REL: December 4, 2020

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2020-2021

2190280

Leonard Pettiway

v.

Wexford Health Sources, Inc.

Appeal from Marion Circuit Court
(CV-19-900112)

PER CURIAM.

Leonard Pettiway, a state inmate who resided at the Hamilton Aged and Infirmed Center ("HAIC"), appeals from a summary judgment entered

by the Marion Circuit Court ("the trial court") in favor of Wexford Health Sources, Inc. ("Wexford"), on Pettiway's claims alleging negligence arising from Wexford's provision of health-care services at HAIC. Because Pettiway was not served with a copy of Wexford's summary-judgment motion, we reverse the judgment of the trial court and remand the cause for further proceedings consistent with this opinion.

On July 8, 2019, Pettiway, acting pro se, filed a complaint in the trial court against Wexford and Steven Sealy, a nurse employed by Wexford at HAIC. Pettiway alleged that on March 31, 2019, Sealy had negligently removed a bandage from Pettiway's body, which act, Pettiway contended, had caused "the skin [to be] violently ... ripped off [Pettiway's buttocks], causing excessive bleeding ... and public humiliation." With regard to Wexford, Pettiway specifically alleged that "[Wexford had] negligently failed to obtain the testimony of [a Wexford employee] and [an employee] of the Alabama [Department of Corrections] to verify the act of medical malpractice Pettiway received during medical treatment [on] March 31[,] 2019." Pettiway's complaint included a demand for $25,000 in compensatory and punitive damages.

On November 4, 2019, Wexford filed a motion for a summary judgment as to all claims asserted against it. The motion included a certificate of service, electronically signed by counsel for Wexford, which stated as follows:

> "I hereby certify that on November 4, 2019, I electronically filed the foregoing with the Clerk of the Court using the Ala-file system, which will send electronic notification of such filing to the following:
>
> "Leonard Pettiway ....
> Hamilton A&I Infirmary
> 223 Sasser Drive
> Hamilton, AL 35570"

On November 7, 2019, the trial court issued an order setting Wexford's motion for a summary judgment for a hearing on December 6, 2019. A copy of the order setting the hearing date was mailed to Pettiway, and it is undisputed that he received that order. On November 13, 2019, Pettiway filed a motion for a "transport order" seeking leave to attend the December 6, 2019, summary-judgment hearing; that motion was granted, and Pettiway appeared in person at the December 6, 2019, summary-judgment hearing.

At the hearing, Pettiway informed the trial court that he had not received a copy of Wexford's summary-judgment motion.[1] The trial court noted that Pettiway's correct address had been listed on the certificate of service included in the summary-judgment motion and inquired of counsel for Wexford whether a copy of the motion had been sent to Pettiway. Although counsel for Wexford initially stated that he believed that a copy of the summary-judgment motion had been sent to Pettiway, he ultimately conceded: "I don't know whether, in fact, it was sent at all." Nevertheless, the trial court concluded that the certificate of service constituted proof that the summary-judgment motion had been sent via mail to Pettiway. The trial court observed:

> "[Counsel for Wexford] signs this thing on a Certificate of Service, so I have no doubt that it was placed in the mail addressed to you, and the address they used is the address that you have on the complaint with the clerk's office. So you may want to talk to the folks in the mail room over there at [HAIC] to make sure that they're giving you your legal paperwork."

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[1]Pettiway admitted to the trial court that he had received notice of the summary-judgment hearing, but he indicated that he had interpreted that document as a notice "to come to trial."

On December 9, 2019, the trial court entered a summary judgment in favor of Wexford on Pettiway's claims. Because Pettiway's claims against Sealy remained pending, the trial court directed the entry of a final judgment as to that ruling pursuant to Rule 54(b), Ala. R. Civ. P. No postjudgment motion was filed.[2] Pettiway timely filed a notice of appeal on December 27, 2019.[3]

On appeal, Pettiway argues that he was never provided with a copy of Wexford's summary-judgment motion and contends that granting that motion was, therefore, inconsistent with his right to procedural due process as guaranteed by the Fourteenth Amendment to the United States

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[2]On March 16, 2020, Pettiway filed a motion in this court seeking leave to file a motion in the trial court pursuant to Rule 60(b), Ala. R. Civ. P.; this court granted Pettiway's motion. The status of any Rule 60(b) motion thereafter filed by Pettiway does not appear in the appellate record, although Pettiway's brief to this court asserts that he did file such a motion and that his motion was denied.

