REL: May 21, 2021

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2020-2021

2200001

Tiffany Johnson

v.

James Pirtle

Appeal from Madison Circuit Court
(DR-15-184.04)

HANSON, Judge.

Tiffany Johnson ("the mother") appeals from the judgment of the Madison Circuit Court ("the trial court") denying her motion to set aside a judgment entered in an action arising from a dispute between her and

James Pirtle ("the father") regarding the custody of the parties' child, K.P. ("the child"). The judgment was entered after the mother could not be located at the time the case was called for trial. For the following reasons, we reverse the judgment of the trial court and remand the cause for further proceedings.

Facts and Procedural History

The record indicates that, in 2015, the trial court entered an initial custody judgment granting the parties joint physical and legal custody of the child. In 2018, the trial court modified the 2015 custody judgment and granted the father sole physical custody of the child and ordered the mother to pay child support. On March 18, 2020, the mother, acting pro se, filed a petition to modify the 2018 modification judgment and also sought a finding of contempt against the father. On May 5, 2020, the father filed an answer and counterclaim responding to the mother's petition to modify custody, which pleading included a request to relocate with the child to Loganville, Georgia.

On May 13, 2020, the father filed an emergency motion for pendente lite custody and for the appointment of a guardian ad litem for the child

because, he alleged, the mother had left the child alone with her half siblings for an extended period during her visitation period. The trial court appointed a guardian ad litem and conducted an evidentiary hearing on the motion on June 9, 2020, at which hearing the parties were present and testified. Following the hearing, the trial court denied the father's request for emergency pendente lite custody and set the case for a July 20, 2020, trial.

On July 14, 2020, the trial court issued an order stating that "the docket will not be 'called' on the morning of July 20[, 2020] .... The court will notify you when your case will be called. If you are not for trial first on July 20, [2020,] your case will be on call for the remainder of the week." Notwithstanding the July 14, 2020, order, the mother appeared for the docket call on the morning of July 20, 2020, and was instructed by trial-court personnel that her case was "on call." Nevertheless, when the parties' case was called at 1:00 p.m. that same day, the mother could not be reached by telephone. At the outset of the trial, the trial-court judge stated on the record:

> "This matter came before the court on several motions and requests filed by the [mother], who is not present. The court will note that the [mother] was in court at the beginning of this day for the docket call and was informed that the case would be on call. This court called this case today for 1 o'clock trial. The [father] is present, along with his attorney, ... and the guardian ad litem ... is present.
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> "Both the court's office and [the guardian ad litem] have tried to reach out to [the mother] to instruct her to be here today for this trial. It is approximately 1:45. She has neither responded to any messages sent by [the guardian ad litem] or a message by the court. In fact, her voice mailbox of her phone that we have was full, and she was nonresponsive.
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> "The court is dismissing all of the requests and motions filed by [the mother].
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> "There was also a counterclaim and a request to relocate filed by [the father], and I am going to hear testimony regarding that request now."

Thereafter, the trial court heard the father's testimony regarding his request to relocate with the child to Loganville, Georgia.

On July 23, 2020, the trial court issued a final judgment denying all relief requested by the mother and granting the father's request to relocate. The trial court's judgment stated, in pertinent part:

> "This matter came before the court upon various petitions for modification and contempt filed by the [mother] and an answer and counterclaim filed thereto. This matter

> was set on a regularly published domestic relations docket and called for trial on July 20, 2020. [The father] appeared when called along with counsel. The Guardian ad Litem appeared when called. Numerous attempts were made to contact and call the [mother] to appear for trial but [the mother] failed to respond or appear. ...
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> "It is hereby ordered, adjudged and decreed as follows:
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> "1. Due to [the mother's] failure to appear at trial when called, all [of the mother's] motions, requests and petitions are hereby denied.
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> "2. [The father's] request to relocate is granted. ..."

