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Successive Rule 59 (e) Motions: A Less Slippery Slope

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I. INTRODUCTION

To preserve an issue for review on appeal, a trial court must rule on the issue, or, if the trial judge fails to rule on the issue, the party must bring a motion to amend or alter the judgment.[1] "'Issues on which the trial judge never ruled and which are not raised in a post-trial motion are not properly'" preserved for appeal.[2] In South Carolina, a motion to alter or amend a judgment must be made pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure in order to preserve error when the appellant has made an argument that the trial court has not explicitly ruled on in its trial order.[3] A Rule 59(e) motion cannot be used to introduce an issue not raised prior to judgment.[4]

The filing of a motion to alter or amend judgment has two additional implications: First, a party may wish to file a Rule 59(e) motion because it gives the trial judge another opportunity to reconsider his order, consider the issues raised in the Rule 59(e) motion, and rule on those issues. Second, a timely and proper motion to alter or amend a judgment will stay the time in which notice of appeal is due.[5] If a party intends to appeal a judgment, "[a] notice of appeal shall be served on all respondents within thirty (30) days after receipt of written notice of entry of the order of judgment."[6] However, "[w]hen a timely motion . . . to alter or amend the judgment . . . has been made, the time for appeal for all parties shall be stayed and shall run from receipt of written notice of entry of the order granting or denying such motion."[7]

In order for a motion to alter or amend a judgment pursuant to Rule 59(e) to be considered timely, it "shall be served not later than 10 days after receipt of written notice of the entry of the order."[8] If this requirement is not met, the Rule 59(e)

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1. I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000); *see also* Charles E. Carpenter Jr., *Preserving Error For Appeal—A Special Case-Rule 59(e) Motions*, 6 S.C. LAWYER, Mar.-Apr. 1995, at 14, 17.

2. Goddard v. Fairways Dev. Gen. P'ship, 310 S.C. 408, 412, 426 S.E.2d 828, 831 (Ct. App. 1993); *see also* Rickborn v. Liberty Life Ins. Co., 321 S.C. 291, 305, 468 S.E.2d 292, 300–01 (1996) (holding that the defendant failed to preserve its claim for appellate review when it failed to bring a post-trial motion challenging the issue).

3. *See* Bailey v. Covil Corp., 291 S.C. 417, 419, 354 S.E.2d 35, 36 (1987); Washington v. Whitaker, 317 S.C. 108, 114, 451 S.E.2d 894, 898 (1994); *see, e.g.*, Talley v. S.C. Higher Educ. Tuition Grants Comm., 289 S.C. 483, 487, 347 S.E.2d 99, 101 (1986) (holding that issue raised in the lower court but not ruled on by trial judge was not preserved because plaintiff did not bring post trial motion to alter or amend the judgment).

4. Hickman v. Hickman, 301 S.C. 455, 456-57, 392 S.E.2d 481, 482 (Ct. App. 1990); *see* C.A.H. v. L.H., 315 S.C. 389, 392, 434 S.E.2d 268, 270 (1993) (citing *Hickman*, 301 S.C. 455, 392 S.E.2d 481).

5. C. Mitchell Brown & Elizabeth Herlong Campbell, *Preserving Errors: Get Your Appeal Ducks In a Row*, S.C. LAWYER, July 2004, at 20, 23 (citing S.C. APP. CT. R. 203(b)(1)).

6. S.C. APP. CT. R. 203(b)(1).

7. *Id.*

8. S.C. R. CIV. P. 59(e).

motion will be considered untimely, and the time for filing the notice of appeal will not be tolled. Moreover, if a Rule 59(e) motion is untimely, the party filing the motion loses the benefit of having the issues raised preserved for appeal, and the trial court will not have subject matter jurisdiction to review its order or any of the points raised in the Rule 59(e) motion.[9]

Unfortunately, for parties who intend to raise a Rule 59(e) motion, timeliness is not the only procedural requirement that can prevent a Rule 59(e) motion from having beneficial implications. In the cases of *Coward Hund Construction Co. v. Ball Corp.*,[10] *Quality Trailer Products, Inc. v. CSL Equipment Co.*,[11] *Collins Music Co. v. IGT*,[12] and *Matthews v. Richland County School District One*,[13] the South Carolina Supreme Court and South Carolina Court of Appeals held that under certain circumstances, a Rule 59(e) motion could be improper or ineffective notwithstanding the fact that it satisfied the requirements for timeliness.[14] The courts held such circumstances exist when successive Rule 59(e) motions are filed or when the Rule 59(e) motion merely repeats or expands grounds raised in prior post trial motions, such as motions for judgment notwithstanding the verdict (JNOV).[15] The consequences of filing an ineffective Rule 59(e) motion is that none of the benefits that derive from filing this motion will be available.[16]

> This is especially important because if the 59(e) motion is found improper . . . and if a trial attorney has relied upon the filing of the motion to stay the time limits for taking an appeal of an earlier order or judgment, then the trial lawyer can find himself in a position where the time for appeal of the earlier . . . judgment has expired. In such circumstances, not only will the Rule 59(e) motion be of no effect, but also all appeal rights will be lost.[17]

Rule 4(a)(4) of the Federal Rules of Appellate Procedure states that a notice of appeal filed before the disposition of a Rule 59(e) motion shall have no effect and "the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion. . . ."[18] A party who plans on appealing an order

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9. *See* Pitman v. Republic Leasing Co., 351 S.C. 429, 432, 570 S.E.2d 187, 188–89 (Ct. App. 2002) (holding that trial court lacked subject matter jurisdiction when petitioner failed to file motion within ten days of judgment); Ackerman v. 3-V Chem., Inc., 349 S.C. 212, 214–15, 562 S.E.2d 613, 615 (2002) (finding trial court did not have jurisdiction when motion was filed within ten days of receipt of the trial court's written order but more than ten days after receipt of the notice of the written order).

