court entered an order setting Means's motion for a hearing on March 19, 2020.
>
> March 19, 2020 -- The trial court began the hearing on Means's motion by confirming that "we are here on plaintiff's motion to reconsider the court's order granting a summary judgment in favor of the [Sanders Lead] defendants." The parties then proceeded to make arguments about the merits of the judgment entered in favor of the Sanders Lead defendants. No one argued that Means's motion had already been denied or otherwise disposed of. The trial court concluded the hearing by stating that it would take the matter "under advisement."

As this timeline makes clear, there can be no serious dispute about whether the trial court affirmatively chose to treat Means's motion to reconsider as a postjudgment motion. It most certainly did, and all the parties knew it. And the relevant caselaw empowered the trial court to make that decision. See McIntyre, 961 So. 2d at 137. In light of these circumstances, I cannot fault Means for failing to file a brand new postjudgment motion after the February 24 final judgment was entered. Why would he?

Of course, this case diverges from McIntyre and Slocumb Law Firm because the trial court later reversed course and held that Means's motion to reconsider could not operate as a postjudgment motion. But the trial

court's conclusion was inconsistent with every action it had taken up until that point in time. While the trial court certainly had the discretion not to treat Means's motion to reconsider as a postjudgment motion after the final judgment was entered, once it did, it could not consistently communicate to Means that he had a postjudgment motion pending and then -- after the time to file a postjudgment motion had passed -- rule that he had never put such a motion before the court. In my view, the trial court exceeded its discretion by attempting to rewrite the procedural history in this way. And, in light of our muddy caselaw in this area, a decision by this Court affirming the trial court's belated conclusion would conflict with Rule 1(c), Ala. R. Civ. P., and our stated policy to decide cases on the merits whenever it is permissible to do so. See Ex parte Cowley, 43 So. 3d 1197, 1199 (Ala. 2009) ("It is long settled that rules of procedure are properly construed so as to allow the court to reach the merits of the issues.").

Because the trial court affirmatively treated Means's motion to reconsider as a postjudgment motion, the time for Means to appeal from the February 24 final judgment was tolled by Rule 4(a)(3), Ala. R. App. P.

After that motion was denied, Means filed his notice of appeal within the next 42 days, as required by Rule 4(a)(1), Ala. R. App. P. This appeal is therefore timely and it is appropriate for us to consider the merits of the arguments he makes on appeal.

Bolin, J., concurs.

SHAW, Justice (dissenting).

I respectfully dissent. I believe that this appeal is untimely and, thus, that this Court does not have jurisdiction.

As discussed more fully in the main opinion, the appellant, Raymon Means, Jr., commenced an action against two sets of defendants, designated in the main opinion as the Sanders Lead defendants and the chemical defendants. The trial court entered a summary judgment in favor of the Sanders Lead defendants on November 19, 2019. This was not a final judgment because it did not dispose of all the claims as to all the parties in the case. Grantham v. Vanderzyl, 802 So. 2d 1077, 1079-80 (Ala. 2001) ("Ordinarily, an appeal can be brought only from a final judgment. Ala. Code 1975, § 12-22-2. If a case involves multiple claims or multiple parties, an order is generally not final unless it disposes of all claims as to all parties."). On February 16, 2020, Means filed a "motion for reconsideration" that asked the trial court to reconsider that summary judgment. On February 24, 2020, the trial court dismissed Means's claims against the chemical defendants. At that point, the November 19, 2019, summary judgment previously entered in favor of the Sanders Lead

defendants became a final judgment. Thereafter, the Sanders Lead defendants filed a response to Means's motion to reconsider. Following a hearing the trial court denied Means's motion on April 15, 2020. On May 20, 2020, Means filed a notice of appeal.