On August 22, 2020, the mother, through retained counsel, filed a postjudgment "motion for new trial/set aside default."[1] In an attached supporting affidavit, the mother testified that she and the witnesses she had planned to call at trial had appeared for trial on the morning of July 20, 2020 at 9:00 a.m. but had been informed by court personnel that her case would not be heard on that date. The mother claimed that court personnel had informed her that her case would be called later in the week and that she would be called on the following day to let her know

[1]The motion was purportedly filed pursuant to Rules 59 and 60, Ala. R. Civ. P.

when the trial would occur. The mother stated that she had then instructed her witnesses to return home and had returned to her home. The mother explained that, once home, she had placed her cellular telephone on its battery charger and left it there and that she had not realized until later in the day that the court had tried to reach her. The mother argued that her failure to appear was, at worst, negligent, but was not willful or in bad faith. Furthermore, she argued that she had been deprived of her ability to present evidence in support of her claims and that she had had a meritorious defense to the father's claim seeking to relocate with the child.

The trial court held a hearing on the mother's postjudgment motion on September 11, 2020.[2] On September 15, 2020, the trial court entered an order denying the mother's postjudgment motion. The mother timely appeals.

Analysis

[2]The record indicates that, because of the COVID-19 pandemic, the hearing, which was not an evidentiary hearing, was conducted "virtually" via video-conferencing. No transcript of the hearing is included in the record on appeal.

On appeal, the mother argues that the trial court erred in denying her motion to set aside the "default judgment," and her arguments before this court -- along with the father's responses to those arguments -- primarily address the factors for setting aside a default judgment as established in Kirtland v. Fort Morgan Authority Sewer Service, Inc., 524 So. 2d 600, 603 (Ala. 1988). With regard to the father's counterclaim against the mother seeking leave to relocate with the child to Georgia, the trial court took evidence on the day of trial and then issued a judgment on that claim three days later. Alabama appellate courts have long recognized that a defendant's failure to appear at trial and "otherwise defend" may result in the entry of a default judgment against that defendant and have treated judgments entered against defendants for the failure to appear at a trial as being in the nature of default judgments. See, e.g., Triple D Trucking, Inc. v. Tri Sands, Inc., 840 So. 2d 869, 871 n.2 (Ala. 2002) (interpreting judgment entered following defendant's failure to appear at trial as a default judgment); Marks v. Marks, 181 So. 3d 361, 363 (Ala. Civ. App. 2015) (interpreting judgment dismissing former wife's petition to modify divorce judgment upon her failure to appear at trial as

a default judgment); R.D.J. v. A.P.J., 142 So. 3d 662, 665 n.2 (Ala. Civ. App. 2013) (interpreting judgment entered against party who failed to appear at trial as a default judgment); D.B. v. D.G., 141 So. 3d 1066, 1070 (Ala. Civ. App. 2013) (noting that a default judgment may be entered for a failure to appear at trial); Burleson v. Burleson, 19 So. 3d 233, 238 (Ala. Civ. App. 2009) (treating divorce judgment entered against husband who failed to appear at trial as a default judgment); Sumlin v. Sumlin, 931 So. 2d 40, 46 n.2 (Ala. Civ. App. 2005) (noting that a default judgment may be entered for a failure to appear at trial); Alexander v. Washington, 707 So. 2d 254, 255 (Ala. Civ. App. 1997) ("A judgment entered after one party fails to appear at trial is treated as a default judgment."), overruled on other grounds by Ex parte Keith, 771 So. 2d 1018 (Ala. 1998); Bush v. James T. Johnson & Co., 411 So. 2d 139 (Ala. Civ. App. 1982) (treating judgment against defendant as a default judgment when defendant appeared at trial docket and announced "ready" and returned to office to await call for trial but clerk did not call defendant and judgment was entered following trial on the merits conducted in defendant's absence).

Indeed, Kirtland itself arose from a judgment entered following a defendant's failure to appear at trial.

