REL: April 9, 2021

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2020-2021

2200051

Jessie Tompkins

v.

Wal-Mart Associates, Inc.

Appeal from Montgomery Circuit Court
(CV-18-900375)

PER CURIAM.

In February 2018, Jessie Tompkins, an assistant store manager employed by Wal-Mart Associates, Inc. ("Wal-Mart"), initiated, through an

attorney (Cathy B. Donohoe), a civil action in the Montgomery Circuit Court seeking an award of benefits under the Alabama Workers' Compensation Act, Ala. Code 1975, § 25-5-1 et seq. ("the Act"). In his complaint, Tompkins asserted that, while working within the line and scope of his employment, he had sustained two injurious events: one on October 5, 2014, in the form of a gunshot wound to his right shoulder and a torn meniscus in his knee,[1] and another on May 10, 2016, in the form of a reinjury of his knee. Although claims under the Act are generally required to be filed "within two years" of the accident giving rise to the claimed work injury, see Ala. Code 1975, § 25-5-80, and the October 5, 2014, injuries asserted in Tompkins's complaint occurred more than two years before the complaint was filed, Tompkins's complaint asserted that he had "receiv[ed] ... [c]ompensation benefits" under the Act "through January 2017" and that the two-year period was thereby "tolled." See id. (providing that, when "payments of compensation" have been made, "the

[1]Although Tompkins's original complaint specified the injured knee as being the left knee, the complaint was amended in May 2018, pursuant to Rule 15(a), Ala. R. Civ. P., to instead specify the right knee.

period of limitation shall not begin to run until the time of making the last payment").

Wal-Mart filed a motion to dismiss, asserting that it had been misnamed in the complaint and that the statute of limitations in the Act "ha[d] expired as to any claims arising out of an accident of October 5, 2014." After a hearing had been set on that motion, Donohoe, acting on Tompkins's behalf, immediately amended the complaint to correct the misnomer and filed a response to the motion to dismiss in which she stated that "[t]he statute [of limitations] is tolled because [Tompkins] drew ... compensation checks until January of 2017." Wal-Mart then filed an "additional submission" supporting its motion to dismiss in which it asserted that, although the complaint had apparently been timely filed as to the May 10, 2016, injury, only one "compensation payment" for temporary-total-disability benefits "for the period of June 15, 2016 to July 5, 2016" had been paid to Tompkins, which payment occurred "after the second alleged accident and, in Wal-Mart's view, "clearly related" to a knee surgery Tompkins had undergone on June 20, 2016, rather than the October 5, 2014, accident. Wal-Mart thus contended in its "additional

submission" that the two-year period specified in the applicable statute of limitations had, as to the claimed October 5, 2014, injuries, expired on October 5, 2016, because, Wal-Mart said, "[t]here [had been] no payment of compensation for that accident that would have" tolled the time for bringing an action as to those injuries, and it sought dismissal of any claims pertaining to "any injury of October 5, 2014." After that filing, Donohoe, acting on behalf of Tompkins, filed a response stating that "[t]here is no objection to dismissing the first ... claim date of 10/5/2014," which, the response said, "appears to only remain a medical case."

Counsel for Wal-Mart then submitted a proposed order, which the circuit court then executed and entered as its order on March 27, 2018, dismissing Tompkins's claims as to any injuries occurring on October 5, 2014, but denying Wal-Mart's motion to dismiss as to claims as to any May 10, 2016, injury. Notably, the circuit court did not direct the entry of a final judgment as to its March 27, 2018, order. Thus, pursuant to Rule 54(b), Ala. R. Civ. P., that order remained "subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."

In December 2018, the circuit court set the case for a trial to be held on March 28, 2019. However, on January 4, 2019, the circuit court ordered the case to mediation that was to be held within 60 days of the entry of that order. See Ala. Code 1975, § 6-6-20(b)(3) (indicating that "the trial court may, on its own motion, order mediation"). It does not appear, however, that that contemplated mediation ever took place because Donohoe, acting on behalf of Tompkins, filed a motion on February 20, 2019, stating that the parties had reached a settlement and requesting what was termed a "walk-through settlement hearing" to be held on February 26, 2019, to obtain judicial approval thereof. See generally Ala. Code 1975, § 25-5-56 (requiring judicial approval of settlements "for an amount less than the amounts and benefits stipulated in" the Act). The circuit court then set the matter for a settlement conference in open court to be held on February 26, 2019.