10. 336 S.C. 1, 518 S.E.2d 56 (Ct. App. 1999).

11. 349 S.C. 216, 562 S.E.2d 615 (2002).

12. 353 S.C. 559, 579 S.E.2d 524 (Ct. App 2002).

13. 357 S.C. 594, 594 S.E.2d 177 (Ct. App. 2004).

14. *See infra* Part II.

15. *See infra* Part II.

16. Brown & Campbell, *supra* note 5, at 23–24.

17. *Id.*

18. FED. R. APP. P. 4(a)(4)(A).

of judgment cannot get around this rule by filing a Rule 59(e) motion and a notice of appeal contemporaneously.[19]

Clearly, this recent case law regarding improper or ineffective post trial motions pursuant to Rule 59(e) demonstrates the difficulties attorneys encounter while making the decision to either raise such a post trial motion or simply appeal the judgment outright. An attorney must consider not only the time limitations in making such a motion, but also whether such a motion would be found improper or ineffective.[20]

Recently, in *Elam v. S.C. Department of Transportation*,[21] the South Carolina Supreme Court examined previous case law regarding improper Rule 59(e) motions and clarified which standard should be used in determining whether a Rule 59(e) motion is proper.[22] As a result, lawyers now have a more concrete standard to determine whether the appellate court will find potential Rule 59(e) motions effective for purposes of tolling the time for notice of appeal. This Note examines the standard *Elam* clarified and, more importantly, what a lawyer must now do to meet this standard. Part II of this Note considers the cases that the court in *Elam* used in reaching the current standard and Part III discusses the issues addressed in *Elam* and how the court reconciled the holdings of preceding cases. Part IV addresses the implications that the *Elam* opinion will have on lawyers who must decide whether to bring a Rule 59(e) motion. Part V provides suggestions for lawyers so their Rule 59(e) motion will preserve all issues for appeal while still effectively tolling the time for notice of appeal.

II. HISTORY

In *Coward Hund*, the plaintiff filed a timely Rule 59(e) motion, which was subsequently denied by the trial court.[23] Following the denial of the motion, Coward Hund filed a second Rule 59(e) motion "'seek[ing] clarification of [an] issue raised before the trial court on two occasions. . . .'"[24] The trial court issued an order denying this motion and Coward Hund subsequently served its notice of appeal.[25] Coward Hund clearly served this notice of appeal within thirty days of receiving the trial court's order denying its second Rule 59(e) motion, but more than thirty days after receiving the order denying its first Rule 59(e) motion.[26] The issue was whether the second Rule 59(e) motion tolled the time for notice of appeal.[27]

The court agreed with the prevailing rule:

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19. *See* Hudson v. Hudson, 290 S.C. 215, 349 S.E.2d 341 (1986) (holding that when a timely post trial motion has been brought before the trial court, any notice of appeal will be dismissed as premature).

20. *See infra* Part II.

21. 361 S.C. 9, 602 S.E.2d 772 (2004).

22. *Id.*

23. Coward Hund Constr. Co. v. Ball Corp., 336 S.C. 1, 2, 518 S.E.2d 56, 57 (Ct. App. 1999).

24. *Id.* (alteration in original).

25. *Id.*

26. *Id.* at 3, 518 S.E.2d at 58.

27. *Id.*

> [A] second motion for reconsideration is appropriate only if it challenges something that was altered from the original judgment as a result of the initial motion for reconsideration .... If, on the other hand, the trial court denies such a motion, the finality of the judgment is restored and the appeal time begins to run from the date the order is entered.[28]

The court held that since the trial court denied Hund's first Rule 59(e) motion and no new issues came to light as a result of the trial court's treatment of this initial motion, the second motion for consideration was inappropriate.[29] Therefore, the time for filing the notice of appeal began to run upon Hund's receipt of the order denying its first Rule 59(e) motion.[30] As a result, the appeal was untimely and subsequently dismissed.[31]

In *Quality Trailer Products*, I Corp.—a codefendant in the case—made its first written post-trial motion for JNOV and a new trial, collectively.[32] The trial court denied I Corp.'s first motion, and I Corp. filed a timely Rule 59(e) motion.[33] The second motion was almost a duplicate of the first motion, except that I Corp. captioned the motion differently and changed the type of "relief sought to coincide with the second motion's caption."[34] The trial court denied this second motion, and I Corp. filed its notice of appeal within thirty days of the denial.[35]

The South Carolina Supreme Court agreed with the trial court's assertion that "'the [second] Motion [was] an exact compilation of the prior motion for judgment notwithstanding the verdict and motion for new trial with a few procedural alterations.'"[36] The second motion "did not ask the trial court to rule" on a single issue presented, but not ruled on, in the initial post trial motion.[37] The supreme court found that I Corp.'s second motion, while captioned as a Rule 59(e) motion, was not a Rule 59(e) motion but simply a successive motion for JNOV and a new trial.[38] The court relied on the rationale in *Coward Hund* in holding that successive trial motions or motions for JNOV, like successive Rule 59(e) motions, do not toll the time for serving notice of appeal.[39] The court concluded "[t]he time for filing

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28. *Id.* at 3–4, 518 S.E.2d at 58 (citations omitted).