Rule 4(a)(1), Ala. R. App. P., provides 42 days to appeal from a judgment. Generally, the judgment must be final to support an appeal. Grantham, supra, and Ex parte P&H Constr. Co., 723 So. 2d 45, 47 (Ala. 1998) ("Rule 4(a)(1), Ala. R. App. P., sets the time allowed for filing a notice of appeal, in any appeal by right and from a final judgment, at 42 days."). Rule 4(a)(3), Ala. R. App. P. provides, however, that "[t]he filing of a post-judgment motion pursuant to Rules 50, 52, 55 or 59 of the Alabama Rules of Civil Procedure ... shall suspend the running of the time for filing a notice of appeal."

Means's May 20, 2020, notice of appeal was not filed within 42 days of February 24, 2020. The issue, as I see it, is whether his February 16, 2020, motion to reconsider the November 19, 2019, summary judgment in favor of the Sanders Lead defendants was a postjudgment motion as

contemplated by Rule 4(a)(3), specifically, a motion pursuant to Rule 59(e), Ala. R. Civ. P., that suspended the time to appeal.

As noted above, the November 19, 2019, summary judgment in favor of the Sanders Lead defendants was a nonfinal judgment at the time the motion was filed. Numerous decisions have held that a motion to reconsider what is otherwise a nonfinal judgment cannot be considered a motion pursuant to Rule 59(e). See, e.g., State v. Brantley Land, L.L.C., 976 So. 2d 996, 998 n.3 (Ala. 2007) ("Because no final judgment had been entered when the State filed the documents denominated as a 'Rule 59' motion and an 'Amendment/Supplement' to the 'Rule 59 motion,' Rules 59 and 59.1 were inapplicable. The motion and amendment were, in fact, motions to reconsider [an] interlocutory ... order."); Lambert v. Lambert, 22 So. 3d 480, 483-84 (Ala. Civ. App. 2008) ("The wife's motion was not a postjudgment motion pursuant to Rule 59, Ala. R. Civ. P., because the circuit court's ... order [adjudicating one of several pending claims] was not a 'judgment' within the meaning of Rule 54(a), Ala. R. Civ. P. The wife's ... motion was, in effect, a motion to reconsider an interlocutory order."); and Lanier v. Surrett, 772 So. 2d 1187, 1188 (Ala. Civ. App. 2000)

("Because the partial summary judgment was interlocutory, Surrett's motion was not one filed pursuant to Rule 59(e).").

The rationale of these decisions appears to be based on the general rule that a Rule 59(e) motion can be directed to only a final judgment:

> "By its express terms, Rule 59(e) applies only where there is a 'judgment.' That term is specifically defined in Ala. R. Civ. P. 54(a), as 'a decree and any order from which an appeal lies.' (Emphasis added.) Rule 59 does not apply to interlocutory orders, because such orders remain 'within the breast of the court.' Rheams v. Rheams, 378 So. 2d 1125, 1128 (Ala. Civ. App. 1979). A 'Rule 59 motion may be made only in reference to a final judgment or order.' Malone v. Gainey, 726 So. 2d 725, 725 n. 2 (Ala. Civ. App. 1999); see also Anderson v. Deere & Co., 852 F.2d 1244, 1246 (10th Cir. 1988); Momar, Inc. v. Schneider, 823 So. 2d 701, 704 (Ala. Civ. App. 2001) (a Rule 59(e) 'motion may be taken only from a final judgment')."

Ex parte Troutman Sanders, LLP, 866 So. 2d 547, 549-50 (Ala. 2003).[10] See also Ex parte Cate, 303 So. 3d 142, 145 (Ala. Civ. App. 2020) (noting that "a valid postjudgment motion filed pursuant to Rule 59(e), Ala. R. Civ. P., may be filed only in reference to a final judgment").

[10]The interlocutory order at issue in Troutman Sanders was the denial of a motion to dismiss and, thus, was not a final judgment.