[3]Pettiway also named Sealy as an appellee in his notice of appeal from the summary judgment entered in favor of Wexford. However, at the time that notice of appeal was filed, no judgment had been entered as to the claims asserted against Sealy, and this court accordingly dismissed Sealy as an appellee. Although it appears from the record in this appeal that the trial court entered a summary judgment in favor of Sealy on February 24, 2020, the record does not indicate whether Pettiway appealed from that judgment.

Constitution and Article I, § 6, of the Alabama Constitution of 1901. This court has considered similar contentions on at least two occasions.

In Morris v. Glenn, 154 So. 3d 1055 (Ala. Civ. App. 2014), an inmate in the state correctional system filed a legal-services-liability action against his former attorney. The attorney filed two motions to dismiss the action, neither of which bore a certificate of service indicating that the inmate had been served with a copy of the motion. The trial court in Morris granted the second motion to dismiss. The inmate filed a postjudgment motion asserting that he had not been properly served with a copy of the second motion to dismiss and arguing that the judgment had been entered in a manner inconsistent with due process. The inmate's postjudgment motion was denied, and the inmate appealed. On appeal, this court agreed that the judgment was due to be reversed on due-process grounds. We reasoned:

> "In Ex parte Weeks, 611 So. 2d 259 (Ala. 1992), our supreme court explained:
>
> > " 'Procedural due process, as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, § 6, of the Alabama Constitution of 1901, broadly speaking,

> contemplates the rudimentary requirements of fair play, which include a fair and open hearing before a legally constituted court or other authority, with notice and the opportunity to present evidence and argument, representation by counsel, if desired, and information as to the claims of the opposing party, with reasonable opportunity to controvert them.'

"611 So. 2d at 261. The right to be heard and to present objections 'has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.' Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950).

"To satisfy constitutional standards, notice must be 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' Id. Notice must also be 'of such nature as reasonably to convey the required information,' and 'it must afford a reasonable time for those interested to make their appearance.' Id. Whether the notice be ' "that an action has commenced or that the moving party has added a new or additional claim for relief ..., the need for notice is the same." ' Austin v. Austin, [159 So. 3d 753, 758] (Ala. Civ. App. 2013) (quoting Varnes v. Local 91, Glass Bottle Blowers Ass'n of United States & Canada, 674 F.2d 1365, 1368 (11th Cir. 1982)).

"Service of written notice is 'the classic form of notice' and is 'always adequate in any type of proceeding.' Mullane, 339 U.S. at 313. Rule 5(a), Ala. R. Civ. P., provides that 'every written motion other than one which may be heard ex parte, and every written notice, ... shall be served upon each of the

parties' unless the rules provide otherwise. We note that Rule 5(d), Ala. R. Civ. P., requires a certificate of service to be included on '[a]ll papers after the complaint required to be served upon a party' and that the 'certificate of service shall list the names and addresses, including the e-mail addresses of registered electronic-filing-system users, if known, of all attorneys or pro se parties upon whom the paper has been served.'

"In Woodruff v. City of Tuscaloosa, 101 So. 3d 749 (Ala. 2012), our supreme court stated:

> " '[D]ue-process requirements could prevent a trial court from ruling on a motion that had not been properly served in accordance with Rule 5, even though personal jurisdiction over the parties had been established. See, e.g., Neal v. Neal, 856 So. 2d 766, 782 (Ala. 2002) (stating that a person already made a party to litigation could, "on some critical motion or for some critical proceeding within that litigation," be deprived of the due process required by the Fourteenth Amendment to the United States Constitution if he or she is not provided with "notice, a hearing according to that notice, and a judgment entered in accordance with such notice and hearing").'

"101 So. 3d at 752. Thus, the failure to serve a motion in accordance with Rule 5 might result in a violation of an opposing party's due-process rights and can render a judgment entered pursuant to the motion void. See Pirtek USA, LLC v. Whitehead, 51 So. 3d 291, 295 (Ala. 2010) (quoting Orix Fin. Servs., Inc. v. Murphy, 9 So. 3d 1241, 1244 (Ala. 2008), quoting in turn Ins. Mgmt. & Admin., Inc. v. Palomar Ins. Corp., 590 So. 2d 209, 212 (Ala. 1991)) (' " 'A judgment is void ... if the

court rendering it ... acted in a manner inconsistent with due process.' " ').