Although Tompkins was represented by counsel, he filed, on February 25, 2019, a "Motion to the Court and Notice of Fraud" in which he purported to assert that the circuit court had been "misinformed" about the statute-of-limitations issue, that Wal-Mart had made payments to him

under the Act through March 2018, and that Wal-Mart had refused to provide him with a "panel of four" physicians to evaluate his health (see generally Ala. Code 1975, § 25-5-77(a) (setting forth procedure whereby employee, if he or she is dissatisfied with employer's chosen treating physician "and if further treatment is required," shall be entitled to select a replacement physician from a list of four physicians supplied by the employer)); he also filed an affidavit in which he indicated that he had not agreed to any settlements regarding his claims. The circuit court entered an order on February 26, 2019, setting a new trial date of April 29, 2019, and, on March 27, 2019, it granted a motion that Donohoe had filed seeking withdrawal from representation of Tompkins.

On April 4, 2019, another attorney, William K. Abell, appeared in the case as counsel for Tompkins, and Abell filed a motion to continue the scheduled trial to a later date, which was granted; the circuit court granted a further continuance on the parties' joint motion in June 2019. In July 2019, Abell, on behalf of Tompkins, filed a motion to amend the complaint to state a claim relating to a back injury that, "combined with

previous conditions," it was alleged, had rendered Tompkins permanently and totally disabled. The circuit court granted that motion to amend.

However, on August 7, 2019, Tompkins, despite Abell's having appeared as counsel on his behalf, filed a document purporting to state objections to the amendment of the complaint and purporting to seek reinstatement of the claims in the original complaint pertaining to the alleged October 5, 2014, injuries. Abell then filed, on August 8, 2019, a motion seeking to withdraw from his representation of Tompkins, but Abell also requested in that motion a "hearing relative to all pending matters" then before the circuit court.[2] Although the circuit court had

[2]There is no indication that Abell's motion to withdraw was ever granted. Although it is true that "the employment of an attorney by a client is revocable by the client with or without cause," see Gaines, Gaines & Gaines, P.C. v. Hare, Wynn, Newell & Newton, 554 So. 2d 445, 447 (Ala. Civ. App. 1989), it is also true that, "[a]fter the attorney has entered an appearance in the case, effective withdrawal at the insistence of the client is dependent upon the consent of the court." 7A C.J.S. Attorney & Client § 326 (2015); see also Rule 1.16(c), Ala. R. Prof. Cond. (indicating that attorney's representation may continue, "notwithstanding good cause for terminating the representation," when counsel is "ordered to do so by a tribunal"), and Comment to Rule 1.16 ("[e]ven if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client").

summarily allowed Donohoe to withdraw, that court did not immediately act on Abell's motion to withdraw but, instead, set the case for a hearing on pending motions. Wal-Mart filed a response to the August 7, 2019, filing by Tompkins in which Wal-Mart contended, notwithstanding the provisions of Rule 54(b), Ala. R. Civ. P., that the March 27, 2018, order dismissing the claims pertaining to the alleged October 5, 2014, injuries was final and could not be revived under Rule 60(b), Ala. R. Civ. P. In contrast, Abell filed a response positing, among other things, not only that Tompkins had given express consent for the complaint to be amended to assert a back-injury claim, but also that the March 27, 2018, order had been erroneous under Jackson v. Delphi Automotive Systems, 42 So. 3d 1264 (Ala. Civ. App. 2010), because, Abell said, Tompkins had been allowed to work at light-duty tasks after his 2014 injuries.

The scheduled hearing on "all pending matters" was continued from its original setting on several occasions at the request of Wal-Mart, at the request of Abell, and on the circuit court's own motion. Meanwhile, Tompkins, again without regard to his represented status, continued to file motions in the case, such as an August 29, 2019, motion "to compel

production of documents" from Wal-Mart and third parties, a November 14, 2019, motion seeking a finding of contempt against Wal-Mart, and a November 14, 2019, motion seeking "emergency medical treatment." For all that we can perceive of the events in the underlying case, none of those motions appears to have been acted on by the circuit court, or even to have been treated by that court as properly before it.[3] In addition, Tompkins filed a notice of appeal on January 6, 2020, asserting that the circuit court had, via "operation of law," denied the August 29, 2019, "motion to compel production of documents." This court dismissed Tompkins's appeal[4] on the basis that it had not been taken from a final judgment (see Ala. Code