29. Coward Hund Constr. Co. v. Ball Corp., 336 S.C. 1, 3–4, 518 S.E.2d 56, 58 (Ct. App. 1999).

30. *Id.*

31. *Id.* at 5–6, 518 S.E.2d at 59.

32. Quality Trailer Prods., Inc. v. CLS Equip. Co., 349 S.C. 216, 218, 562 S.E.2d 615, 616 (2002).

33. *Id.*

34. *Id.* at 218, 562 S.E.2d at 617.

35. *Id.*

36. *Id.* at 220, 562 S.E.2d at 617 (second alteration added).

37. *Id.*

38. Quality Trailer Prods., Inc. v. CLS Equip. Co., 349 S.C. 216, 221, 562 S.E.2d 615, 617–18 (2002); *see also* Miller v. Transamerican Press, Inc., 709 F.2d 524, 527 (9th Cir. 1983) (indicating that "'nomenclature is not controlling,'" so that substance was the factor in determining the type of post trial motion brought) (citations omitted); Lyell Theatre Corp. v. Loews Corp., 682 F.2d 37, 41 (2d Cir. 1982) (stating nomenclature and styling do not outweigh substance).

39. *Quality Trailer Prods., Inc.*, 349 S.C. at 220, 562 S.E.2d at 617–18.

appeal is not extended by submitting the same motion under a different caption."[40] Consequently, the court dismissed the appeal as untimely.[41]

In *Collins Music*, IGT brought a written motion "for JNOV, new trial, and alternatively, [for] new trial nisi remittitur" in response to a jury verdict against it.[42] Within this timely post trial motion, "IGT delineated twenty-eight grounds as support for its request for relief."[43] The trial court, after careful review, "issued a written order denying all of IGT's post trial motions."[44] While the time for appeal began to run immediately after IGT was served with a copy of the order denying its original post-trial motion, IGT served a timely Rule 59(e) motion.[45] Subsequently, the trial judge issued a written order denying the Rule 59(e) motion; the order stated that "IGT failed to raise any issue not already considered."[46] IGT received written notice of the order denying its Rule 59(e) motion, and accordingly, it served notice of its appeal sixteen days later.[47] The issue before the court of appeals was whether IGT's second post trial motion pursuant to Rule 59(e) tolled the time for serving notice of appeal.[48]

The court of appeals reviewed the opinions in *Coward Hund* and *Quality Trailer* in determining that the Rule 59(e) motion was ineffective to toll the time for notice of appeal.[49] The court reasoned that all of the issues raised in the first post trial motion were resolved by the trial judge—preserving them for appeal—and that the Rule 59(e) motion requesting the judge to rule specifically on each ground raised was improper.[50] Furthermore, the Rule 59(e) motion contained no arguments or issues arising from the order denying the previous post trial motions.[51] Instead, the court found, as the supreme court did in *Quality Trailer*, that the Rule 59(e) motion simply "repeated verbatim the twenty-eight grounds found in the first [post trial] motion" and failed to raise any issues that had not been ruled upon.[52] In summarizing its reasoning, the court of appeals stated:

> [T]he subsequent motion must seek relief on issues coming to light as a result of an order following an initial post-trial motion that alters or amends the judgment. The successive motion cannot

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40. *Id.* at 220, 562 S.E.2d at 618; *see also* Mickle v. Blackmon, 255 S.C. 136, 140, 177 S.E.2d 548, 549 (1970) (finding that a type of motion depends on its "substance and effect" rather than how it is captioned).

41. *Quality Trailer Prods., Inc.*, 349 S.C. at 221, 562 S.E.2d at 618.

42. Collins Music Co. v. IGT, 353 S.C. 559, 560, 579 S.E.2d 524, 524 (Ct. App. 2002).

43. *Id.*

44. *Id.*

45. *See id.* at 560–61, 579 S.E.2d at 524.

46. *Id.* at 561, 579 S.E.2d at 524.

47. *Id.*

48. Collins Music Co. v. IGT, 353 S.C. 559, 561, 579 S.E.2d 524, 524 (Ct. App. 2002).

49. *Id.* at 562–64, 579 S.E.2d at 525–26.

50. *Id.* at 565-66, 579 S.E.2d at 527; *see, e.g.*, Armstrong v. Union Carbide, 308 S.C. 235, 417 S.E.2d 597 (Ct. App. 1992) (holding that the order of the circuit court did not have to separately list and specifically address each of the twenty-nine issues raised when it was clear that the order considered all of the grounds raised).

51. *Collins Music Co.*, 353 S.C. at 566, 579 S.E.2d at 527.