In this case, each party contends that the trial court's judgment was a default judgment, and each party contends that the trial court's denial of the mother's postjudgment motion is governed by the factors established in Kirtland. In light of the above cited caselaw and the contentions of the parties, we will proceed to consider the mother's appeal as to the aspect of the judgment addressing the father's counterclaim as being one in the nature of an appeal from a default judgment,[3] and our

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[3]We recognize that the judgment at issue may not strictly comport with the requirements for the entry of a default judgment provided in Rule 55(b), Ala. R. Civ. P. For example, in Armstrong v. Hill, 290 So. 3d 411 (Ala. 2019), the trial court in a dog-bite case purported to enter a default judgment from the bench against a defendant dog owner who was not present at the commencement of a scheduled bench trial and indicated that the trial would proceed only as to damages. After the commencement of trial, however, the dog owner arrived and was allowed a chance to "tell [her] side of the story" and participate in the trial. 290 So. 3d at 414. The trial court in Armstrong thereafter entered a judgment against the dog owner and denied her subsequent postjudgment motion. On appeal, the dog owner argued that the plaintiff had not met his burden of proof at trial to establish her liability. In response, the plaintiff contended that, because the trial court had initially purported to enter a default judgment, he had thereafter been excused from offering proof of the dog owner's liability at trial. Our supreme court disagreed, concluding that the

review of that portion of the trial court's judgment will, therefore, be guided by the factors established in Kirtland. See Gary v. Crouch, 923 So. 2d 1130, 1136 (Ala. Civ. App. 2005) ("This court is confined in its review

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judgment was not a default judgment but, rather, a judgment on the merits. 290 So. 3d at 415. In so concluding, the supreme court reasoned that the plaintiff had not applied for a default judgment, that the defendant had ultimately appeared for and participated without limitation at trial, that there had been no entry of default on the docket, that the trial court's judgment had not been entered on the day of trial, and that the judgment did not make reference to being a "default judgment." Id. at 415-16.

In the present case, however, the mother's postjudgment motion did not challenge the merits of the judgment but, rather, challenged the process through which it was entered. She claims that, through mistake or excusable neglect, she was deprived of the opportunity to appear at trial and present a defense to the father's counterclaim. As set forth above, such claims have historically been treated as seeking relief from a default judgment, yet can properly be raised under Rules 59 and 60(b), Ala. R. Civ. P. (as they were, see note 1, supra), even if Rule 55(c), Ala. R. Civ. P., was technically inapplicable. See, e.g., Marks v. Marks, 181 So. 3d 361, 364 (Ala. Civ. App. 2015) (recognizing that party may seek to have default judgment set aside pursuant to Rule 60(b)(1) for "excusable neglect" or Rule 60(b)(4) when the judgment is entered in a manner inconsistent with due process); White v. New Hampshire Dep't of Emp. Sec., 455 U.S. 445, 451 (1982) (noting that Fed. R. Civ. P. 59(e), the basis for Alabama's Rule 59(e), was designed to allow the trial court to correct mistakes in the period immediately following the entry of the judgment).

to addressing the arguments raised by the parties in their briefs on appeal.").

Our standard of review with respect to a trial court's ruling on a motion to set aside a default judgment is whether the trial court's decision constituted an abuse of discretion. See Kirtland, 524 So. 2d at 603, and Smith v. Tyson Foods, Inc., 884 So. 2d 861, 863 (Ala. Civ. App. 2003). This court has explained:

> "When exercising its discretionary authority regarding whether to set aside a default judgment, a trial court should begin with the presumption that cases should be decided on the merits whenever possible. Kirtland, 524 So. 2d at 604. '[T]his court and the Supreme Court have reiterated that the trial court "should exercise its broad discretionary powers with liberality and should balance the equities of the case with a strong bias toward allowing the defendant to have his day in court." ' DeQuesada v. DeQuesada, 698 So. 2d 1096, 1098 (Ala. Civ. App. 1996) (quoting Hutchinson v. Hutchinson, 647 So. 2d 786, 788 (Ala. Civ. App. 1994)). Furthermore,
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> > " ' "[b]y its plain language, Rule 55(c)[, Ala. R. Civ. P.,] confers broad discretionary authority upon trial judges. This discretion, however, is not boundless. Rule 1(c), Ala. R. Civ. P., states: 'These rules shall be construed to secure the just, speedy and inexpensive determination of every action.' Thus, Rule 1 mandates that trial courts construe Rule 55(c) to effectuate an expeditious, efficient, and just resolution of litigation. This requires a trial court

> to balance two competing policy interests associated with default judgments: 1) the need to promote judicial economy and 2) the need to preserve an individual's right to defend on the merits. See C. Wright, A. Miller & M. Kane, Federal Practice and Procedure, Civil, § 2693 (2d ed. 1983)." '

"Ex parte Family Dollar Stores of Alabama, Inc., 906 So. 2d 892, 898 (Ala. 2005) (quoting Kirtland, 524 So. 2d at 604).

