Rel: October 21, 2022

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2022-2023

2210294 and 2210304

J.N.M.-R.

v.

M.D.L.-C.

Appeals from Baldwin Circuit Court
(DR-18-901255 and DR-21-900030)

PER CURIAM.

J.N.M.-R. ("the father") appeals from two judgments entered by the Baldwin Circuit Court ("the trial court") -- one denying his Rule 60(b)(4), Ala. R. Civ. P., motion to set aside a contempt order and a writ for his arrest for violating a protection-from-abuse judgment and the other

denying his Rule 60(b)(1), Ala. R. Civ. P., motion to set aside a custody judgment entered in a separate action. For the reasons set forth herein, we reverse the judgment denying the Rule 60(b)(4) motion and affirm the judgment denying the Rule 60(b)(1) motion.

Background

M.D.L.-C. ("the mother") and the father had a long-term relationship, but they have never been married to each other. On September 25, 2018, the mother filed a completed form petition seeking an order of protection from abuse ("PFA") against the father, asking the trial court to prohibit the father from having any contact with her, the four children that they have together, the mother's oldest child (who is not the father's child), and certain other members of the mother's family. The trial court designated the PFA action as case no. DR-18-901255. The trial court entered an initial PFA order on September 26, 2018, and set the matter for a final hearing.

On November 7, 2018, the trial court entered a judgment in the PFA action ("the PFA judgment"), which was to remain in effect until further order of the court, restraining the father from having any contact with the mother and her children. The PFA judgment also ordered the father

to return all the children to the mother's custody and directed the Baldwin County sheriff's office to assist the mother in securing the return of the children, if necessary.

On February 28, 2020, the mother filed a handwritten document in the trial-court clerk's office stating that she "wanted to press charges" against the father because he had not returned the children and was in violation of the PFA judgment. She also asked that the PFA judgment be modified to include a statement directing law-enforcement officials in Montgomery to assist her with securing the return of her children.

The trial court treated the mother's handwritten letter as a motion for contempt against the father. On March 10, 2020, after an ore tenus hearing, the trial court entered a judgment ("the contempt judgment") finding the father in criminal contempt for violating the PFA judgment. Specifically, the trial court found that the father had had contact with two of the mother's children, including her oldest child, and had "taken them from the lawful custody of the [mother] and [had] secreted them away." The trial court sentenced the father to five days in jail for each child.

In the contempt judgment, the trial court stated that the father was believed to be in Montgomery and ordered law-enforcement officials in any jurisdiction where the father was located to assist the mother in "procuring the return" of the two children to the mother. The trial court further directed that the father be taken into custody for violating the PFA judgment if he was found in the children's presence. A year later, on March 1, 2021, the trial court issued a writ for the father's arrest to serve the jail time ordered in the contempt judgment.

On December 3, 2021, nine months after the arrest warrant was issued and about a year and nine months after the trial court entered the contempt judgment, the father filed a motion pursuant to Rule 60(b)(4), Ala. R. Civ. P., seeking to set aside the contempt judgment and the writ for his arrest. The father argued that because the mother had not paid a filing fee or commenced a new action for contempt, the trial court had not acquired subject-matter jurisdiction over her contempt claim. On December 6, 2021, the trial court denied the father's Rule 60(b)(4) motion.

Separately, on January 8, 2021, the mother filed in the trial court a petition for custody of the four children that she had had with the father. The trial-court clerk's office designated that action as case no. DR-

21-900030. At the time the mother filed the custody petition, the parties' four children were nine years old, seven years old, five years old, and four years old, respectively. The mother's oldest child was 18 years old. He has now reached the age of majority, and his custody is not at issue.

At the July 19, 2021, custody hearing, which the father did not attend, the mother testified that, during the eight or nine years she and the father had been together, the father had physically assaulted her and had raped her. She also contended that he had locked her in the house and she had not had the ability to leave because, she said, he had paid someone to watch the house. She stated that he had also released rats into the house to cause her to panic and had "run [her] over with a vehicle" while the children were in it. Additionally, the mother testified that the father had commenced six PFA actions against her, three in Alabama and three in Florida, but that every one of his actions had been dismissed when he failed to appear at court.

On August 10, 2021, the trial court entered a judgment awarding the mother sole legal custody and sole physical custody of the parties' four children ("the custody judgment"). Consistent with the PFA judgment, the trial court said in the custody judgment that the father

was to have no contact with the children. The trial court ordered the father to pay the mother child support in the amount of $476 each month.

