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# ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2023

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CL-2022-1175

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J.A.S.

v.

S.W.S.

Appeal from Jefferson Circuit Court  
(DR-18-900971.01)

MOORE, Judge.

J.A.S. ("the father") appeals from a judgment entered by the Jefferson Circuit Court ("the trial court") dismissing, as a discovery sanction, a postdivorce action he had commenced against S.W.S. ("the mother"). Because we conclude that the sanction of dismissal was not

appropriate in this case, we reverse the judgment with instructions and remand the case for further proceedings consistent with this opinion.

### Background

On April 27, 2020, the father commenced the underlying action, which we refer to as "the postdivorce action,"<sup>1</sup> by filing an objection to the mother's notice that she was relocating from Birmingham to an apartment in Chicago, Illinois, with the parties' two minor children and by filing a petition asking the trial court to modify the child-custody provisions of the parties' divorce judgment to award him sole physical and sole legal custody of the children. After the trial court denied a petition for a temporary restraining order to prevent the relocation, denied the mother's motion to dismiss the postdivorce action, and the mother filed an answer, the mother began engaging in discovery.

The mother first propounded requests for the production of documents to the father on February 1, 2021. Among those requests, the

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<sup>1</sup>In a previous action, the trial court entered a final judgment divorcing the parties on February 27, 2020, and entered an amended final judgment on June 10, 2020. The father appealed. This court affirmed the judgment, and the supreme court denied the father's petition for the writ of certiorari. See J.A.S. v. S.W.S., 349 So. 3d 241 (Ala. Civ. App. 2021).

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mother asked the father to produce "[a]ny and all statements and charge tickets on any credit card account maintained by you or upon which you had any drawing rights from January 1, 2020 to the date of production." On March 29, 2021, after the father did not respond to any of those requests for production, the mother filed a motion for an order compelling discovery. On April 7, 2021, the trial court granted the motion and ordered that the father "shall answer" and "shall produce" the requested discovery by April 21, 2021. On April 20, 2021, the father filed a response to the requests for production. In his response, the father specifically objected to the request for credit-card statements and for charge tickets on the grounds that it was vague, overly broad, and irrelevant, but indicated that he was attaching some documents in response to that request and would provide others as they became available.

On May 28, 2021, the mother filed a motion for sanctions, asserting that the father had not adequately responded to the requests for production as ordered by the trial court and that he was attempting to conceal documents. On June 3, 2021, the father filed a response to the motion for sanctions, indicating that he had complied with the order granting the motion to compel by filing a written response to the requests

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for production and that he was not concealing discoverable documents. The trial court scheduled a hearing on the motion for sanctions to take place on July 7, 2021. On June 23, 2021, the father filed a motion for a protective order in which he asserted that the mother was requesting documents in the possession of Regions Bank, with whom the father had formerly maintained an account. The father alleged that, since his account had been closed, Regions Bank had denied his requests for records relating to his account, had demanded that he cease all communications with the bank, and had threatened him with legal action if he continued to attempt to procure the documents. The father also asserted that he had provided the mother with some financial documents, that the requests for additional financial documents was unduly burdensome, and that he did not have possession or control over any financial documents that he had not already produced.

At the hearing on the motion for sanctions on July 7, 2021, the mother agreed to dismiss her motion for sanctions based, in part, on the father's counsel agreeing to ask the father about his credit-card accounts and to convey the information received from that inquiry to the mother's counsel. The parties further agreed that the trial court could enter "the

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generalized standard protective order for the records so that those can be disclosed." On July 15, 2021, the trial court entered a protective order preventing the mother from using any documents produced by the father for any purpose other than for the litigation in the postdivorce action.

On August 23, 2021, the two attorneys representing the father in the postdivorce action filed a joint motion to withdraw, asserting, among other things, that the father had not been responsive to them and had failed to cooperate with them and to follow their advice. On August 31, 2021, after the trial court had granted the joint motion to withdraw, the mother filed a motion requesting that the trial court order the father to disclose his electronic-mail, residential, and mailing addresses so that "future pleadings can be properly mailed, served or directed to [the father]."