"In determining whether to set aside a default judgment, the trial court should consider the following three factors: '1) whether the defendant has a meritorious defense; 2) whether the plaintiff will be unfairly prejudiced if the default judgment is set aside; and 3) whether the default judgment was a result of the defendant's own culpable conduct.' Kirtland, 524 So. 2d at 605.

"Moreover, a particularly 'strong bias' exists for deciding domestic-relations cases on the merits. Buster v. Buster, 946 So. 2d 474, 478 (Ala. Civ. App. 2006). As this court stated in DeQuesada, ' "[w]e think that especially in the divorce context, a court should be particularly reluctant to uphold a default judgment (and thereby deprive a litigant of his day in court) because it means that such important issues as child custody, alimony, and division of property will be summarily resolved." ' 698 So. 2d at 1099 (quoting Evans v. Evans, 441 So. 2d 948, 950 (Ala. Civ. App. 1983)).

"Furthermore, this court has previously stated, that ' "we can envision no species of case in which the 'strong bias' in favor of reaching the merits ... could be any stronger than in a case such as this involving custody of a minor child." ' Buster, 946 So. 2d at 478 (quoting Sumlin v. Sumlin, 931 So. 2d 40, 44

> (Ala. Civ. App. 2005), quoting in turn Kirtland, 524 So. 2d at 605)."

Bates v. Bates, 194 So. 3d 976, 978-79 (Ala. Civ. App. 2015).

The mother first argues that her postjudgment motion demonstrated that she had a meritorious defense to the father's counterclaim seeking court approval to relocate the child's principal residence to Loganville, Georgia. Establishing a meritorious defense under Kirtland does not require "that the movant satisfy the trial court that the movant would necessarily prevail at a trial on the merits, only that the movant show the court that the movant is prepared to present a plausible defense." Sampson v. Cansler, 726 So. 2d 632, 634 (Ala. 1998) (citing Kirtland, 524 So. 2d at 605). A movant shows the existence of a plausible defense by setting forth allegations within a motion or an answer that constitute more than "mere bare legal conclusions without factual support." Kirtland, 524 So. 2d at 606. Such allegations "must counter the cause of action averred in the complaint with specificity -- namely, by setting forth relevant legal grounds substantiated by a credible factual basis." Id. "Moreover, the defense offered 'must be of such merit as to induce the trial

court reasonably to infer that allowing the defense to be litigated could foreseeably alter the outcome of the case.' " Bates, 194 So. 3d at 979 (quoting Kirtland 524 So. 2d at 606).

We note that, under the Alabama Parent-Child Relationship Protection Act ("the Act"), Ala. Code 1975, § 30-3-160 et seq., there is a rebuttable presumption that a change of a child's principal residence is not in the best interests of the child, and the party seeking a change of the principal residence of a child bears the initial burden of proof to overcome that presumption. See Ala. Code 1975, § 30-3-169.4 ("In proceedings [under the Act,] unless there has been a determination that the party objecting to the change of the principal residence of the child has been found to have committed domestic violence or child abuse, there shall be a rebuttable presumption that a change of principal residence of a child is not in the best interest of the child."). In the mother's motion to set aside the default judgment as to the father's relocation claim and her accompanying affidavit, she invokes that presumption and further avers that she can present evidence, pursuant to the Act, that the father's relocation with the child to Georgia will not serve the child's best

interests. For instance, the mother testified that the child has family and friends in Alabama from whom the child would be separated, asserted that she had evidence indicating that there are educational benefits to the child's remaining in Alabama, and contended that her evidence would establish that the father had not "provided direct care and ha[d] foisted this responsibility off on others during his parenting time." The mother also contended that the father had not provided her with proper notice of the proposed relocation under the Act -- a factor that, if true, the trial court may consider in determining whether to deny the father leave to relocate.[4] If presented at trial, such evidence could foreseeably alter the

