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# ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2021-2022

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Scott McDonald

v.

Across the Pond, Inc.

Appeal from Madison Circuit Court  
(CV-20-26)

EDWARDS, Judge.

Scott McDonald appeals from a judgment entered by the Madison Circuit Court ("the circuit court") dismissing his action against Across the Pond, Inc., an Alabama corporation, on the ground of lack of jurisdiction.

We reverse and remand.

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On May 15, 2019, McDonald, appearing pro se, filed a complaint against Across the Pond in the small-claims division of the Madison District Court ("the district court"); that action was assigned case number SM-19-373 ("the first district-court action"). McDonald alleged that he was entitled to \$1,500 as damages because Across the Pond allegedly had failed to deliver to him "the product that was select[ed] and the product that was delivered [was] defective beyond use."

On May 22, 2019, Across the Pond, which appeared without counsel, see Ala. Code 1975, § 12-12-31(b), filed an answer denying that it was liable to McDonald. A trial was set for October 8, 2019, and, on that date, the district court entered an "Order of Dismissal." That order stated that McDonald had failed to appear for trial and "that any remaining claims, not previously adjudicated herein are dismissed without prejudice." See Rule N, Ala. Small Cl. R. (discussing the applicability of the Alabama Rules of Civil Procedure in cases in the small-claims division of a district court); Rule 41(b), Ala. R. Civ. P. (stating that a dismissal "[f]or failure of the plaintiff to prosecute" "operates as an adjudication upon the merits," "[u]nless the court in its order for dismissal otherwise specifies"); see also

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Palughi v. Dow, 659 So. 2d 112, 113 (Ala. 1995) ("[T]he words 'without prejudice,' when used in an order, 'mean that there is no decision of the controversy on its merits, and [that an order containing those words] leaves the whole subject in litigation as much open to another suit as if no suit had ever been brought.' Vacalis v. Lowry, 279 Ala. 264, 267, 184 So. 2d 345, 347-48 (1966).").<sup>1</sup>

On October 10, 2019, McDonald filed a purported postjudgment motion in the first district-court action. See Walker Bros. Inv., Inc. v. City of Mobile, 252 So. 3d 57, 62 (Ala. 2017) ("Motions filed pursuant to Rule 60(b)[, Ala. R. Civ. P.,] and Rule 59[, Ala. R. Civ. P.,] ... may be filed only in reference to a final judgment."); Palughi, 659 So. 2d at 113 (stating that, when an action has been dismissed without prejudice, "there is no final judgment upon which to base an appeal"). McDonald requested that the October 2019 order of dismissal be set aside on the ground that he had failed to appear at trial because his brother had died on October 7, 2019, and he had been charged with handling his deceased brother's affairs.

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<sup>1</sup>No previous order adjudicating McDonald's claim had been entered by the district court in the first district-court action.

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Across the Pond filed a response opposing McDonald's purported postjudgment motion. On October 15, 2019, the district court entered an order in the first district-court action purportedly denying McDonald's purported postjudgment motion and stating: "The Court notes that the earlier dismissal is without prejudice and, further, that [McDonald] has a right to appeal." But see Palughi, supra.

On October 21, 2019, McDonald, appearing pro se, filed a new complaint against Across the Pond in the district court; that action was assigned case number SM-19-852 ("the second district-court action"). In his complaint, McDonald alleged that Across the Pond had engaged in unlawful business practices under the Deceptive Trade Practices Act ("the Act"), Ala. Code 1975, § 8-19-1 et seq., and that he was entitled to \$6,000 as damages.<sup>2</sup> McDonald also alleged that Across the Pond had provided

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<sup>2</sup>Section 8-19-10(a), Ala. Code 1975, authorizes a private right of action against a person who commits an act in violation of the Act. Such an action "may be brought in the circuit court for the county in which the defendant resides, has his or her principal place of business, is doing business, or committed the unlawful act or practice." § 8-19-10(c). However, the small-claims division of a district court "shall exercise exclusive jurisdiction over all civil actions in which the matter in controversy, exclusive of interest and costs, does not exceed six thousand

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landscaping services and that, in April 2019, he had ordered retaining-wall blocks and caps from Across the Pond for his use at his residence. According to McDonald, Across the Pond had made misrepresentations to him regarding the brand of blocks he would receive. In addition, McDonald alleged that Across the Pond had delivered damaged or unusable blocks and unusable landscape adhesive to him. McDonald alleged further that, on May 10, 2019, he had sent Across the Pond a demand letter regarding his complaints but that Across the Pond had refused to correct the alleged problems. See Ala. Code 1975, § 8-19-10(e). Thereafter, according to McDonald, he had purchased the blocks he needed to complete his retaining wall from another provider.

Across the Pond, again appearing without counsel, filed an answer in the second district-court action. Across the Pond denied that it was liable to McDonald and alleged, as affirmative defenses, that the

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dollars (\$6,000)." Ala. Code 1975, § 12-12-31(a). In light of the use of the word "may" in § 8-19-10(c), we do not read the Act as providing for exclusive jurisdiction in the circuit court when the private right of action under the Act also satisfies the requirements for the exercise of jurisdiction by the district court.