On December 3, 2021, almost four months after the entry of the custody judgment, the father filed a motion to have it set aside pursuant to Rule 60(b)(1), Ala. R. Civ. P., and attached his supporting affidavit to that motion. In the affidavit, the father acknowledged that a process server had come to the house where he was living with the mother's oldest child, who was then 19 years old. The father said that the oldest child had been living with him for six years, but, he said, the oldest child did not speak or read English well. As a result, the father said, when the oldest child accepted service from the process server, the oldest child did not understand what had been delivered.

The father said that he and the oldest child had a practice of placing any item or package not addressed to them on top of the refrigerator for the landlord to pick up periodically. The father said that the oldest child had believed that the service packet was intended for the landlord and had placed it on the refrigerator without telling the father. He stated that "the address where we were living at that time did not receive mail," so, he said, he had not received any court notices and had been unaware of

the trial. He claimed that he was not aware that the mother's custody petition had been filed until after the hearing, when law-enforcement officials gave him a copy of the custody judgment while retrieving the parties' youngest child, who had also been living with the father. The father claimed that he had not intentionally missed the final hearing or ignored the trial court's orders; he said that he simply had not known that a court date had been set. On December 6, 2021, the same day it denied the Rule 60(b)(4) motion to set aside the contempt judgment, the trial court denied the father's motion Rule 60(b)(1) to set aside the custody judgment.

The father timely filed notices of appeal from the trial court's judgments refusing to set aside the contempt judgment and the custody judgment. This court assigned the appeal from the denial of the Rule 60(b)(4) motion to set aside the contempt judgment appeal no. 2210294, assigned the appeal from the denial of the Rule 60(b)(1) motion to set aside the custody judgment appeal no. 2210304, and consolidated the appeals.

Analysis

Appeal No. 2210294

The father argues that the trial court erred in denying his Rule 60(b)(4) motion to set aside the contempt judgment because, he says, that judgment was void. Specifically, he contends that the mother was required to pay a filing fee when she filed what was treated as a motion seeking to hold him in contempt for violating the PFA judgment. Because she did not do so, the father says, the trial court never obtained jurisdiction over the matter, rendering the contempt judgment void. Thus, he argues, the trial court erred in denying his Rule 60(b)(4) motion to set aside that judgment and the subsequent writ for his arrest.

Our standard of review as to this issue is well settled. "When the grant or denial of relief turns on the validity of the judgment, as under Rule 60(b)(4) [Ala. R. Civ. P.,] discretion has no place. If the judgment is valid, it must stand; if it is void, it must be set aside." Insurance Mgmt. & Admin., Inc. v. Palomar Ins. Corp., 590 So. 2d 209, 212 (Ala. 1991).

The father correctly states that a filing fee must be paid to initiate a new contempt action and that the initiation of a new contempt action and the payment of the filing fee are jurisdictional matters. De-Gas, Inc. v. Midland Res., 470 So. 2d 1218, 1220 (Ala. 1985); Farmer v. Farmer, 842 So. 2d 679, 681 (Ala. Civ. App. 2002). He cites several cases in which

this court has held that judgments entered in contempt actions were void because the party seeking the contempt judgment had not paid a filing fee.

The mother argues that none of the cases on which the father relies involved a finding of contempt based on the violation of a PFA judgment, and she contends that a filing fee is not required under such circumstances. In support of her argument, the mother relies on § 30-5-5(g), Ala. Code 1975, a part of the Protection from Abuse Act ("the PFA Act"), § 30-5-1 et seq., Ala. Code 1975, which provides: "No court costs and fees shall be assessed for the filing and service of a petition for a protection order, for the issuance or registration of a protection order, or for the issuance of a witness subpoena under this [the PFA Act]."

Principles of statutory construction govern our resolution of this issue. "The fundamental rule of statutory construction is to ascertain and give effect to the intent of the legislature in enacting the statute." IMED Corp. v. Systems Eng'g Assocs. Corp., 602 So. 2d 344, 346 (Ala. 1992). "Words used in a statute must be given their natural, plain, ordinary, and commonly understood meaning, and where plain language is used a court is bound to interpret that language to mean exactly what it says."

Id. If the language of the statute is unambiguous, then there is no room for judicial construction and the clearly expressed intent of the legislature must be given effect. Tuscaloosa Cnty. Comm'n v. Deputy Sheriffs' Ass'n of Tuscaloosa Cnty., 589 So. 2d 687, 689 (Ala. 1991).