A separate line of cases relied on by the Court of Civil Appeals has held that a motion to reconsider a nonfinal judgment can mature or "quicken" into a proper postjudgment motion when the judgment becomes final. See, e.g., Riverbend Ass'n v. Riverbend, LLC, 204 So. 3d 870, 874 (Ala. Civ. App. 2015) ("[The] premature postjudgment motion quickened when the judgment was made final ...."); Woods v. SunTrust Bank, 81 So. 3d 357, 364 (Ala. Civ. App. 2011) (holding that a motion to reconsider "quickened into a postjudgment motion" upon the entry of a final judgment); and Richardson v. Integrity Bible Church, Inc., 897 So. 2d 345, 347 (Ala. Civ. App. 2004) ("[A] premature postjudgment 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 (see Ala. R. App. P., Rule 4(a)(3)) 'quickens' on the day that the final judgment is entered.").

The genesis of the "quickening" rule appears to stem from this Court's decision in New Addition Club, Inc. v. Vaughn, 903 So. 2d 68, 72 (Ala. 2004). In that case, this Court held that a motion under Rule 50, Ala. R. Civ. P., and, alternately, under Rule 59(e), filed before the actual entry of the judgment is "not a nullity" and "becomes effective when the

judgment is entered." Id. See also Ex parte Cavalier Home Builders, LLC, 275 So. 3d 1110, 1111-12 (Ala. 2018) (holding that, under the authority of New Addition Club, a Rule 59(e) motion challenging an arbitration award pursuant to the process found in Rule 71B(f), Ala. R. Civ. P., but filed before the court had entered a judgment on the award, became effective when the court entered the judgment); Jakeman v. Lawrence Grp. Mgmt. Co., 82 So. 3d 655, 658 (Ala. 2011) (applying New Addition Club to a Rule 59(e) motion filed before the entry of a judgment); and Ex parte Bates, 225 So. 3d 650, 651 (Ala. Civ. App. 2016) (holding that, under New Addition Club, a Rule 55(c), Ala. R. Civ. P., motion to set aside a default judgment became effective on the date of the entry of the judgment from which it sought relief). It appears that the court in Richardson took the rule from New Addition Club regarding a premature motion filed before the entry of a judgment and extended it to apply to motions filed after the entry of judgments but before they became final.

These are not the same thing,[11] but I do see the logic behind this expansion of the New Addition Club rule.

> Judge Donaldson has criticized this line of cases as follows:
>
> "[T]he concept of a motion directed to a nonfinal judgment 'quickening' into a motion filed pursuant to Rule 59, Ala. R. Civ. P., upon the entry of a final judgment is not found in the Alabama Rules of Civil Procedure or in the Alabama Rules of Appellate Procedure and could, in certain circumstances, based on the application of Rule 59.1, Ala. R. Civ. P., present a trap for even the most wary practitioner if a second motion is filed raising the same grounds after the judgment is entered."

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[11]Providing for the quickening of a postjudgment motion filed before the entry of a judgment, as contemplated in New Addition Club, appears to me to be a distinguishable scenario. There is no interlocutory judgment that the movant is requesting the trial court to use its inherent power to modify. Instead, a verdict might be returned by a jury, New Addition Club, or an award might be made by an arbitrator, Ex parte Cavalier Home Builders, but no judgment yet entered by the court, or a judgment might be signed by the judge but not yet entered by the clerk, see Jakeman. Those scenarios simply involve a delay in a ministerial process, and the movant has truly acted prematurely instead of requesting interlocutory relief. I do recognize, however, that the rule in New Addition Club is not without problems. See S.S. v. T.Y., 177 So. 3d 218, 220 (Ala. Civ. App. 2015) (holding that a purported postjudgment motion that was filed and also denied by the trial court before the trial court actually entered the judgment must be deemed denied, for the purposes of determining the start of the time to file a notice of appeal, on the date the judgment was entered), and note 12, infra.