On September 15, 2021, the father's attorneys reappeared on behalf of the father in the case. On that same date, counsel for the mother sent the father's counsel an e-mail requesting that the father provide his credit-card records "as previously agreed and as ordered by the court" within 10 days "so we can avoid my seeking sanctions." On September 22, 2021, the mother propounded her second set of discovery requests to

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the father, which included interrogatories asking the father to disclose the addresses of the residences where he had lived since June 1, 2020, and requests for production seeking, among other things, "copies of all credit card monthly statements for all credit cards utilized by [the father] since June 1, 2020." On September 23, 2021, the father, through counsel, filed an objection to those discovery requests and a motion for a protective order. The father asserted that he should not have to produce his credit-card statements because they were irrelevant to the proceedings and he did not maintain those statements, either physically or electronically. The father further asserted that he had never agreed to produce the statements, that he had never been ordered to produce the credit-card statements, and, thus, any motion for sanctions would be inappropriate. On October 28, 2021, the mother requested that the trial court overrule the father's objection and deny his motion for a protective order because, she said, the credit-card statements were relevant and the father had failed to provide information as to his credit-card accounts as his counsel had agreed to do during the July 7, 2021, hearing.

On December 7, 2021, the trial court conducted a hearing on the discovery issues that the father did not attend. During that hearing, the

trial court determined that the father should disclose his addresses and that credit-card and bank-account statements previously requested by the mother were relevant and discoverable. The father's counsel indicated that the father could obtain the financial documents only through a nonparty subpoena because, he said, he no longer maintained an account at Regions Bank and he did not have any records in his possession at his new bank, Synovus Bank. After the hearing, the trial court entered an order formally requiring the father to disclose the requested addresses by December 21, 2021. On December 23, 2021, the trial court entered an order formally denying the father's objections to the requests for production and requiring the father to produce all financial documents, including the credit-card statements, by January 6, 2022, subject to a protective order precluding their use outside the litigation in the postdivorce action.

On December 14, 2021, the father filed a handwritten document in which he claimed that he had not been personally notified of the December 7, 2021, hearing. The father requested that the trial court vacate any orders arising from that hearing and to set the matter for a rehearing. On December 16, 2021, the father's counsel filed a response

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to that document, stating that the father was resisting their attempts to communicate with him and that he would not cooperate with their efforts to obtain information requested in the case; they also stated that they had notified him of the hearing through electronic mail. The trial court ultimately denied the motion to vacate filed by the father.

On December 31, 2021, the mother filed a motion for sanctions based on the failure of the father to disclose his addresses. On January 11, 2022, the father's counsel filed a second joint motion to withdraw, again stating that the father had been unresponsive and had failed to cooperate with them and to follow their advice. On January 18, 2022, the trial court granted the second joint motion to withdraw. On January 19, 2022, the mother filed a second motion for sanctions, alleging that the father had not complied with the order requiring him to produce his credit-card statements and other requested financial documents.

On March 2, 2022, the trial court scheduled a virtual hearing for March 28, 2022, to consider the motions for sanctions filed by the mother. On the date of the scheduled hearing, the father filed a handwritten document in which he indicated that he could not attend the hearing because he did not have the technical ability to do so, and he requested



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an in-person hearing. In that same document, the father also contended that the mother already knew his addresses; that he no longer maintained a relationship with Regions Bank that would allow him access to its records; that the mother was harassing him by seeking "outrageously inappropriate and totally irrelevant" information after he had already provided her with extensive documentation of his financial condition; and that the orders requiring him to disclose his addresses and to produce his financial documents had been entered without due process because he was not notified of the December 7, 2021, hearing, and had never received the orders.