"Our supreme court has recognized that the failure to serve a motion or other paper in compliance with Rule 5(a) will not always result in a due-process violation. See Woodruff, 101 So. 3d at 752–53 (holding that the trial court did not violate due process in considering the defendant's motion to dismiss because the defendant had corrected its error in not serving its motion to dismiss on the plaintiff and because the plaintiff had received adequate time to consider and respond to the arguments made in the motion). But, in this case, we hold that [the inmate] has been deprived of due process.

"The trial court considered [the attorney]'s May 10, 2013, motion to dismiss without any notice being provided to [the inmate], and it dismissed the action on the ground alleged in [the attorney]'s motion without affording [the inmate] an opportunity to respond. Because [the attorney]'s May 10 motion had not been properly served in accordance with Rule 5 and because the record does not indicate that [the inmate] was provided with notice of [the attorney]'s motion, principles of due process required the trial court to refrain from ruling on the motion. We conclude that the judgment dismissing the action is void because it is inconsistent with due process. See Pirtek USA, LLC, supra.

"[The inmate]'s claim might lack merit, but the process followed in this case does not permit the claim to be dismissed under the existing circumstances. We, therefore, reverse the trial court's judgment and remand the cause to the trial court."

154 So. 3d at 1057-59.

In Holt v. Limestone County Department of Human Resources, 226 So. 3d 201 (Ala. Civ. App. 2016), Harold Holt, another inmate in the state correctional system acting pro se, brought an action against the Limestone County Department of Human Resources alleging that that agency had unlawfully required him to pay child support. The agency moved to dismiss the complaint. The motion to dismiss contained a certificate of service asserting that all parties of record had been served with a copy of the motion electronically or by United States mail. The certificate of service, however, did not specifically identify the inmate as a party to be served. The trial court in Holt set the motion to dismiss for a hearing. The inmate then filed a paper in the trial court arguing that he had not received a copy of the motion to dismiss and that requiring him to defend against the motion in the absence of notice would violate his right to procedural due process. The inmate also moved for an order directing that he be transported to the hearing on the agency's motion to dismiss, but the trial court declined to require transportation of the inmate. The trial court in Holt conducted the hearing on the motion to dismiss and granted the motion, dismissing the inmate's claims with prejudice.

On appeal, this court reversed the judgment of the trial court. Citing Morris, this court reasoned:

> "The record in this case indicates a similar denial of proper service of a motion to dismiss and of an absence of meaningful notice of the grounds stated in a defendant's motion. Although the record in this case indicates that the Limestone County DHR's motion to dismiss differed from the motions to dismiss filed in Morris because the Limestone County DHR did include some form of certificate of service, that certificate did not comply with Rule 5(d), Ala. R. Civ. P., which, as we noted in Morris, mandates that a party who files any paper after the initial complaint must specifically identify the intended recipients of service of that paper by listing each recipient's name and address in the required certificate of service. Here, the Limestone County DHR's assertion that it did serve Holt despite not having listed him in the certificate of service was refuted by Holt's June 20, 2016, filing in which he denied receipt of the motion to dismiss and asserted a denial of due process thereby even though he acknowledged in that filing that he had received notice from the trial court that that court had scheduled a hearing on that motion. Notwithstanding Holt's incarcerated status; his assertions in his June 20, 2016, filing that he had no effective means of countering the stated grounds for dismissal without being provided a copy of the motion that had asserted them; and the absence of any other filing on Holt's part making a substantive response to the grounds asserted by the Limestone County DHR in its motion to dismiss, the trial court entered an order dismissing the complaint 'with prejudice,' which amounts to an adjudication on the merits so as to bar Holt from ever maintaining his claim, see Calhoun v. Pennsylvania Nat'l Mut. Cas. Ins. Co., 676 So. 2d 1332, 1334 (Ala. Civ. App. 1996). Under the circumstances of this case, we conclude that our

> holding in Morris with regard to due process precludes our affirmance of the trial court's judgment of dismissal."