Riverbend, 204 So. 3d at 879 (Donaldson, J., concurring specially).[12]

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[12]Judge Donaldson has also questioned whether a motion filed before the entry of a judgment can be deemed to have quickened:

> "I write to note that Rule 59(e), Ala. R. Civ. P., which addresses a motion to alter, amend, or vacate a judgment, has been construed to apply only to a final judgment from which an appeal could be taken. Ex parte Troutman Sanders, LLP, 866 So. 2d 547, 549-50 (Ala. 2003). Motions to alter, amend, or vacate nonfinal orders have been held to be motions to 'reconsider' and not filed pursuant to Rule 59(e). See, e.g., State v. Brantley Land, L.L.C., 976 So. 2d 996, 998 n. 3 (Ala. 2007); Lambert v. Lambert, 22 So. 3d 480, 483-84 (Ala. Civ. App. 2008). Issues can arise when more than one postjudgment motion is filed. See, e.g., Roden v. Roden, 937 So. 2d 83 (Ala. Civ. App. 2006) (discussing the effect of a second postjudgment motion). Further, an order or judgment cannot be orally rendered. Rule 58(a), Ala. R. Civ. P.; Ex parte Chamblee, 899 So. 2d 244, 248 (Ala. 2004). To avoid confusion to the bench and bar, I think the issue whether a motion to alter, amend, or vacate filed before the entry of a final judgment is a 'prematurely filed' motion under Rule 59 that somehow 'quickens' upon the entry of a final judgment should be reexamined; however, we currently are bound by authority to the contrary. New Addition Club, Inc. v. Vaughn, 903 So. 2d 68 (Ala. 2004); Jakeman v. Lawrence Grp. Mgmt. Co., 82 So. 3d 655 (Ala. 2011)."

Ex parte Williams, 185 So. 3d 1106, 1110-11 (Ala. Civ. App. 2015) (Donaldson, J., concurring specially).

In its order on the motion to reconsider, the trial court appears to have rejected the proposition that Means's motion to reconsider was a proper postjudgment motion:

> "The [November 19, 2019,] Order granting the Motion for Summary Judgment in favor of the Sanders [Lead] Defendants was an interlocutory judgment as it did not adjudicate the Plaintiff's claims against the [chemical defendants]. Rule 54(b), Alabama Rules of Civil Procedure, states that an order adjudicating fewer than all the claims pending is subject to revision at any time before the entry of a Judgment adjudicating all the claims; Lanier v. Surrett, 772 So. 2d 1187, 1188 (Ala. Civ. App. 2000). In Lanier, the court indicated that a motion seeking reconsideration of a partial summary judgment is not technically a post judgment Motion because an interlocutory order is not a final Judgment. A trial court retains jurisdiction to reconsider a partial summary judgment at the request of either side or on its own initiative until that judgment is made final either by use of Rule 54(b)[, Ala. R. Civ. P.,] certification or by the entry of a Judgment disposing of all claims and all parties in the action.
>
> "....
>
> "This court must first address whether or not it retains jurisdiction to consider the Plaintiff's Motion. There is no doubt that the court retained jurisdiction to consider the Motion up and until the entry of the order granting the dismissal of the [chemical defendants]. The entry of dismissal of all the remaining claims and parties would be the date the partial summary judgment became final. The Plaintiff did not timely file any post judgment motion seeking relief from the

> final judgment. The Plaintiff's Motion for Reconsideration is denied for lack of jurisdiction."

(Some citations omitted.)

The trial court's ruling is supported by Lanier, supra, and the numerous opinions similarly holding that a motion to reconsider a nonfinal judgment is simply a motion to reconsider an interlocutory order and does not constitute a motion under Rule 59(e).