On March 29, 2022, the trial court entered an order on the motions for sanctions. In the order, the trial court related that, on March 28, 2022, the father had telephoned and informed the trial court that he could not attend the hearing scheduled for that day either in-person or virtually. Based on oral arguments from the mother's counsel, the trial court determined that the father had not complied with the orders to disclose his addresses and to produce the financial documents, and the trial court granted the motions for sanctions. The March 29, 2022, order provided, in pertinent part:

- "1. That for such willful disobedience and disregard for the [o]rders of this [c]ourt the [mother's] [motions for sanctions] ... are hereby **GRANTED**.
- "2. [The father] shall fully produce all documents responsive to [the mother's discovery requests] **on or before 5:00 pm on Monday, April 11, 2022**.
- "3. [The father] shall provide the [g]uardian ad [l]item and [a]ttorney for [the mother] with his current and correct physical address, his U.S. Postal Service mailing address(es), and his email address **on or before 5:00 pm on Monday, April 11, 2022**.
- "4. Failure to comply with [p]aragraphs 2 and 3 of this [o]rder shall result in an immediate dismissal of this case on April 12, 2022."

(Bold typeface in original.)

On April 8, 2022, the father filed a handwritten response to the order stating that he had inquired about gaining access to the March 28, 2022, virtual hearing but that he had not been provided a password to access the hearing. The father also alleged that he had telephoned into court and had been placed on hold while the hearing proceeded in his absence. The father stated that he had filed handwritten documents on March 28, 2022, for the trial court to consider during the hearing. The father also stated that the mother and the trial court had his mailing address because he was receiving court orders at that address and that

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the mother had his e-mail address, which, he said, had not changed since the parties were married. The father attached his affidavit in which he stated that his addresses had not changed during the postdivorce action. The father also attested that he had delivered a large volume of financial documents in response to the mother's requests for production six months earlier and stated that he was uncertain as to what more she needed because he had never received the discovery requests and had not been notified of the December 7, 2021, hearing. The father stated that he was attempting to comply with the March 29, 2022, order, but was uncertain of how to comply because the order was ambiguous.

On April 12, 2022, the mother filed a notice informing the trial court that the father had not complied with the March 29, 2022, order. Thereafter, the father filed numerous handwritten documents with the trial court responding to the notice of noncompliance, formally requesting that the trial court disqualify the mother's counsel and seeking various forms of relief relating to the custody of the children. In the documents responding to the noncompliance notice, the father reiterated that he was requesting an in-person hearing on the motions for sanctions that he had not been able to attend virtually; that he had supplied the mother with

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his addresses; and that he had produced voluminous documents responsive to the mother's discovery requests. The father maintained that the mother was abusing the discovery process to obtain an improper dismissal. On June 2, 2022, the mother moved the trial court to dismiss the case based on the father's alleged violation of the March 29, 2022, order.

On June 6, 2022, the trial court conducted oral argument on the motion to dismiss. The mother's counsel asserted that the father had not produced any credit-card statements, bank records, or any other document responsive to the requests for production filed on September 22, 2021. The father admitted that he had not produced any documents specifically responsive to those requests. The father explained that he had intended to object to those discovery requests as being irrelevant at the March 28, 2022, hearing but that he had been unable to attend that hearing virtually. The trial judge recalled that she had spoken to the father on the date of the hearing and had asked him to come to the courthouse so that he could be linked to the virtual hearing, but, she said, the father had stated that he was out of town and was unavailable even though he had known of the hearing. Based on her recollection, the trial

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judge determined that the father had not had a good excuse for failing to attend the March 28, 2022, hearing. The father also indicated that he had produced numerous documents before the mother filed the September 22, 2021, discovery requests and that he had no other documents to produce. The father stated that the mother would have to subpoena the financial institutions that possessed the other documents she was requesting because he did not have access to them. As for the addresses, the father maintained that he had been residing and receiving mail at the same address throughout the case and that he did not have a working e-mail address.

After hearing from the father, the trial court received testimony from the mother's counsel and the guardian ad litem regarding their attorney's fees. The mother's counsel testified that he had provided 45 hours of service to the mother in the postdivorce action at a rate of \$450 per hour. The guardian ad litem testified that she had provided 22 hours of service at a rate of \$300 per hour.

