

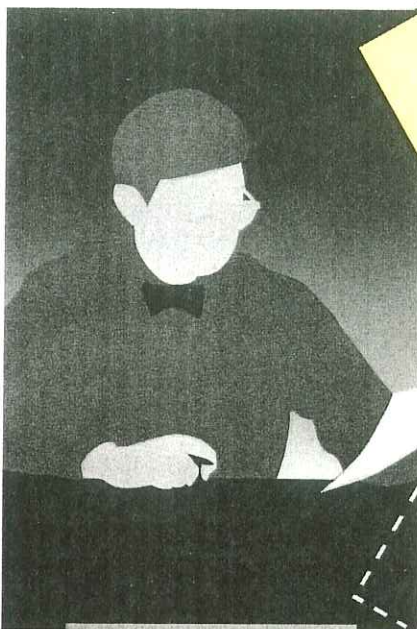
The Tennessee Trial Lawyer



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IN this ISSUE...

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RECONSIDER THE MOTION TO RECONSIDER

By

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Plaintiff loses trial. Plaintiff's counsel files a motion for a new trial within thirty days of entry of order confirming verdict. Trial court overrules motion for new trial. Two days later plaintiff's counsel files a motion to reconsider the order overruling the motion for new trial. Twenty nine days later the trial court overrules the motion to reconsider. Plaintiff's counsel *immediately* files a notice of appeal. The record is prepared. Briefs are filed with the Court of Appeals.

Plaintiff's counsel thinks his appeal is protected. Then the order comes down from the Court of Appeals: "The appeal having not been timely perfected, we are unable to consider the merits of the plaintiff's claim. Dismissed, remanded and affirmed." The lawyer who received this opinion exclaims, "That can't be correct! I filed a motion to reconsider, and that motion extended my time for filing a notice of appeal . . . Didn't it?" No it did not.

In spite of specific amendments to the Tennessee Rules of Civil Procedure and numerous appellate opinions admonishing the practice of filing "motions to reconsider", many attorneys continue to file the non-existent, nonrecognizable motion. The purpose of this article is to advise of the recent changes in the rules and continued appellate decisions which demonstrate the danger of filing such motions.

In an appeal as of right to the Supreme Court, Court of Appeals, or Court of Criminal Appeals, the notice of appeal required by Rule 3 shall be filed with and received by the clerk of the trial court within 30 days after the date of entry of the judgment appealed from; . . . T.R.A.P. 4(a)

The running of the time for filing a notice of appeal may be stopped by specific post-trial motions as provided by T.R.A.P. 4(b):

(b) Termination by Specified Timely Motions in Civil Actions. - In a civil action, if a timely motion under the Tennessee Rules of Civil Procedure is filed in the trial court by any party:

(1) under Rule 50.02 for judgment in accordance with a motion for a directed verdict; (2) under Rule 52.02 to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) under Rule 59.03 to alter or amend the judgment; or (4) under Rule 59.01 for a new trial, the time for appeal for all parties shall run from

the entry of the order denying a new trial or granting or denying any other such motion.

These motions *are the only motions* contemplated in these rules for extending the time within which the notice of appeal must be filed. These motions toll the commencement of the time for appeal because the granting of one of these motions may affect either the availability of or the decision whether to seek appellate review.

There is *no authority* in the rules or under the case law which allows for the tolling of the time of appeal as a result of the filing of (1) a motion to reconsider a judgment itself; or (2) a motion to reconsider the overruling of a motion for a new trial as provided in T.R.C.P. 59.02;; or (3) a motion to reconsider the overruling of a motion to alter or amend a judgment filed pursuant to T.R.C.P. 59.03. There simply is no such thing as a "motion to reconsider."

In *Gassaway v. Patty*, 604 S.W.2d 60 (Tenn. App. 1980), final judgment was entered on May 25, 1979, and appellant filed a motion on June 11, 1979, seeking among other things, to set aside the judgment. Appellant's motion was overruled by an Order entered on July 26, 1979. Appellants filed another motion on August 9, 1979 to *reconsider the decision on the prior motion*. On September 14, 1979 the trial court entered an order overruling the second motion, and on September 25, 1979 a notice of appeal was filed. The Court of Appeals held that the notice of appeal was not timely filed.

A motion to reconsider as such is unknown either to the Tennessee Rules of Civil Procedure or the Federal Rules of Civil Procedure, upon which the Tennessee Rules are predominantly based. Subsequent to *Gassaway, supra*, Rule 59.01 Tennessee Rules of Civil Procedure was amended in August, 1984, by adding the following: "Motions to reconsider any of these motions are *not authorized* and *will not* operate to *extend* the time for appellate proceedings." [Emphasis added.]

The Honorable Lewis H. Conner, Jr., in *Mooneyhan v. Mooneyhan*, (Tenn.App. at Nashville, February 17, 1981) [not published], relates the court's thinking behind its nonrecognition of "rehearing motions":

The interests of justice require that the reasonable limits set forth as to the use of the courts be strictly enforced in the proper administration of justice and to bring appropriate

finality to legal proceedings . . . If it were not so, one could file motion after motion giving them the same or different titles in a trial or, for that matter, appellate court, and thereby indefinitely thwart the appropriate finality of adjudication which is a necessity to any fair and orderly judicial system.

As another Court has stated:

In reaching this conclusion we are not unmindful of the Supreme Court's policy of liberality in resolving doubt as to the proper construction of statutes and rules regulating appeals in favor of the right of appeal. See *Saunders v. McKenzie*, 572 S.W.2d 653 (Tenn. 1978). But Rule 4(b) clearly mandates that the time for appeal for all parties shall run from the entry of an order denying a new trial. The Tennessee Rules of Appellate Procedure provide procedures to be followed in order that the rights of the parties can be resolved with certainty and finality. To validate appellant's appeal would require us to disregard the express language of the rules and the result would enable parties to file repeated post-judgment motions in the trial court. The rules are designed to avoid undue delays and T.R.A.P., Rule 2, expressly prohibits appellate courts from extending the time for taking an appeal as of right since the rights of the parties remain uncertain during the time available for filing a notice of appeal.

Gassaway v. Patty, 604 S.W.2d 60, 61 (Tenn. App. 1980).

The majority of you reading this article will think, "Well everyone should know that, it's right in the rules." The point is, however, that in case after case the courts have ruled against motions to reconsider and to rehear. (Obviously lawyers continue to file such motions.) The courts rule against these motions because for one thing they do not exist, and something that does

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not exist cannot possibly extend the time in which to file an appeal. For another thing, strict time limitations must be adhered to because of the right of the appellee to have "finality" at some point.

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Tennessee Rules of Civil Procedure specifically state what motions can toll that time, and as of August, 1984, they also state which motions do not. Do not let your appeal be barred due to untimely filing of the notice of appeal, based on the assumption that a motion to reconsider or a motion to rehear will "stop the appellate clock." Others have done this in the past and have lost.



**ABOUT
THE AUTHOR . . .**

Randall L. Kinnard is with the firm of Randall L. Kinnard & Associates in Nashville, Tennessee. A life member of TTLA and a member of TTLA's Board of Governors, Randy specializes in representing plaintiffs in medical malpractice cases. He received his B.S. from the United States Military Academy and his J.D. from Memphis State University School of Law, where he served on the law review.