[3]Section 10 of the Alabama Constitution of 1901 provides that a person has the right, "by himself or counsel," to prosecute or defend "any civil cause to which he is a party" (emphasis added). However, "the cases are ... in substantial agreement with respect to the ... proposition that where a [nonattorney] party ... does appear by counsel he has no right to conduct personally, or to help counsel conduct, the litigation." H.C. Lind, Annotation, Right of Litigant in Civil Action Either to Assistance of Counsel Where Appearing Pro Se or to Assist Counsel Where Represented, 67 A.L.R.2d 1102, § 3 (1959).

[4]This court has taken judicial notice of the contents of the record in that appeal. See Veteto v. Swanson Servs. Corp., 886 So. 2d 756, 764 n.1 (Ala. 2003).

1975, § 12-22-2); this court's certificate of judgment was issued on March 16, 2020.

After the case had returned to the circuit court, and Wal-Mart had filed responses to the motions filed by Tompkins on August 29, 2019, and November 14, 2019, Tompkins filed additional documents in the case despite the circuit court's not having relieved Abell of his representation of Tompkins. Those documents included a "motion to show cause" seeking substantially the same relief as in previous filings and a purported amendment to the complaint to add additional claims against Wal-Mart, as well as claims against Donohoe, Abell, and Richard Franklin Mathews, Jr., a third attorney who had apparently been employed by Tompkins before the action was commenced in February 2018. On July 9, 2020, Wal-Mart filed a response to the new "motion to show cause" generally denying that any relief was due to be granted.

Because of the prevailing COVID-19 pandemic in summer 2020, the circuit court issued a "Notice of Virtual Hearing" on June 30, 2020, indicating that a virtual hearing would take place on July 13, 2020, as to "all pending motions." That notice was sent only to Abell and to counsel

for Wal-Mart. In addition, the circuit court sent a second "Notice of Virtual Hearing" on July 6, 2020, indicating a hearing date of July 14, 2020; that notice was sent not only to counsel for Wal-Mart and to Abell, but also to Donohoe and to Mathews (both of whom had filed papers seeking establishment of attorney's liens on any recovery by Tompkins); the July 13 hearing was subsequently canceled. We note that subsection (b) of Rule 5, Ala. R. Civ. P., provides that, "[w]henever ... service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party is ordered by the court," and that the record contains no indication that the circuit court required the clerk of the circuit court to send any notice directly to Tompkins in advance of the scheduled July 14, 2020, virtual hearing.

On July 14, 2020, after the scheduled virtual-hearing time, the circuit court sent a new "Notice of Virtual Hearing" setting a virtual hearing for July 28, 2020. That notice was sent to counsel for Wal-Mart, to Abell, to Donohoe, and to Mathews. In connection with that new notice, the circuit court entered an order stating that recipients should "check

[their] email" for a notice that would "provide a link to download Zoom," a telecommunications program, "as well as a [telephone] number to call into the Virtual Hearing if [a recipient was] unable to download or use" the telecommunications program; the order also stated that recipients who might be "Pro Se Plaintiff[s] or Defendant[s]" should "check [their] mail" to find the notice. In addition, the order stated that, "[a]s ... to witnesses, the Court Reporter has to be able to see and communicate with any witness and the witness must be able to see the Court Reporter and be able to communicate with her"; that "[a]ny written material pertinent to the hearing including copies of any case law or other statutory authority cited [was to be] filed no later than noon on July 23, 2020"; and that "[i]f Plaintiff fails to obtain service or appear on the above date, the action will be Dismissed." Again, there is no indication in the record that the circuit court required the clerk of the circuit court to send any notice or a copy of the court's accompanying order directly to Tompkins before the July 28, 2020, virtual hearing.

Although there is no transcript appearing in the record, other portions of the record indicate that the July 28, 2020, virtual hearing did

proceed, albeit apparently only in the virtual presence of Abell and counsel for Wal-Mart. Within hours of that hearing, counsel for Wal-Mart submitted a proposed order of dismissal in its favor, whereas Abell submitted a proposed order again referring the case to mediation. The circuit court did not immediately act upon either of the proposed orders.