52. *Id.*

> be a motion to alter or amend that merely recites arguments in a previous Rule 59(e) motion, as was the case in *Coward Hund*, or the recaptioning of a previous [JNOV or new trial] motion as a Rule 59(e) motion, as was done in *Quality Trailer*.[53]

As a result of this reasoning, the court of appeals found that the Rule 59(e) motion was not appropriate and "was simply a successive motion for JNOV and new trial."[54] Consequently, the second post trial motion did not toll the time for serving notice of appeal, and the appeal was dismissed as untimely.[55]

In *Matthews*, the jury returned a verdict for the plaintiff in the amount of $10,000 in actual damages.[56] Immediately following the verdict, the school district made an oral JNOV motion on the ground that the amount of the verdict was against the weight of the evidence.[57] The trial court denied the oral JNOV motion in a written order, and the school district brought a timely written motion pursuant to Rule 59(e) to alter or amend the judgment.[58] The trial court subsequently granted the motion, finding the evidence only supported "a verdict in the amount of $7,100."[59] At the hearing on the motion, the trial court awarded Matthews attorney's fees totaling $4,900; "[t]hus, the total awarded . . . was $12,000, rather than the original $10,000 awarded by the jury."[60] The school district appealed.[61]

The court of appeals concluded the trial court lacked jurisdiction to entertain the school district's Rule 59(e) motion because it was identical to the first JNOV motion.[62] Consequently, the Rule 59(e) motion did not toll the time for filing the notice of appeal, and since the school district served its notice of appeal more than thirty days after it received written notice of entry of the denial of its JNOV motion, the court dismissed the appeal due to untimeliness.[63] The court of appeals found that the facts of the current case were similar to those in *Coward Hund, Quality Trailer,* and *Collins Music* because the Rule 59(e) motion merely restated the arguments the school district made in its oral JNOV motion.[64] The court adhered to the rationale in *Coward Hund* and *Collins Music* by holding that "successive post-trial motions are not appropriate unless the initial post-trial order alters the judgment."[65] In order to distinguish this case from the others in which the Rule 59(e) motions were denied, the court said that the appropriateness of the post trial motion, not the trial court's decision to grant or deny the post trial motion, would

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53. *Id.* at 564–65, 579 S.E.2d at 526.
54. Collins Music Co. v. IGT, 353 S.C. 559, 566, 579 S.E.2d 524, 527 (Ct. App. 2002).
55. *Id.*
56. Matthews v. Richland County Sch. Dist. One, 357 S.C. 594, 596, 594 S.E.2d 177, 178 (Ct. App. 2004).
57. *Id.*
58. *Id.*
59. *Id.* at 597, 594 S.E.2d at 178.
60. *Id.*
61. *Id.*
62. Matthews v. Richland County Sch. Dist. One, 357 S.C. 594, 597, 594 S.E.2d 177, 178 (Ct. App. 2004).
63. *See id.* at 599, 594 S.E.2d at 179.
64. *Id.*
65. *Id.*

be the factor in determining whether the post trial motion tolled the time for notice of appeal.[66]

These decisions demonstrate the type of issues and complications that can develop when a party raises a successive Rule 59(e) motion after raising a previous post trial motion, such as a JNOV, or in the case of *Coward Hund*, a previous Rule 59(e) motion.[67] While the reasoning in each of these cases did suggest some common factors to consider in determining whether a Rule 59(e) motion is proper, they left some important questions unanswered. For example, can a Rule 59(e) motion raise arguments for preservation on appeal that were brought at trial, but not ruled on, if the party did not raise these arguments in the initial post trial motion? What if a Rule 59(e) motion recites all of the issues raised in the prior post trial motion, but raises additional issues that resulted from the court's treatment of the first post trial motion, in order to preserve them for appeal? Is it more likely that a Rule 59(e) motion that is similar to an oral JNOV motion or a written JNOV motion will be considered proper? In *Elam*, the supreme court addressed these issues, using the previous cases dealing with improper Rule 59(e) motions[68] as a backdrop to provide a more concrete standard for lawyers to use when deciding whether to assert a Rule 59(e) motion after bringing a previous post trial motion.

III. *ELAM V. SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION*

A. Background

In *Elam*, Elam sued the Petitioner, South Carolina Department of Transportation (SCDOT), for injuries and property damage she sustained in a single-car accident.[69] She alleged that "the accident was caused by SCDOT's improper maintenance of a highway"—allowing excessive rain water to gather on the highway.[70] Elam received a jury verdict in the amount of $250,000, and immediately thereafter SCDOT brought an oral motion for JNOV.[71] The trial judge orally denied SCDOT's motion for JNOV and then filed a written order rejecting the motion.[72] Afterwards, SCDOT timely filed a written motion pursuant to Rule 59(e).[73] In this motion, SCDOT argued that the trial court misapplied the appropriate standard for notice.[74] At trial, "SCDOT asserted that notice of a hazard [was] 'interrupted' by responsive action to correct the defect," and the trial court adopted this standard of notice.[75] SCDOT argued that:

66. *See id.*
67. *See supra* notes 23–31 and accompanying text.
68. *See supra* text accompanying note 14.
69. Elam v. S.C. Dep't of Transp., 361 S.C. 9, 13, 602 S.E.2d 772, 774 (2004).
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. Elam v. S.C. Dep't of Transp., 361 S.C. 9, 25, 602 S.E.2d 772, 781 (2004).