On June 19, 2022, the trial court entered a judgment dismissing the case. The trial court subsequently withdrew that order and entered another order later that same date. The final judgment provides that the

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case is dismissed "without prejudice" "[a]s a result of [the father's] having failed and refused to comply with this [c]ourt's order on March 29, 2022 ...." The trial court further found that "[the father's] contemptuous actions and equity requires that [the father] contribute to [the mother's] counsel['s] fees" and ordered the father to pay \$20,250 to the mother's counsel. Finally, the trial court ordered the father to pay \$6,600 to the guardian ad litem for the children for her services rendered in the case. On July 19, 2022, the father filed a postjudgment motion to alter, amend, or vacate the final judgment. On October 6, 2022, after a hearing, the trial court denied the postjudgment motion. On November 17, 2022, the father filed a notice of appeal.

#### Finality of Judgment

Before proceeding to the merits, we note that the trial court dismissed the postdivorce action without prejudice. The dismissal of an action without prejudice ordinarily lacks sufficient finality to support an appeal. Palughi v. Dow, 659 So. 2d 112, 113 (Ala. 1995). However, "when the applicable statute of limitations would bar a subsequent action, the dismissal becomes, in effect, a dismissal with prejudice." Guthrie v. Alabama Dep't of Labor, 160 So. 3d 815, 816-17 n.2 (Ala. Civ. App. 2014).

In this case, the father filed both an objection to the relocation of the mother and the children to Chicago pursuant to the Alabama Parent-Child Relationship Protection Act ("the APCRPA"), Ala. Code 1975, § 30-3-160 et seq., and a petition to modify the child-custody provisions of the divorce judgment. Section 30-3-169, Ala. Code 1975, a part of the APCRPA, generally provides that a party objecting to a relocation must commence a proceeding seeking a temporary or permanent order to prevent the relocation within 30 days of receiving the notice. But see Ala. Code 1975, § 30-3-169.1(c) ("A proceeding filed under this section must be filed within 30 days of receipt of notice of a proposed change of principal residence of a child, except that the court may extend or waive the time for commencing such action upon a showing of good cause, excusable neglect, or that the notice required by subsection (b) of [Ala. Code 1975, §] 30-3-165 is defective or insufficient upon which to base an action under this article."). The mother sent the father written notice of her planned relocation on April 7, 2020; pursuant to § 30-3-169, the father had until May 7, 2020, to commence the underlying action, which he did. The dismissal of the underlying action prevents the father from re-filing his objection within the period set forth in § 30-3-169 and, thus,

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acts as a dismissal with prejudice of that claim that will support an appeal. See Edwards v. Hanger, 197 So. 3d 993, 996 (Ala. Civ. App. 2015).

As for the petition to modify custody, it was based primarily on the proposed relocation of the mother and the children to Chicago. Section 30-3-169.2, Ala. Code 1975, of the APCRPA provides that, in a proceeding over an objection to a proposed relocation, a trial court may consider modifying custody of a child based on a proposed change in the principal residence of the child. That part of the custody-modification claim arising under § 30-3-169.2 also would be controlled by the applicable "statute of limitations" set forth in § 30-3-169. Because the father cannot refile that claim, the dismissal of that aspect of his custody-modification petition constitutes a final judgment that will support an appeal.<sup>2</sup>

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<sup>2</sup>Arguably, the father could maintain another modification action outside of the APCRPA that would not be affected by the dismissal without prejudice because there is no statute of limitations on custody-modification claims of which we are aware, but we do not consider that fact as affecting the finality of the judgment for purposes of appellate review in this case.