Courts may not interpret statutes to compensate for omissions. "'[I]t is not the office of the court to insert in a statute that which has been omitted'" rather, "'what the legislature omits, the courts cannot supply.'" Pace v. Armstrong World Indus., Inc., 578 So. 2d 281, 284 (Ala. 1991) (quoting 73 Am. Jur. 2d Statutes § 203 (1974)). See also Elmore Cnty. Comm'n v. Smith, 786 So. 2d 449, 455 (Ala. 2000) ("We will not read into a statute what the Legislature has not written."); Siegelman v. Chase Manhattan Bank (USA), Nat'l Ass'n, 575 So. 2d 1041, 1045 (Ala. 1991) ("[A] court may explain the language but it may not detract from or add to the statute."); and Ex parte Jones, 444 So. 2d 888, 890 (Ala. 1983) ("We cannot read into the statute a provision which the legislature did not include.").

An action seeking to hold a party in contempt for failing to abide by the provisions of a judgment is a separate, independent action from the underlying action. Wilcoxen v. Wilcoxen, 907 So. 2d 447, 449, n.1 (Ala.

Civ. App. 2005); Opinion of the Clerk No. 25, 381 So. 2d 58, 59 (Ala. 1980). Although § 30-5-5(g) provides that no court costs and fees should be assessed for the filing of a petition for a PFA order, it does not provide the same exemption for the payment of costs and fees for the filing of a motion for contempt by a party seeking enforcement of a previously entered PFA judgment. Under the statutory-construction principles to which we are bound, we cannot read such an exemption into § 30-5-5(g). Thus, we agree with the father that, because the mother did not pay a filing fee when she filed the document seeking to "press charges" against the father for violating the PFA judgment, the trial court did not obtain jurisdiction over the matter. Because the trial court lacked subject-matter jurisdiction over the contempt action, the contempt judgment is void; therefore, it was error for the trial court to deny the father's Rule 60(b)(4) motion to set aside that judgment and the subsequent writ for his arrest arising from that judgment. We reverse the judgment denying the father's Rule 60(b)(4) motion, and we remand this cause to the trial

court for the entry of an order setting aside its contempt judgment and dismissing the action.[1]

Appeal No. 2210304

In appeal no. 2210304, the father challenges the trial court's denial of his motion to set aside the custody judgment -- which the father claims was a default judgment -- pursuant to Rule 60(b)(1) on the ground of excusable neglect. He also argues that the trial court failed to apply the factors applicable to a determination of whether to set aside a default judgment set forth in Kirtland v. Fort Morgan Authority Sewer Service, Inc., 524 So. 2d 600 (Ala. 1988).[2]

It is well established that the decision to grant or to deny relief pursuant to a Rule 60(b)(1) motion is within the trial court's discretion.

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[1]In the document filed with the trial court advising that the father had not complied with the PFA judgment, the mother stated that she wished to "press charges against" the father for his violations. We note that § 13A-6-142, Ala. Code 1975, makes the knowing violation of a PFA order a Class A misdemeanor and sets forth the appropriate penalties.

[2]The mother challenges the father's contention that the custody judgment was a default judgment. We need not resolve that dispute because, even if the father is correct, for the reasons stated herein, the trial court did not abuse its discretion in denying the father's motion to set aside the custody judgment.

In reviewing the trial court's ruling on such a motion, we cannot disturb the trial court's decision unless the trial court abused that discretion. DaLee v. Crosby Lumber Co., 561 So. 2d 1086, 1089 (Ala. 1990). Additionally, under Rule 60(b)(1), a party seeking to set aside a default judgment not only must prove excusable neglect but also must satisfy the trial court that the other factors enunciated in Kirtland weigh in favor of setting aside the judgment. Marks v. Marks, 181 So. 3d 361, 364 (Ala. Civ. App. 2015). See also DaLee, 561 So. 2d at 1091. Those factors include a showing that the defaulting party has a meritorious defense, that the plaintiff will not be unfairly prejudiced if the default judgment is set aside, and that the default judgment was not a result of the defaulting party's own culpable conduct. Brantley v. Glover, 84 So. 3d 77, 80-81 (Ala. Civ. App. 2011) (citing Kirtland, 524 So. 2d at 605).

In his affidavit in support of his motion to set aside the custody judgment, the father stated that the oldest child was 19 years old and had lived with the father for six years when the oldest child accepted service of the summons and complaint. The father said that the oldest child had placed the service packet on top of the refrigerator, as was the custom in the household, because he had believed that it was intended

for the landlord and that he had not mention it to the father. The father asserted that the oldest child did not speak or read English well and, therefore, had not realized what the packet was.