After the July 28, 2020, virtual hearing, Tompkins filed additional papers in the circuit court. On August 5, 2020, he submitted a notice indicating that he had been under medical quarantine in New York and requesting a hearing on "disputed issues" and leave to file caselaw; he also tendered an additional motion on that date seeking contempt sanctions against Wal-Mart. On August 13, 2020, Tompkins submitted a statement of authorities that, he contended, supported his claims; he also submitted on that date a motion seeking the disqualification of, and sanctions against, Abell, averring that Abell had not notified Tompkins of the July 14, 2020, and July 28, 2020, virtual hearings and that Abell had not communicated with Tompkins since October 30, 2019.

On August 19, 2020, the circuit court entered a judgment in conformity with the proposed order prepared by counsel for Wal-Mart. The judgment provides, in pertinent part:

> "This matter came before the Court on July 28, 2020 pursuant to this Court's Order of July 14, 2020. Present at the hearing was counsel for [Wal-Mart] and former counsel for Plaintiff, William K. Abell. This Court finds as follows:
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> "1. Plaintiff, proceeding Pro Se, failed to appear at the previously set hearing on July 14, 2020.
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> "2. Plaintiff failed to appear at the hearing of July 28, 2020.
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> "3. This Court, in its Order of July 14, 2020, set out that if the Plaintiff again failed to appear, this matter would be dismissed.
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> "4. Pending before this Court are Plaintiff's Motions to Compel, captioned as Motion for Contempt, Motion for Emergency Medical Treatment and Motion to Show Cause, all of which have been considered by this Court and are DENIED.
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> "5. Plaintiff has been through numerous attorneys in this matter and has failed to follow the advice of any of his able counsel, as is evident to this Court and as has been expressed to this Court by prior counsel on multiple occasions.
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> "6. [Wal-Mart] has been forced to expend unnecessary time, legal fees and expenses due to Plaintiff's unwarranted filings and failures to appear before this Court when so Ordered.

> "7. Plaintiff has continued to file repetitive pleadings in this Court and the appellate courts of this State in an attempt to revive matters that have long ago been decided by this Court, the time for reconsideration and appeal of the same having expired.
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> "8. Plaintiff has been warned and advised by this Court on multiple occasions that failure to abide by this Court's directives would result in dismissal of this action.
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> "9. Pursuant to Rule 41, Alabama Rules of Civil Procedure, in that Plaintiff has willfully failed to prosecute this action, failed abide [sic] by this Court's Orders for mediation and to [sic] failed to appear at multiple hearings, this matter is hereby DISMISSED in its entirety, with prejudice, costs taxed as paid."

(Emphasis added.)

On appeal, Tompkins, appearing pro se, asserts, among other things, that the circuit court's dismissal of his action amounts to a denial of due process. Our review of the record compels this court to agree. In Hosey v. Lowery, 911 So. 2d 15 (Ala. Civ. App. 2005), the trial court dismissed, with prejudice, claims against one of three defendants (Donald Lowery) based upon the failure of counsel for the plaintiffs to attend an October 14, 2003, hearing on a matter involving only moot issues arising from claims against the other two defendants that had been settled. This court,

speaking through Judge Murdock, agreed with the position taken by counsel for the plaintiffs in that case to the effect that the dismissal of the claims against Lowery amounted to a denial of due process:

> "The plaintiffs argue that they were denied due process by the trial court's sua sponte dismissal of all claims against Lowery as a sanction for the plaintiffs' counsel's failure to attend the October 14 hearing. The constitutional requirement of due process of law means 'notice, a hearing according to that notice, and a judgment entered in accordance with such notice and hearing.' Ex parte Rice, 265 Ala. 454, 458, 92 So. 2d 16, 19 (1957). See also Kingvision Pay-Per-View, Ltd. v. Ayers, 886 So. 2d 45, 54 (Ala. 2003). Our Supreme Court has also noted that due process
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> > "'contemplates the rudimentary requirements of fair play, which include a fair and open hearing ... with notice and the opportunity to present evidence and argument ... and information as to the claims of the opposing party, with reasonable opportunity to controvert them.'
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> "Ex parte Weeks, 611 So. 2d 259, 261 (Ala. 1992).
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> "The only motions scheduled to be heard at the October 14 hearing were ... two motions for sanctions that had become moot. Lowery had not filed a motion to dismiss, and the trial court had given the plaintiffs no indication that the dismissal of their claims against Lowery would be considered at the October 14 hearing. See Isler v. Isler, 870 So. 2d 730, 734 (Ala. Civ. App. 2003) (trial court violated due process by combining, without adequate notice, a premature trial on the merits with a hearing on temporary custody and other interim