[4]Under Ala. Code 1975, § 30-3-163, "a person who has the right to establish the principal residence of the child shall provide notice to every other person entitled to custody of or visitation with a child of a proposed change of the child's principal residence as required by [Ala. Code 1975, § 30-3-165(b)]." Section § 30-3-165(b) requires that notice be given via certified mail and include a warning to the nonrelocating party that he or she has 30 days to object or the objection is waived. If the relocating party fails to give notice, Ala. Code 1975, § 30-3-168(a), states that "the court shall consider the failure to provide such notice or information as a factor in making its determination regarding the change of principal residence of a child."

outcome of the case. Accordingly, we conclude that the mother established a meritorious defense to the father's counterclaim.

The mother also contends that the father would not be unfairly prejudiced if the judgment were to be set aside. "'[T]he prejudice warranting denial of a Rule 55(c) motion must be substantial.'" Phillips v. Randolph, 828 So. 2d 269, 276 (Ala. 2002) (quoting Kirtland, 524 So. 2d at 607). This court has explained that

> "'"delay alone is not a sufficient basis for establishing prejudice. Rather, it must be shown that delay will 'result in the loss of evidence, create increased difficulties of discovery, or provide greater opportunity for fraud and collusion.' " (citations omitted) Davis v. Musler, 713 F. 2d 907, 916 (2d Cir. 1983) (cited with approval in Kirtland, 524 So. 2d at 607).'"

Wise v. Wise, 264 So. 3d 871, 877 (Ala. Civ. App. 2018) (quoting Owens v. Owens, 626 So. 2d 640, 642 (Ala. Civ. App. 1993)).

This court has previously concluded that when, like here, a motion to set aside a default judgment is filed within 30 days of the entry of that judgment, "it is unlikely that the [nonmovant] would suffer undue prejudice of the type contemplated in Kirtland if the default judgment is

set aside." Thornton v. Davies, [Ms. 2190142, Sept. 25, 2020] __ So. 3d __, ___ (Ala. Civ. App. 2020); see also Wise, 264 So. 3d at 877 (stating that delay of "slightly more than two weeks" between entry of default judgment and filing of motion to set aside that judgment was unlikely to result in undue prejudice of the type contemplated in Kirtland). Accordingly, we conclude that setting aside the judgment likely will not unfairly prejudice the father.

Finally, the mother argues that the judgment was not the result of any culpable conduct on her behalf.

> "Conduct committed wilfully or in bad faith constitutes culpable conduct for purposes of determining whether a default judgment should be set aside. Negligence by itself is insufficient. ... Willful and bad faith conduct is conduct characterized by incessant and flagrant disrespect for court rules, deliberate and knowing disregard for judicial authority, or intentional nonresponsiveness."

Kirtland, 524 So. 2d at 607-608. However, "a defaulting party's reasonable explanation for inaction and noncompliance may preclude a finding of culpability." Id. at 608.

Upon a review of the record, we cannot say that the mother's absence from trial was committed willfully or in bad faith. Indeed, it is undisputed that the mother had appeared in court on the morning of the day the trial had been scheduled but had been informed that the trial would take place at a later time. The mother testified that her intended witnesses had been present with her at court; that court personnel had informed her that she would be called the following day to let her know on when the trial would take place; that she had understood the trial would occur later in the week; and that, based on the provided information, she had released her witnesses and returned to her home. Moreover, the mother had previously appeared for a June 9, 2020, evidentiary hearing on the father's emergency motion for pendente lite custody. Furthermore, within 30 days of the entry of the judgment, the mother retained counsel and moved to set aside that judgment. See Bates, 194 So. 3d at 980 (noting pro se party's prompt postjudgment retention of counsel and filing of motion to set aside default judgment in concluding that her absence from hearing was not the result of willful or bad-faith conduct). In light of such evidence, we conclude that the mother's absence from trial was not