In DaLee, 561 So. 2d at 1091, our supreme court reiterated the long-standing principle that "[a] party who ignores a summons and, without good excuse, neglects to make his defense at the proper time has no standing in any court when he seeks to avoid the resulting judgment or decree." The DaLee court quoted McDavid v. United Mercantile Agencies, Inc., 248 Ala. 297, 301, 27 So. 2d 499, 503 (1946), stating:

> "'It is the duty of every party desiring to resist an action or to participate in a judicial proceeding to take timely and adequate steps to retain counsel or to act in his own person to avoid an undesirable judgment. Unless in arranging for his defense he shows that he has exercised such reasonable diligence as a man of ordinary prudence usually bestows upon important business, his motion to set aside a judgment for default should be denied. Little v. Peevy, [238 Ala. 106, 189 So. 720 (Ala. 1939)].
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> "'Courts cannot act as guardian for parties who are grossly careless of their own affairs. All must be governed by the laws in force, universally applied, according to the showing made.
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> "'If judgment be entered against a party in his absence, before he can be relieved of the judgment he must show that it was the result of a mistake or inadvertence which reasonable care could not have avoided, a surprise which reasonable precaution could not have prevented, or a

> negligence which reasonable prudence could not have anticipated.'"

561 So. 2d at 1091; see also Fountain v. Permatile Concrete Prod. Co., 582 So. 2d 1069, 1072-73 (Ala. 1991) (same).

Here, the record shows that the trial court reasonably could have concluded that the father's failure to respond to the custody complaint was not the result of excusable neglect. There is sufficient evidence from which the trial court could have found that the father was grossly careless of his own affairs, and the trial court reasonably could have believed that the contentions the father made in his affidavit regarding why he had not responded to the complaint in the custody action were specious. The child's name and the father's name are Hispanic, but the father's name is the same whether it is written or spoken in English or in Spanish. Thus, the trial court reasonably could have concluded that the father's statement that the oldest child had not known that the service packet he received from the process server was intended for the father was simply not credible. Additionally, the mother's testimony at the hearing on the custody action showed that the father had a history of ignoring the trial court's orders, as demonstrated by his refusal to comply with the directives of the PFA judgment, and of failing to appear in

numerous cases, particularly six that he himself had commenced. Under the circumstances, we cannot say that the trial court's denial of the father's Rule 60(b)(1) motion is without evidentiary support.

Because the trial court was free to conclude that the father had failed to meet the requirements of Rule 60(b)(1) by failing to demonstrate that his failure to respond to the summons and complaint was a result of excusable neglect, there is no need for us to address the father's argument relating to the Kirtland factors. See Fountain v. Permatile Concrete Prod. Co., 582 So. 2d at 1072 (holding that, to obtain relief under Rule 60(b)(1), the moving party had to show not only that the Kirtland factors weighed in the party's favor but also that the requirements of Rule 60(b)(1) were satisfied).

The father failed to demonstrate that the trial court abused it discretion in denying his motion to set aside the custody judgment based on Rule 60(b)(1). Therefore, the judgment denying his Rule 60(b)(1) motion is affirmed.

The mother's request for an attorney fee on appeal is denied.

2210294 -- REVERSED AND REMANDED.

Edwards and Hanson, JJ., concur.

Fridy, J., concurs specially, with opinion, which Thompson, P.J., and Moore, J., join.

2210304 -- AFFIRMED.

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

FRIDY, Judge, concurring specially in appeal no. 2210294.

I agree with the main opinion that, based on the plain language of § 30-5-5(g), Ala. Code 1975, a filing fee is required to invoke the jurisdiction of the trial court in a contempt action against a person who allegedly has violated a protection-from-abuse order ("PFA order"). However, the same policy reasons that would support allowing a petitioner to seek a PFA order without first having to pay a filing fee, see § 30-5-1(b), Ala. Code 1975, would seem to support allowing that same petitioner to later seek an order holding in contempt the person the PFA order binds without first having to pay a filing fee. Of course, it is the prerogative of the legislature, not a court, to set the policy of the State of Alabama and to amend statutes when necessary to carry out that policy. See Grimes v. Alfa Mut. Ins. Co., 227 So. 3d 475, 489 (Ala. 2017). Therefore, I urge the legislature to consider whether a filing fee should be required when a petitioner seeks to enforce a PFA order and to amend § 30-5-5(g) if it deems doing so appropriate.

Thompson, P.J., and Moore, J., concur.