> [A]lthough the trial court had instructed the jury correctly on its notice theory, the court in denying SCDOT's JNOV/new trial motions considered evidence of notice at any time sufficient to create a factual issue for the jury, regardless of whether the notice occurred before or after the remedial work.[76]

SCDOT also raised the same issues it previously addressed in its first post trial motion.[77] This motion was also denied by the trial court in a written order, and SCDOT filed its notice of appeal within thirty days of receiving the written notice of the order denying its second post trial motion.[78]

The court of appeals concluded that the Rule 59(e) motion simply repeated grounds previously raised by SCDOT that were ruled on by the trial judge when he denied SCDOT's oral JNOV motion.[79] Accordingly, the court found the Rule 59(e) motion did not toll the time for notice of appeal and dismissed the appeal as untimely.[80]

B. Discussion

The South Carolina Supreme Court affirmed the holdings and the rationale expressed in *Coward Hund*, *Quality Trailer*, and *Collins Music* in *Elam*.[81] The court, however, concluded that the court of appeals in *Elam*, and in *Matthews*, extended the holdings and the rationale of *Coward Hund*, *Quality Trailer*, and *Collins Music* in a manner that unnecessarily complicated post trial and appellate practice.[82] First, the court took the opportunity to clarify the limits and the rationale of the three cases.[83] The court concluded that "*Coward Hund* correctly stated and applied the prevailing view among federal courts that a second Rule 59(e) motion which raises the same issues and arguments made in a previous Rule 59(e) motion does not toll the time to appeal."[84]

The court further concluded that *Quality Trailer* and *Collins Music*, which involved JNOV motions that were denied by the trial courts in written orders and were followed by identical written Rule 59(e) motions, were correctly decided.[85] In affirming the rationales and holdings expressed in these three cases, the court held:

> An appeal may be barred due to untimely service of the notice of appeal when a party—instead of serving a notice of appeal—files

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76. *Id.* at 25–26, 602 S.E.2d at 781.
77. *Id.* at 26, 602 S.E.2d at 781.
78. *See id.* at 13, 602 S.E.2d at 774.
79. *Id.* at 13–14, 602 S.E.2d at 774.
80. *Id.* at 14, 602 S.E.2d at 774.
81. Elam v. S.C. Dep't of Transp., 361 S.C. 9, 20, 602 S.E.2d 772, 778 (2004).
82. *Id.* at 14, 602 S.E.2d at 775.
83. *Id.*
84. *Id.* at 18, 602 S.E.2d at 777; *see, e.g.*, Glinka v. Maytag Corp., 90 F.3d 72, 74 (2d Cir. 1996) (stating that "[a]llowing subsequent motions to repeatedly toll" the time period for "notice of appeal would encourage frivolous motions").
85. *Elam*, 361 S.C. at 19, 602 S.E.2d at 777.

> a successive Rule 59(e) motion, where the trial judge's ruling on the first Rule 59(e) motion does not result in a substantial alteration of the original judgment. *Coward Hund.* An appeal also may be barred due to untimely service of the notice of appeal when a party—instead of serving a notice of appeal—recaptions a written JNOV/new trial motion, which has been ruled on, and resubmits it as a virtually identical, written Rule 59(e) motion. *Quality Trailer, Collins Music.*[86]

The supreme court was unable to find any case similar to the court of appeals' decision in *Elam* or *Matthews* "in which a court held [that] a written Rule 59(e) motion following an oral JNOV/new trial motion" was ineffective for purposes of tolling the time for notice of appeal.[87] The court rejected the rationale and result of the court of appeals in *Matthews* and *Elam*, concluding that as a general rule:

> [A] party usually is free to file an initial Rule 59(e) motion, regardless of whether the previous JNOV/new trial motions were made orally or in writing, without unnecessary concern the repetition of an issue or argument made in a previous motion will result in a subsequent appeal being dismissed as untimely.[88]

The court found that this process was part of a party's "single bite at the apple," but it did caution parties who file "post-trial motions to note carefully the exceptions to this general rule as expressed in" the cases it affirmed.[89] The court stated several reasons in support of why the general rule[90] it stated was the correct approach.

First, the court recognized that a Rule 59(e) motion was not only "a vehicle to request the trial court 'alter or amend the judgment,' but also as a vehicle to seek 'reconsideration' of issues and arguments."[91] In accordance with this principle, the court said that parties would usually be allowed to request that the court reconsider its decision even if that meant rehashing all or part of an argument that had previously been presented.[92] The court did acknowledge the fact that neither the South Carolina nor Federal Rules of Civil Procedure contained any provisions for a motion for "reconsideration."[93] However, the court did recognize that a Rule 59(e) motion in the South Carolina Rules of Civil Procedure was practically identical to the same motion in the federal rules and that the United States Supreme

86. *Id.* at 19, 602 S.E.2d at 778.

87. Elam v. S.C. Dep't of Transp., 361 S.C. 9, 21, 602 S.E.2d 772, 778 (2004).

88. *Id.*

89. *Id.*

90. *See supra* textual quotation accompanying note 86.

91. *Elam*, 361 S.C. at 21, 602 S.E.2d at 778.