the result of willful or bad-fath conduct. See, e.g., Bachner v. Citizens Bank, 512 So. 2d 93, 94 (Ala. 1987) (holding that default judgment entered after failure to appear at trial was due to be set aside when failure to appear was result of misinformation provided by clerk's office); Bates, 194 So. 3d at 980 (concluding that pro se defendant in custody action had not been willfully absent from trial when the evidence indicated that she had believed that her presence had not been required at hearing and that a guardian ad litem would be representing the children at the hearing); and D.B. v. D.G., 141 So. 3d 1066, 1072 (Ala. Civ. App. 2013) (holding that party met initial burden to establish third Kirtland factor when party testified that absence at trial was due to fact that party had moved and had not received notice of trial setting); Bush, 411 So. 2d at 142 (holding that trial court abused its discretion in not vacating judgment entered when defendant, who believed that clerk of court would, per usual custom, call to notify him that case was ready to be heard, did not appear for trial). Accordingly, we conclude that the mother demonstrated that each of the Kirtland factors weigh in her favor, and, thus, the trial court erred in

failing to grant her motion to set aside the judgment entered as to the father's counterclaim.

With regard to that portion of the trial court's judgment entered against the mother on her own custody-modification and contempt claims, we note that this court has, under similar circumstances, previously concluded that a "default judgment" entered against a plaintiff as a result of that plaintiff's failure to appear at a scheduled trial is more properly construed as a sanction entered pursuant to Rule 41(b), Ala. R. Civ. P. Tyson Foods, 884 So. 2d at 864 ("Despite its caption as a 'default judgment,' the first portion of the trial court's judgment evidences an intent to sanction [the plaintiff] pursuant to Rule 41(b) for having failed to appear at a scheduled trial to prosecute her claims."). Likewise, in this case, the on-the-record statements of the trial-court judge and paragraph 1 of the trial court's judgment indicated that the judgment entered against the mother was intended as a dismissal sanction based on the mother's absence at trial.

This court has stated:

> " ' "The dismissal of a civil action for want of prosecution because of the plaintiff's failure to appear at a trial falls within the judicial discretion of a trial court and will not be reversed upon an appeal except for an abusive use of that discretionary power." Thompson v. McQuagge, 464 So. 2d 105, 106 (Ala. Civ. App. 1985). However, "[d]ismissal with prejudice is a harsh sanction and should be used only in extreme circumstances." Atkins v. Shirley, 561 So. 2d 1075, 1077 (Ala. 1990) (quoting Selby v. Money, 403 So. 2d 218, 220 (Ala. 1981))." '

Tyson Foods, 884 So. 2d at 864 (quoting Goodley v. Standard Furniture Mfg. Co., 716 So. 2d 226, 227 (Ala. Civ. App. 1998)). Furthermore, " 'a trial court "may dismiss with prejudice an action 'only in the face of a clear record of delay or contumacious conduct by the plaintiff.' " ' " S.C. v. Autauga Cnty. Bd. of Educ., [Ms. 1190382 Oct. 30, 2020] __ So. 3d __, __ (Ala. 2020) (quoting Kendrick v. Earl's, Inc., 987 So. 2d 589, 593 (Ala. Civ. App. 2007)).

In this case, as explained above, there is no evidence indicating that the mother was willfully or deliberately absent from trial. To the contrary, the mother initially appeared for trial, was told the case was "on call," and then missed follow-up calls attempting to alert her that her case would actually be called for trial early that afternoon. We conclude that

the mother's conduct was not so extreme and contumacious as to warrant the most severe sanction of dismissal of her claims. See, e.g., Poore v. Poore, 285 So. 3d 852, 857 (Ala. Civ. App. 2019) (holding that party's failure to appear at trial due to lack of notice did not warrant dismissal of action when party's other actions indicated intent to prosecute action). Accordingly, for the above-stated reasons, the judgment of the trial court is reversed, and the cause is remanded for further proceedings.

REVERSED AND REMANDED.

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

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