In response to an order to show cause "as to why this appeal should be considered as timely filed," Means points out that the November 19 summary judgment was not final and that the motion to reconsider was not a Rule 59 motion because there was no final judgment. Means then argues that the notice of appeal was filed within 42 days of the entry of the order denying the motion to reconsider. However, because the motion to reconsider was not a Rule 59(e) motion, it did not, under Rule 4(a)(3), suspend the time for filing the notice of appeal. Thus, Means's notice of appeal was required to be filed 42 days after the trial court's judgment became final, which did not occur. A "quickening" of the motion to reconsider was implicitly rejected by the trial court and is not cited as a

basis for determining that this appeal is timely. Given that the trial court's holding is not refuted on appeal, I cannot hold that the trial court erred. Crutcher v. Williams, 12 So. 3d 631, 635 (Ala. 2008) ("[T]his Court is not obligated to embark on its own expedition beyond the parties' arguments in pursuit of a reason to exercise jurisdiction."). The motion to reconsider did not suspend the time to file the notice of appeal, and therefore this appeal was untimely. This Court has no jurisdiction to hear an untimely appeal, which must be dismissed. Graves v. Golthy, 21 So. 3d 720, 723 (Ala. 2009). See also Buchanan v. Young, 534 So. 2d 263, 264 (Ala.1988) ("The failure to file a notice of appeal within the time provided in Rule 4, [Ala. R. App. P.], is a jurisdictional defect and will result in a dismissal of the appeal."), and 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."). I thus respectfully dissent to affirming on the merits the trial court's summary judgment in favor of the Sanders Lead defendants.

I am wary of the correctness of the quickening rule as it has been applied to motions directed to nonfinal judgments. I cannot locate a

decision of this Court explicitly adopting it. It would appear to conflict with the requirement that a Rule 59(e) motion applies only when there is a final judgment. Further, although there is merit to the notion that, in general, premature motions should simply be held in abeyance until they are ripe, a motion to reconsider an interlocutory order is a separate thing from a postjudgment motion: a trial court retains the ability to vacate or modify an interlocutory order, and, although no rule provides for a motion by a party to urge the trial court to exercise that ability, I see nothing prohibiting it. But, the motion should not be considered both a motion to reconsider an interlocutory order and a premature Rule 50, 52, 55, or 59 motion that quickens if the trial court fails to act. The movant may intend to challenge only the interlocutory order and not intend for the motion to be an early filed postjudgment motion that would later quicken. Further, a trial court may intend for its entry of the final judgment to be deemed as having rejected the motion, leaving a party unsure of whether to file a proper postjudgment motion or resulting in a duplicate motion.[13]

[13]This, in turn, may cause issues with the application of Rule 59.1, Ala. R. Civ. P. See Roden v. Roden, 937 So. 2d 83, 84-85 (Ala. Civ. App.

Additionally, if motions subject to quickening are allowed, they may nonetheless require amendments to address new issues found in the final judgment.

There is a need for a formal postjudgment motion to be filed after the entry of a final judgment, as opposed to such motions being implied from different motions. Motions under Rules 50, 52, 55, and 59 must be filed within a certain time.[14] They have the substantial effect of suspending the time to file a notice of appeal. Rule 4(a)(3). They may have independent restrictions on the issues they can raise that might not necessarily apply to a motion to reconsider an interlocutory order. It thus seems preferable to require a formal motion after the entry of a final judgment instead of allowing one to spring from a wholly different type of motion that was intended to serve another purpose. Because of the above, I would be disinclined to adopt the reasoning of the line of cases relied on

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2006).

[14]See Rules 50(b), 52(b), 55(c), and 59(e) Ala. R. Civ. P. The motion to reconsider in this case was filed more than 30 days after the nonfinal judgment was entered. If the judgment had been final, and the motion filed under Rule 59(e), then it would have been untimely.

by the Court of Civil Appeals, but I also point out that the main opinion does not do so. Ex parte Town of Lowndesboro, 950 So. 2d 1203, 1210 (Ala. 2006) (holding that appellate decisions that do not decide an issue and make it part of the case "cannot be binding precedent on the issue").

Mendheim, J., concurs.