Standard of Review

The trial court dismissed the case because the father did not obey its March 29, 2022, order requiring him to disclose his addresses and to respond to the requests for production propounded by the mother. We construe the judgment as an involuntary dismissal under Rules 37 and 41, Ala. R. Civ. P. Rule 41(b), Ala. R. Civ. P. provides, in pertinent part: "For failure of the plaintiff ... to comply with ... any order of court, a defendant may move for dismissal of an action ...." Rule 37(b)(2)(C), Ala. R. Civ. P., authorizes a court to dismiss an action when a party fails to obey an order requiring responses to discovery.

In Riddlesprigger v. Ervin, 519 So. 2d 486, 487 (Ala. 1987), the Alabama Supreme Court stated:

"Rule 41(b)[, Ala. R. Civ. P.,] has been construed to mean that a trial court has the inherent power to dismiss a cause ... for failure to comply with court rules or orders. Such a dismissal is generally considered to be within the sound discretion of the trial court and will be reversed on appeal only for an abuse of that discretion."

(Citation omitted.)

In Iverson v. Xpert Tune, Inc., 553 So. 2d 82, 87 (Ala. 1989), the supreme court discussed the standard of review applicable to a dismissal under Rule 37, Ala. R. Civ. P., for failure to comply with discovery rules:

"The trial court is vested with broad and considerable discretion in controlling the discovery process and in making rulings on all matters pertaining to discovery, including the authority to make such rulings as are necessary to protect the integrity of the discovery process. Furthermore, deeply rooted in the common law is the court's power to manage its affairs in order to achieve the orderly and expeditious disposition of cases, including the authority to impose reasonable and appropriate sanctions for failure to comply with discovery.

"The choice of discovery sanctions is within the trial court's discretion and will not be disturbed on appeal absent gross abuse of discretion, and then only upon a showing that such abuse of discretion resulted in substantial harm to appellant.

"We recognize that the sanction of dismissal is the most severe sanction that a court may apply. Judicial discretion must be carefully exercised to assure that the situation warrants the imposition of such a sanction. Dismissal orders must be carefully scrutinized, and the plaintiff's conduct must mandate dismissal. We have held that 'willfulness' on the part of the noncomplying party is a key factor supporting a dismissal. If one party has acted with willful and deliberate disregard of reasonable and necessary requests for the efficient administration of justice, the application of even so stringent a sanction as dismissal is fully justified and should not be disturbed."

(Citations omitted.)

Issue

On appeal, the father contends that the trial court exceeded the limits of its discretion by dismissing the postdivorce action because, he says, he did not willfully disobey any order compelling him to provide his addresses or to respond to discovery.<sup>3</sup>

Discussion

The March 29, 2022, order required the father to produce his addresses to the guardian ad litem and the mother's counsel by April 12, 2022. On April 8, 2022, the father filed a formal response in the trial court indicating that his addresses were known to the opposing parties and that they had not changed during the proceedings in the postdivorce action. The father also noted in other filings that the mother and the guardian ad litem had used his e-mail address on numerous occasions and that the mother had served numerous documents on the father at

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<sup>3</sup>Based on our disposition of this appeal, we pretermite discussion of several other arguments made by the father supporting reversal of the judgment. We note, however, that the father has waived any argument that the mother's counsel should be disqualified because the father failed to cite any relevant legal authority or to explain how that authority applies to require disqualification in this case. See Rule 28(a)(10), Ala. R. App. P.; White Sands Grp., L.L.C. v. PRS II, LLC, 998 So. 2d 1042, 1058 (Ala. 2008).

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the same residential and mailing address, indicating that that address was well known. The record indicates that, after the father's counsel withdrew in January 2022, the father regularly received court orders and notices at the address he had designated as his residence and mailing address. In her brief on appeal, the mother does not refute those facts or even attempt to counter the father's argument that he had disclosed his addresses to the mother and the guardian ad litem even before being ordered to do so. Based on the record, we find no basis for concluding that the father had willfully disobeyed the trial court by failing or refusing to disclose his addresses.