226 So. 3d at 205.

In this case, we note that, unlike the dispositive motions filed in Morris and Holt, Wexford's summary-judgment motion contained a certificate of service that listed Pettiway's name and set forth his correct address, and the trial court relied upon the contents of that certificate of service in concluding that the motion had been mailed to Pettiway. Notably, however, the certificate of service did not actually contain a certification that the motion had been mailed to Pettiway. Rather, counsel for Wexford merely certified that the motion had been "electronically filed ... with the Clerk of the Court using the Ala-file system." Whether or not the Alafile system -- Alabama's system for Internet-based service and filing -- actually provides electronic service of a filing to a particular party, however, depends on whether the party to be served is a registered user of the Alafile system.[4] In this case, the

[4]The Administrative Policies and Procedures for Electronic Filing in the Civil Divisions of the Alabama Unified Judicial System, promulgated by the Administrative Director of Courts pursuant to Rule 44, Ala. R. Jud.

appellate record suggests that Pettiway was not a registered user of the

Admin., provides:

> "Whenever a pleading or other paper is filed electronically in accordance with these policies and procedures, the system shall generate a 'notice of electronic filing' to the e-mail address of record of the filing party and any attorneys of record or pro se parties in the case who are users of the system and who are required to be served by the Alabama Rules of Civil Procedure. The email will include an attachment with a copy of the 'notice of electronic filing' and the document that was filed electronically.
>
> "If the attorney or party is a user of the system, the e-mailing of the 'notice of electronic filing' by the system shall constitute service of the pleading or other paper.
>
> "A party who is not a registered participant of the system is entitled to a paper copy of any electronically filed pleading, document, or order. The filing party must therefore provide the nonregistered party with the pleading, document, or order according to the Alabama Rules of Civil Procedure. After the document is filed electronically, the user will receive an email from the system with an attachment containing the 'notice of electronic filing' and a copy of the document electronically filed for service on the non-registered party(s).
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> "To determine whether another party is a registered user, the filer can enter the case number, select the notification tab and notification information will appear, stating whether or not the filer must mail a copy or if the system will electronically generate notice."

(Emphasis added).

Alafile system. Thus, a paper copy of Wexford's summary-judgment motion should have been mailed by Wexford to Pettiway, and electronic filing of the document did not equate to service upon Pettiway. The certificate of service affixed to the summary-judgment motion in this case, therefore, did not actually "certify" service. Accordingly, the trial court's reliance on the certificate of service as proof of mailing was misplaced, especially in light of Pettiway's denial that he had received the summary-judgment motion and counsel for Wexford's acknowledgment that a copy of the motion might not have been sent to Pettiway.

To be sure, our supreme court has recognized that "it is generally held in Alabama that a party is under a duty to follow the status of his case, whether he is represented by counsel or acting pro se." Ex parte Weeks, 611 So. 2d 259, 262 (Ala. 1992). Furthermore, we recognize that, under certain circumstances, a nonmoving party's decision to willingly participate in a hearing on a summary-judgment motion that the nonparty has not been served with might be deemed a waiver of the service and notice requirements of Rule 5(a) and Rule 56(c), Ala. R. Civ. P. See, e.g., Van Knight v. Smoker, 778 So. 2d 801, 805 (Ala. 2000) (noting that "the

nonmoving party may waive the requirements of notice and hearing"). Nevertheless, based on the particular facts before us, we decline to conclude that, as a matter of law, Pettiway waived his right to service of Wexford's summary-judgment motion.[5] Rather, based on the foregoing facts and authorities, we conclude that requiring Pettiway to refute the merits of Wexford's summary-judgment motion without first affording him a copy of that motion and a reasonable opportunity to respond to the specific arguments made therein is contrary to our rules of civil procedure and the principles of procedural due process.

Accordingly, we reverse the judgment entered in favor of Wexford, and we remand the cause with instructions that Pettiway be properly served with a copy of Wexford's summary-judgment motion and be afforded an opportunity to respond to the arguments raised by Wexford therein. We emphasize that our reversal should not be interpreted as addressing in any way the merits of Wexford's arguments or, indeed, of Pettiway's claims. Further, because our conclusion regarding Pettiway's

[5]Wexford has not taken the position that Pettiway waived his right to service of the its summary-judgment motion.

entitlement to notice is dispositive, we pretermit consideration of other issues Pettiway has raised in this appeal.

REVERSED AND REMANDED WITH INSTRUCTIONS.

Thompson, P.J., and Donaldson, Edwards, and Hanson, JJ., concur.

Moore, J., concurs in the result, without writing.