92. *Id.* at 21–22, 602 S.E.2d at 778–79; *see, e.g.*, Arnold v. State, 309 S.C. 157, 172–73, 420 S.E.2d 834, 842 (1992) (stating that the purpose of a Rule 59(e) motion is allow the judge an opportunity to reconsider issues and arguments "'properly encompassed in a decision on the merits'").

93. *Elam*, 361 S.C. at 22, 602 S.E.2d at 779.

Court has explicitly described a Federal Rule 59(e) motion as one which "'involves *reconsideration* of matters properly encompassed in a decision on the merits.'"[94]

Second, the court stressed the overwhelming importance and "necessity of ensuring that all issues and arguments" raised before the trial court have been ruled on or, if not ruled on, have been presented before the trial judge for his reconsideration.[95] "South Carolina appellate courts do not recognize the 'plain error rule,' under which a court in certain circumstances is allowed to consider and rectify an error not raised below by the party."[96] A motion to alter or amend a judgment must be made pursuant to Rule 59(e) in order to preserve error when the appellant has made an argument before a trial court, but the trial court has not explicitly ruled on the argument in its trial order.[97] The court stated that "[South Carolina's] mandatory preservation requirements make it doubly important that litigants generally be freely allowed to file a first, written Rule 59(e) motion without concern a later appeal will be deemed untimely."[98]

Third, the court found that while a party must raise a Rule 59(e) motion to preserve arguments for appeal that have been raised but not ruled on, the common law rules contemplated another situation in which a party might consider bringing a Rule 59(e) motion.[99] In reference to this situation, the court stated that "[a] party *may* wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it."[100] A party will often raise several issues that result in the same legal outcome, and unless the trial judge rules on each of these issues or the arguments are brought in a Rule 59(e) motion, then the issues not ruled on or raised in the Rule 59(e) motion will not be preserved for appeal.[101]

Finally, the court stressed that the rules of civil procedure and appellate practice "should not be written or interpreted to create a trap" for an attorney who raised a Rule 59(e) motion in order to ensure that certain issues would be preserved for

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94. Elam v. S.C. Dep't of Transp., 361 S.C. 9, 22–23, 602 S.E.2d 772, 779 (2004) (citing Osterneck v. Ernst & Whinney, 489 U.S. 169 (1989)).

95. *See id.* at 23, 602 S.E.2d at 779. *See also* I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). The court described the process of ensuring that all issues have been preserved for appeal:

> the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments . . . .
>
> If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review.

Id. (citations omitted).

96. *Elam*, 361 S.C. at 24, 602 S.E.2d at 780.

97. *See supra* note 3 and accompanying text.

98. *Elam*, 361 S.C. at 25, 602 S.E.2d at 780.

99. *See id.* at 24, 602 S.E.2d at 780.

100. *Id.*

101. Interview with James F. Flanagan, Oliver Ellsworth Professor of Federal Practice, University of South Carolina School of Law, in Columbia, S.C. (Oct. 4, 2004) [hereinafter Flanagan Interview].

appeal.[102] The court concluded that the expansion of the rationale and holdings of *Coward Hund, Quality Trailer,* and *Collins Music* by the court of appeals in *Matthews* and *Elam* had this exact effect.[103] The court referred to the fact that a party who raised a Rule 59(e) motion in order to preserve certain issues for appeal might "unwittingly forfeit the right to an appeal if an appellate court later determines the Rule 59(e) motion was unnecessary because he already had raised the issue and obtained a ruling."[104] The court urged avoiding situations such as this, which would "routinely . . . place a party between the proverbial rock and a hard place."[105]

Turning to the facts in *Elam*, the supreme court determined that while SCDOT did revisit issues previously addressed in its oral JNOV/new trial motions, the motion was still proper based on the court's clarifications of the previous case law and reasons it gave in support of a presumption of properness.[106] The court found that the facts of the present case were "not factually similar to *Quality Trailer* or *Collins Music* because SCDOT did not simply resubmit a virtually identical, written Rule 59(e) motion raising the same issues on which it already had obtained a ruling by virtue of a previous, written JNOV/new trial motion."[107] Furthermore, the court overruled *Matthews* because it considered the decision inconsistent with the view of post trial motions that the court identified.[108]

IV. ANALYSIS OF THE HOLDINGS OF *ELAM*

Elam is different than its predecessors because while SCDOT's Rule 59(e) motion did revisit some of the issues it raised in its oral JNOV motion, it also raised an issue that came to light as a result of the trial court's treatment of its original post trial motion.[109] The Rule 59(e) motion raised the argument that the trial court applied a different standard of notice in reviewing the JNOV motion, instead of the standard it instructed the jury to use.[110] Consequently, a new issue developed as a result of the trial court's treatment of the JNOV motion, and it was necessary for SCDOT to raise this issue in its Rule 59(e) motion in order to have it preserved for trial.[111] SCDOT did not simply recaption its JNOV argument so that the nomenclature would appear as though it was a Rule 59(e) motion like the parties in

102. Elam v. S.C. Dep't of Transp., 361 S.C. 9, 25, 602 S.E.2d 772, 780 (2004).
103. *Id.*
104. *Id.*
105. *Id.* at 25, 602 S.E.2d at 780–81.
106. *Id.* at 26, 602 S.E.2d at 781.
107. *Id.*
108. Elam v. S.C. Dep't of Transp., 361 S.C. 9, 26, 602 S.E.2d 772, 781 (2004).
109. *See id.* at 25–26, 602 S.E.2d at 781.
110. *Id.*
111. *See, e.g.*, Fraternal Order of Police v. S.C. Dep't of Revenue, 332 S.C. 496, 506 S.E.2d 495 (1998) (finding the issue not preserved for appellate review when party failed to call it to trial court's attention in a Rule 59(e) motion); *In re* Timmerman, 331 S.C. 455, 460, 502 S.E.2d 920, 922 (Ct. App. 1998) (stating that when a party receives an order granting relief that was "not previously contemplated or presented to the trial court," the party must bring a Rule 59(e) motion "in order to preserve the issue for appeal").