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complaint failed to state a claim against it; that McDonald was barred from recovery based on the dismissal of the first district-court action for lack of prosecution and on the grounds of res judicata or collateral estoppel; and that McDonald had failed to timely appeal from the judgment entered in the first district-court action.

After ore tenus proceedings, the district court entered a judgment in the second district-court action on March 9, 2020, in favor of Across the Pond and against McDonald as to all of his claims. The March 2020 judgment stated:

"The Court heard sworn, ore tenus evidence from both parties and another witness from [McDonald]. After giving much consideration to the testimony as well as the documents entered into evidence the Court finds in favor of [Across the Pond] and against [McDonald] and hereby enters judgment in favor of [Across the Pond] ....

"... This matter is closed. [McDonald] does have a right to appeal."

On March 13, 2020, McDonald appealed to the circuit court for a trial de novo. See Rule M., Ala. Small Cl. R. ("A judgment may be appealed to the circuit court by the filing of a notice of appeal in the office of the clerk of the small claims court within 14 days from the date of the

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judgment ...."); see also Ala. Code 1975, § 12-12-71 (stating that, subject to certain exceptions not applicable in the present case, "all appeals from final judgments of the district court shall be to the circuit court for trial de novo"); Ball v. Jones, 272 Ala. 305, 309, 132 So. 2d 120, 122 (1961) ("A trial de novo, within the common acceptance of that term, means that the case shall be tried in the Circuit Court as if it had not been tried before, and that that court may substitute its own findings and judgment for that of the lower tribunal."); Louisville & Nashville R.R. Co. v. Lancaster, 121 Ala. 471, 473, 25 So. 733, 735 (1899) (noting that an appeal for a trial de novo "operates to annul and vacate" the previous judgment).

On May 28, 2020, the circuit court entered an order referring the case to mediation. Across the Pond, which by then had retained counsel, filed a motion objecting to that order. Across the Pond alleged that McDonald's claims against it were based on the same allegations that he had made in the first district-court action, which had been

"dismissed on or about October 8, 2019, for lack of prosecution as a result of [McDonald's] failure to appear at the call of the docket (and trial) of the proceeding, coupled with his failure to advise the [district court] in advance as to a reason why he did not appear at the call of the docket."

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Across the Pond further alleged that McDonald had filed a postjudgment motion seeking the reinstatement of the first district-court action and that that motion had been denied. Across the Pond argued that McDonald's claims had been adjudicated on the merits adversely to McDonald, that McDonald was due no damages from Across the Pond, and that mediation was unwarranted. Across the Pond requested that the circuit court withdraw the mediation-referral order or, in the alternative, order McDonald to pay all costs and expenses associated with any mediation.

On June 22, 2020, the circuit court entered an order withdrawing the mediation-referral order. On February 17, 2021, McDonald filed an amended complaint in the circuit court, adding claims alleging breach of contract and breach of express and implied warranties. On March 14, 2021, Across the Pond filed a motion to dismiss McDonald's claims on the grounds of res judicata or collateral estoppel. Across the Pond asserted that the claims alleged in the circuit-court action were based on the same transactions and occurrences that had been alleged in the first district-court action; that, pursuant to Rule 41(b), Ala. R. Civ. P., the dismissal of the first district-court action had been an adjudication on the merits; and



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that McDonald had failed to appeal from that judgment. Across the Pond further asserted that the circuit-court action was due to be dismissed for lack of subject-matter jurisdiction, based on McDonald's purported failure to file a timely appeal from the October 2019 order of dismissal entered in the first district-court action. Across the Pond also noted that it had raised the issue of McDonald's failure to appeal from the order of dismissal entered in the first district-court action in the second district-court action.

McDonald filed a response in opposition to Across the Pond's motion to dismiss, which he subsequently amended. McDonald argued that there was no jurisdictional defect as to the circuit-court action. He also noted that his appeal was from the judgment entered in the second district-court action, that the record of the proceedings in the first district-court action were not before the circuit court, that the complaint in the second district-court action had made no reference to the first district-court action, and that the judgment entered in the second district-court action, which addressed the merits of his claims rather than dismissing them, must be presumed correct for purposes of Across the Pond's motion to dismiss.

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McDonald also noted that Across the Pond had made no evidentiary submission that would support the factual contentions it had made in its motion to dismiss and that those factual contentions were in addition to the factual allegations made in his complaint, as amended. Further, McDonald contended that the first district-court action had been dismissed "without prejudice," which McDonald described as a "pivotal fact" that Across the Pond had omitted from the facts alleged in its motion to dismiss, and he contended that the motion to dismiss should be treated as a motion for a summary judgment because it required consideration of matters outside the pleadings. In support of his contentions, McDonald attached a copy of the October 2019 order of dismissal entered in the first district-court action.