> relief). Under the circumstances of this case, the dismissal of the plaintiffs' claims against Lowery, without notice or a hearing, violated the plaintiffs' due-process rights.
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> "This state 'has a long-established and compelling policy objective of affording litigants a trial on the merits whenever possible.' Cincinnati Ins. Co. v. Synergy Gas, Inc., 585 So. 2d 822, 827 (Ala. 1991). A trial court has the discretion and inherent power to dismiss claims for various reasons, including failure to prosecute and failure to attend a hearing, but '"since dismissal with prejudice is a drastic sanction, it is to be applied only in extreme situations."' Burdeshaw v. White, 585 So. 2d 842, 848 (Ala. 1991) (quoting Smith v. Wilcox County Bd. of Educ., 365 So. 2d 659, 661 (Ala. 1978)).
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> "Although we do not condone an unexcused failure to attend a hearing, we do not find that the circumstances presented here were extreme and we do not believe that the sanction was proportionate to the offense. Compare Burdeshaw, 585 So. 2d at 849 (unexcused failure to appear at a hearing and a 10-month delay in attempting to schedule another hearing was not sufficient to warrant dismissal); Brown v. Brown, 896 So. 2d 573 (Ala. Civ. App. 2004) (reversing a dismissal that was based on an inmate's failure to attend a pretrial conference); and Miller v. Miller, 618 So. 2d 728 (Ala. Civ. App. 1993) (reversing a dismissal based on counsel's failure to attend hearing; counsel was 30 minutes late)."

911 So. 2d at 17-18.

Likewise, in this case, we do not find that the "circumstances presented here" (i.e., Tompkins's failure to participate in a virtual hearing

as to which apparently only his opponent and his current and former counsel of record were given notice) were "extreme," nor do we believe that the sanction of dismissal of all of Tompkins's claims, including those asserted by Donohoe and Abell on his behalf, was "proportionate to the offense" of failing to participate in that virtual hearing. Hosey, 911 So. 2d at 18. First, at the time that the circuit court entered its judgment of dismissal, Abell was still Tompkins's counsel of record -- the circuit court has not ruled on Abell's motion seeking withdrawal from his representation, and Abell's presence at the July 28, 2020, virtual hearing and his subsequent submission of a proposed order that would have rereferred the case to mediation[5] are actions that are inconsistent with what the circuit court termed a "willful[] fail[ure] to prosecute this action." Moreover, Abell's continued involvement in the case as counsel for

[5]This court is at a loss on this record to comprehend the circuit court's determination that Tompkins "failed [to] abide by" multiple "[o]rders for mediation" -- only one such order appears to have been entered by the circuit court, which directed that mediation occur within 60 days of January 4, 2019, which deadline had not arrived when Donohoe notified the circuit court of the existence of a settlement on February 20, 2019.

Tompkins would have, from the standpoint of Rule 5(b), obviated any need on the part of the clerk to provide notice directly to Tompkins of the July 14, 2020, and July 28, 2020, virtual-hearing settings, as well as the July 14, 2020, order (which appears to be a generic form order) indicating that dismissal would be a contemplated sanction "[i]f Plaintiff fail[ed] to obtain service or appear" on July 28.

On the authority of Hosey, supra, we conclude that the circuit court's dismissal with prejudice of Tompkins's pending claims amounted to a denial of due process. The judgment of the circuit court, therefore, is due to be reversed. On remand, the circuit court will have the authority to determine, in the first instance, whether Abell's motion to withdraw should be granted and whether Tompkins should be allowed to proceed pro se in lieu of being represented by counsel, as well as the remaining issues raised by Tompkins in his pro se brief on appeal upon which the circuit court has not yet passed, including whether the March 27, 2018, interlocutory order of dismissal as to claims arising from the alleged October 5, 2014, injuries should be vacated; whether Tompkins is entitled

to a "panel of four" under the Act; and whether Tompkins should be permitted to assert claims of malpractice or fraud.

REVERSED AND REMANDED.

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

Fridy, J., recuses himself.