The question whether the father willfully disobeyed that part of the March 29, 2022, order requiring him to produce all documents responsive to the mother's September 22, 2021, discovery requests is a closer question. The father could not rely on any objection to the relevancy of those requests because, on December 23, 2021, the trial court had overruled his objections following a hearing that his counsel had attended. The father claims that he did not receive an opportunity to be heard on the objections, but the trial court sent notice of the December 7, 2021, hearing to the parties through their counsel, see Rule 5(b), Ala. R.

Civ. P., which the father's counsel said they relayed to the father. Also, the father's counsel did attend the hearing, during which they asserted and argued the father's objections. See Rutledge Indus. Corp. v. Newman Indus. Corp., 560 So. 2d 1061 (Ala. Civ. App. 1989) (holding that service of counsel of record satisfies due process).

However, the father also asserted that he could not produce the financial documents that the mother was requesting because he did not have access to them. The father contended that Regions Bank had closed his credit-card and bank accounts at some point during the postdivorce action. According to the father, he could not access his former accounts at Regions Bank to obtain the requested documents because Regions Bank would not communicate with him or honor his demands. The mother presented no contrary information to the trial court. Rule 34, Ala. R. Civ. P., provides that a party may only request such documents "as are in the in the possession, custody, or control of the party upon whom the request is served ...." In Ex parte BASF Corp., 957 So. 2d 1104 (Ala. 2006), the supreme court held that a trial court cannot order a party to produce documents in the possession and under the exclusive control of a third party. Thus, we conclude that the father did not willfully

disobey the order requiring him to produce the Regions Bank records because he was not capable of complying with that order.

The father had opened a new account at Synovus Bank, and he maintained that, like with his Regions Bank accounts, he did not keep any physical records or have access to any electronic records relating to the Synovus account. However, the father did not claim that he was unable to obtain his bank records upon demand. See Ex parte BASF Corp., supra (holding that a party has "control" over documents in the possession of a third party when the third party has an obligation to produce the records upon demand of the party). From all that appears in the record, the father could have demanded that Synovus Bank produce his account records and then could have provided those records to the mother within the time allotted by the trial court, but he willfully failed or refused to do so.

The law strongly favors disposition of cases, particularly domestic-relations cases, on the merits and that interest may be overcome and an involuntary dismissal affirmed only when, upon carefully scrutinizing the case, this court determines that there is a clear record of delay, willful default, or contumacious conduct. Fipps v. Fipps, [Ms. CL-2022-0725,

Feb. 10, 2023] \_\_\_ So. 3d \_\_\_ (Ala. Civ. App. 2023). In this case, the record shows that the father did not willfully and contumaciously fail or refuse to respond to most of the mother's discovery requests. The father had responded to the first discovery requests made by the mother. Although the mother filed a motion for sanctions relating to that set of discovery, she dismissed the motion as moot. The father also partially responded to the second set of requests for production by filing at least some valid objections to producing the Regions Bank records. The father also disclosed his addresses during the litigation. Although the father did not fully respond to all the discovery requests, the trial court could have imposed a lesser sanction other than the dismissal with prejudice of his APCRPA claims. We make no comment as to the merits of those claims; we hold only that the trial court should not have dismissed those claims with prejudice based on the record before us.

The father also argues that the trial court erred in awarding attorney's fees to the mother's counsel and in awarding fees to the guardian ad litem. Based on our reversal of the judgment of dismissal, we hold that the fee awards are due to be vacated. The record indicates that the trial court considered the conduct of the father in responding to

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discovery and its decision to dismiss the case based on that conduct as part of its reason for awarding attorney's fees. The trial court also awarded the guardian ad litem fees for services rendered under the assumption that the postdivorce action had been concluded. Because we have determined that the case should not have been dismissed based on the conduct of the father when responding to discovery, and the litigation will continue, the trial court may reconsider the awards upon remand.

#### Conclusion

Based on the foregoing, the trial court exceeded its discretion by dismissing the postdivorce action. The judgment dismissing the case is reversed and the case is remanded for proceedings consistent with this opinion.

**REVERSED AND REMANDED WITH INSTRUCTIONS.**

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

Fridy, J., recuses himself.