At the hearing on Across the Pond's motion to dismiss, McDonald argued that Across the Pond should be required to pay the requisite filing fee for a motion for a summary judgment. Counsel for Across the Pond apparently responded by insisting that Across the Pond was not seeking a summary judgment and, thus, that it was unnecessary to pay that fee, and the circuit court apparently agreed with that contention. Also, on the

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day of the hearing on Across the Pond's motion to dismiss, Across the Pond submitted documents to the circuit court, including copies of the above-discussed documents filed in the first district-court action and in the second district-court action. Across the Pond also filed a motion requesting an award of attorney fees under the Alabama Litigation Accountability Act, Ala. Code 1975, § 12-19-270 et seq. In that motion, Across the Pond alleged that it had not sought a summary judgment but, rather, had sought a dismissal of the circuit-court action on the basis that the facts were undisputed and the circuit court lacked jurisdiction because McDonald had failed to timely appeal from the October 2019 order of dismissal entered in the first district-court action.

On May 10, 2021, the circuit court entered the following judgment:

"This cause came before the Court for hearing on the MOTION TO DISMISS filed by ACROSS THE POND .... After considering the history of litigation between the parties, the arguments of the parties, the parties' filings, and the applicable authorities, the Court finds that the motion is due to be, and the same is hereby, GRANTED. Accordingly, it is hereby ORDERED, ADJUDGED AND DECREED as follows:

"1. As a result of [McDonald's] failure to exercise his right to appeal the final order in [the first district-court

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action], this cause is DISMISSED FOR LACK OF JURISDICTION.

"2. All other requests for relief are DENIED.

"3. Costs are taxed as paid."

(Capitalization in original.)

On the day that the circuit court entered the May 2021 judgment, McDonald filed a postjudgment motion; the following day, Across the Pond filed a postjudgment motion "renewing" its request for attorney fees and opposing McDonald's postjudgment motion. On May 17, 2021, McDonald filed a notice of appeal to this court. That notice of appeal was held in abeyance, pursuant to Rule 4(a)(5), Ala. R. App. P. The appeal quickened after the postjudgment motions were denied by operation of law. See Rule 59.1, Ala. R. Civ. P.

McDonald argues that the circuit court erred by concluding that his action was due to be dismissed for lack of jurisdiction. He also argues that the alternative grounds of res judicata or collateral estoppel, which the trial court did not address, do not support the May 2021 judgment. We agree.

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As the supreme court stated in Lloyd Noland Foundation, Inc. v. HealthSouth Corp., 979 So. 2d 784, 791 (Ala. 2007), appellate courts review a dismissal pursuant to Rule 12(b), Ala. R. Civ. P., without a presumption of correctness. Also, when a motion to dismiss is based on a purported lack of jurisdiction, that motion "is a 'speaking' motion that may be supported or opposed by materials outside the complaint, i.e., '[e]videntiary matters may be freely submitted on a motion to dismiss that attacks jurisdiction.'" Hutchinson v. Miller, 962 So. 2d 884, 886 n.2 (Ala. Civ. App. 2007) (quoting Williams v. Skysite Commc'ns Corp., 781 So. 2d 241, 245 (Ala. Civ. App. 2000)).

The October 2019 order of dismissal entered in the first district-court action plainly states that the dismissal was without prejudice. As noted in the authorities cited at the outset of this opinion, namely Palughi and Walker Bros., such an order is not a final judgment that will support an appeal or a postjudgment motion. The district court's subsequent ruling on McDonald's purported postjudgment motion, referencing McDonald's having a right to appeal from that judgment, reflected an erroneous legal conclusion.

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The circuit court erred by concluding that it lacked jurisdiction over McDonald's appeal for a trial de novo from the May 2020 judgment entered in the second district-court action because McDonald had failed to appeal from the October 2019 order of dismissal entered in the first district-court action. The order of dismissal entered in the first district-court action would not have supported an appeal. See Palughi, supra. Likewise, we cannot affirm the circuit court's May 2021 judgment on the alternative grounds of res judicata or collateral estoppel because the October 2019 order of dismissal was not a judgment on the merits. See, e.g., Smith v. Union Bank & Tr. Co., 653 So. 2d 933, 935 (Ala. 1995) ("In dismissing the previous action without prejudice, the trial court was not adjudicating the merits of the action, and its order of dismissal therefore could not be given res judicata effect. ... Further, because the dismissal was without prejudice, there was no 'actual litigation' for the purposes of collateral estoppel.").<sup>3</sup>

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<sup>3</sup>McDonald has also requested that this court direct Across the Pond to pay the filing fee applicable to a motion for a summary judgment. See Ala. Code 1975, 12-19-71(a)(10). Because we have decided this appeal based on the materials submitted in support of or in opposition to a

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Based on the foregoing, the circuit court's May 2021 judgment is hereby reversed, and this case is remanded to the circuit court for proceedings consistent with this opinion.

**REVERSED AND REMANDED WITH INSTRUCTIONS.**

Thompson, P.J., and Moore, Hanson, and Fridy, JJ., concur.

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speaking motion to dismiss based on a lack of jurisdiction, we need not address that issue.