Quality Trailer and *Collins Music*.[112] Instead it was a "subsequent motion . . . seek[ing] relief on [an] issue[] coming to light as a result of an order following an initial post-trial motion that alter[ed] or amend[ed] the judgment."[113] The fact that the Rule 59(e) motion addressed issues already raised in the JNOV motion—and ruled on in the trial court's order denying the motion—did not mean the Rule 59(e) motion was improper because it raised at least one issue that came to light as a result of the order denying the JNOV motion.[114] This decision was consistent with the court's reasons for supporting a presumption of properness regarding Rule 59(e) motions.[115]

In *Matthews*, the school district's Rule 59(e) motion to alter or amend the judgment restated the arguments made in its JNOV motion, which argued no evidence existed to support the amount of the verdict.[116] On its face, these facts look almost identical to the facts in *Quality Trailer* and *Collins Music*. However, the facts in the cases that the *Elam* court affirmed had one significant difference than the facts in *Matthews*. In *Quality Trailer* and *Collins Music*, the Rule 59(e) motions failed to raise a single issue presented to the trial court in the initial post trial motion but not ruled on in its order addressing the initial post trial motions.[117] In *Matthews*, while the Rule 59(e) motion did restate all of the issues made in the school district's prior JNOV, the court clearly did not rule on all of the issues presented in the original JNOV motion.[118] Often, more than one legal issue will have the same result, and it is important that a court addresses each of these legal issues in deciding whether a certain requested result is warranted. For example, if a party claims evidence should not have been admitted because it was not authenticated properly and it was not relevant, the court must address both of these issues in making its decision in order for them to be preserved for appeal.[119] While the trial court in *Matthews* addressed the ultimate legal outcome of the school district's claim in its JNOV motion, it did not address all of the issues argued in support of reducing the jury verdict.[120] As a result, it was absolutely necessary for the school district to bring a Rule 59(e) motion in order to preserve all of these issues for appeal.[121] Simply because some of the issues presented in the Rule 59(e) motion were raised in the initial JNOV motion—and ruled on by the trial judge—did not render the Rule 59(e) motion improper.[122]

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112. *Elam*, 361 S.C. at 26, 602 S.E.2d at 781.

113. Collins Music Co. v. IGT, 353 S.C. 559, 564, 579 S.E.2d 524, 526 (Ct. App. 2002).

114. *See Elam*, 361 S.C. at 25–26, 602 S.E.2d at 781.

115. *See supra* Part III.B.

116. Matthews v. Richland County Sch. Dist. One, 357 S.C. 594, 596, 594 S.E.2d 177, 178 (Ct. App. 2004).

117. *See supra* Part II.

118. Flanagan Interview, *supra* note 101.

119. *Id.*

120. *Id.*

121. *See supra* notes 2–3 and accompanying text.

122. Elam v. S.C. Dep't of Transp., 361 S.C. 9, 26, 602 S.E.2d 772, 781 (2004).

V. TIPS FOR ATTORNEYS AFTER *ELAM*

After analyzing the rationale and holdings in *Elam*, here are some suggestions attorneys in South Carolina might want to consider when deciding whether a successive Rule 59(e) motion will be effective for purposes of staying the time for notice of appeal.

First and foremost, it is important for a party to raise all of the issues it wishes to preserve for appeal in its initial post trial motion. If the judge rules on the issues and arguments therein, then the party has no reason to file a Rule 59(e) motion since the issues and arguments are preserved for appeal.[123] Also, a party will not have to deal with tolling the time for appeal as long as it files the notice of appeal within thirty days of written notice of the order granting or denying its initial motion.[124] Typically, a court will find a Rule 59(e) motion ineffective if it raises issues and arguments that could have been raised in the first written motion.[125] Therefore, it is important that a party contemplate all of the possible issues it wants to preserve for appeal and bring them in its first post trial motion.

Second, a party must file a Rule 59(e) motion if the trial court does not rule on all of the issues presented in it initial post trial motion in order to preserve them for appeal.[126] Even though an order may seem to resolve a case and all of the issues therein, "it must explicitly address the disputed issue."[127] This presents a potential problem since a party might feel that the trial court did not rule explicitly on an issue, but the appellate court finds otherwise, which would render the Rule 59(e) motion ineffective for the purpose of tolling the time for notice of appeal.[128] If a party did choose to take this risk, the best approach is to list only the issues not explicitly ruled upon, instead of listing all issues again, to avoid the court finding that the initial motion was simply recaptioned as a virtually identical Rule 59(e) motion. To be safe, a party who files a second post trial motion in the form of a Rule 59(e) motion might want to ask the trial court to act expediently in consideration of its Rule 59(e) motion because if it is ineffective, the party might still file a timely notice of appeal.

Third, a party must file a Rule 59(e) motion when the trial court's order regarding the initial motion brings new issues to light, as it did in *Elam*.[129] The party must challenge or raise an issue that was altered from the original judgment as a result of the order granting or denying the initial post trial motion in order to

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123. *See* Carpenter, *supra* note 1, at 17.

124. S.C. App. Ct. R. 203(b)(1).

125. *See Elam*, 361 S.C. at 19–20, 302 S.E.2d at 777–78 (citing Sears v. Sears, 422 N.E.2d 610 (Ill. 1981)).

126. *See id.* at 23, 602 S.E.2d at 779–80; *see also* Talley v. S.C. Higher Educ. Tuition Grants Comm., 289 S.C. 483, 487, 347 S.E.2d 99, 101 (1986) (holding that issue raised in the lower court but not ruled on by trial judge was not preserved because plaintiff did not bring post trial motion to alter or amend the judgment).

127. Carpenter, *supra* note 1, at 17 (citing Flavor-Inn, Inc. v. NCNB Nat'l Bank of S.C., 309 S.C. 508, 424 S.E.2d 534 (Ct. App. 1992)).

128. *Elam*, 361 S.C. at 26, 602 S.E.2d at 780.

129. *See id.* at 25–26, 602 S.E.2d at 781 (arguing the trial court misapplied the appropriate standard of notice in denying the JNOV motion).

preserve that issue for appeal.[130] If a party does so, then the motion will be considered proper and will toll the time for filing the notice of appeal. However, a party cannot file a successive Rule 59(e) motion simply because they are displeased that the trial court denied their initial post trial motion or because they are "hoping for a change of heart."[131]

Finally, a party may wish to file a Rule 59(e) motion when it believes that the trial court, while ruling on an issue in its initial post trial motion, misunderstood the issue raised in the initial motion.[132] It is important to note, however, that the *Elam* court did not address this particular situation or cite examples in which it might apply. A party should exercise a great deal of caution when bringing a Rule 59(e) motion based on this scenario. If a party raises this issue in a Rule 59(e) motion, and the trial court finds that the party was really just resubmitting the same issue that it had presented in its initial motion, it is likely that the trial court will consider the motion improper and the notice of appeal will not be tolled.[133] Clearly, a party will encounter a less defined standard of law if they raise an issue in a successive motion claiming that the trial court did not understand the argument that it ruled on in the initial post trial motion. This approach appears to be more acceptable when a Rule 59(e) motion constitutes the initial post trial motion and the party is requesting the trial court to "'reconsider matters properly encompassed in a decision on the merits.'"[134]

VI. CONCLUSION

South Carolina lawyers have an important responsibility to determine whether a Rule 59(e) motion or a notice of appeal is appropriate under the facts of the case. Unfortunately, this responsibility is a double-edged sword. On one side, if a party chooses to bring a Rule 59(e) motion, it must take into account all of the factors the appellate court might look at in determining whether the motion is proper. If the appellate court finds a Rule 59(e) motion is improper, then the motion will not toll the time for appeal likely resulting in an appeal being dismissed because the notice of appeal was filed more than thirty days after issuance of the order regarding the initial post trial motion. On the other edge of the sword, if a party simply decides to appeal after its initial post trial motion is denied, it runs the risk of not preserving all the issues raised in the initial post trial motion because the trial court did not explicitly rule on them.

While the South Carolina Supreme Court in *Elam* did not explicitly state a concrete standard governing effectiveness of Rule 59(e) motion, after careful review of the rationales and holdings, a lawyer should be able to more clearly identify what factors a trial court will now look at to determine whether a Rule 59(e) motion is effective for staying the time for notice of appeal. Moreover, a lawyer in South Carolina now knows that the court should operate under the presumption that a Rule

130. Coward Hund Constr. Co. v. Ball Corp., 336 S.C. 1, 3, 518 S.E.2d 56, 58 (Ct. App. 1999).

131. *See* Sears v. Sears, 422 N.E.2d 610, 612 (Ill. 1981).

132. *Elam*, 361 S.C. at 24, 602 S.E.2d at 780.

133. *See supra* Part III.B.

134. Arnold v. State, 309 S.C. 157, 172–73, 420 S.E.2d 834, 842 (1992) (quoting Budinich v. Becton Dickinson and Co., 486 U.S. 196, 200 (1988)).

59(e) motion is valid unless the exceptions noted in *Elam* arise. It is important that an attorney, who knows that his party's successive Rule 59(e) motion will fall under these exceptions, not recaption or redraft this motion so that the substance is disguised under a new caption. The *Elam* opinion should be referred to by all attorneys who choose to file a successive Rule 59(e) motion in order to present their client with an opportunity to appeal all of the issues initially raised before the trial court. While there is a presumption in favor of finding successive Rule 59(e) motions proper, *Elam* and the cases that it affirmed clearly show the courts will not tolerate using a Rule 59(e) motion as a disguise for raising the same exact issues ruled upon in the initial post trial motion.

T. Cory Ezzell