

SUPREME COURT OF ARKANSAS

No. 12-137

DONALD G. CREWS

APPELLANT

V.

DEERE & COMPANY

APPELLEE

Opinion Delivered February 21, 2013APPEAL FROM THE CRAIGHEAD
COUNTY CIRCUIT COURT
[NO. CIV-98-216]HONORABLE JOHN N.
FOGLEMAN, JUDGEREVERSED AND DISMISSED.**PAUL E. DANIELSON, Justice**

Appellant Donald G. Crews appeals from an order of the Craighead County Circuit Court vacating a prior order staying enforcement of judgment and denying Crews's motion to stay the enforcement of judgment pending resolution of posttrial motions; motion to quash writ of execution; motion to quash writ of scire facias; motion to set aside order reviving judgment; and petition for dismissal with prejudice. Rather, the order permitted execution efforts in favor of appellee Deere & Company on a prior, revived consent judgment. Crews raises two points on appeal: (1) the consent judgment was not valid because it was entered after the case had been dismissed for want of prosecution and, therefore, could not be revived; and (2) Deere & Company had remedies no longer available due to its own lack of diligence. We hold that the consent judgment entered was not a valid order because the circuit court no longer had jurisdiction when it entered the order; therefore,

we reverse and dismiss.

The pertinent facts are these. Deere & Company filed a complaint against Crews on May 4, 1998, alleging that Crews had breached a retail installment contract by failing to make the required payments for a John Deere cotton picker. The cotton picker was repossessed and sold, but a deficiency balance remained in the amount of \$58,592.98. Crews filed a timely answer; however, on January 6, 2001, the Craighead County Circuit Court notified Deere & Company's counsel that, after twelve months of no action of record, the case would be dismissed by the court without prejudice for want of prosecution unless good cause was shown by February 16, 2001, why the case should remain pending. On February 28, 2001, an order dismissing the case without prejudice was filed.¹

However, the parties appeared, by and through counsel, before the court on April 9, 2001, to enter a consent judgment. The judgment to which Crews agreed was filed on April 13, 2001, and ordered that Deere & Company would recover the sum of \$12,000, in full and complete satisfaction, compromise and discharge of all claims and demands, actions, and causes of action that Deere & Company had against Crews in regard to this action. The sum was due and payable on or before August 18, 2002. If the sum was not received by Deere & Company by that date, the judgment reflected the parties' agreement that the full deficiency balance would be due and payable at the rate of eight-percent interest per annum until paid

¹Deere & Company's attorney did submit a letter to the circuit court on February 5, 2001, asking for a trial date. The court initially set it for trial on March 23, 2001; however, the court still dismissed the matter for want of prosecution on February 28, 2001.

in full.

The matter remained dormant for ten years until Deere & Company moved to revive the April 13, 2001 consent judgment by filing a petition for writ of scire facias and the writ itself on March 17, 2011. The circuit court entered an order reviving the judgment on April 13, 2011. However, on July 26, 2011, Crews filed several pleadings of his own: a motion to stay enforcement of the judgment pending resolution of posttrial motions; a motion to quash the writ of execution; a motion to quash the writ of scire facias; a motion to set aside the order reviving judgment; and a petition for dismissal with prejudice.

While the circuit court initially entered an order staying enforcement of the judgment in favor of Crews, it ultimately entered an order denying Crews's motions and allowing execution on the judgment. This appeal followed, and we now turn to the merits.

The issue presented here is whether the circuit court had jurisdiction to enter a consent judgment in a case that had been dismissed. It is a question of law, which this court reviews de novo. See *Unknown Heirs of Warbington v. First Cmty. Bank*, 2011 Ark. 280, 383 S.W.3d 384; *Nucor Corp. v. Kilman*, 358 Ark. 107, 186 S.W.3d 720 (2004). De novo review means that the entire case is open for review. See *ConAgra, Inc. v. Tyson Foods, Inc.*, 342 Ark. 672, 30 S.W.3d 725 (2000). We do not, however, reverse the circuit court's findings of fact unless they are clearly erroneous. See *id.*

As previously noted, the circuit court dismissed Deere & Company's complaint for want of prosecution pursuant to Ark. R. Civ. P. 41(b), which provides:

In any case in which there has been a failure of the plaintiff to comply with these rules

or any order of court or in which there has been no action shown on the record for the past 12 months, the court shall cause notice to be mailed to the attorneys of record, and to any party not represented by an attorney, that the case will be dismissed for want of prosecution unless on a stated day application is made, upon a showing of good cause, to continue the case on the court's docket. A dismissal under this subdivision is without prejudice to a future action by the plaintiff unless the action has been previously dismissed, whether voluntarily or involuntarily, in which event such dismissal operates as an adjudication on the merits.

There is no dispute that the consent judgment at issue was entered after the case had been dismissed by the circuit court pursuant to Rule 41(b). This court has previously determined that a Rule 41(b) dismissal is not a "clerical error" under Rule 60(b) of the Arkansas Rules of Civil Procedure. See *Watson v. Connors*, 372 Ark. 56, 270 S.W.3d 826 (2008) (citing *Wal-Mart Stores, Inc. v. Taylor*, 346 Ark. 259, 57 S.W.3d 158 (2001)). However, Deere & Company argues that the circuit court had jurisdiction to enter the consent judgment pursuant to Ark. R. Civ. P. 60(a). That rule states in pertinent part:

To correct errors or mistakes or to prevent the miscarriage of justice, the court *may modify or vacate a judgment, order or decree* on the motion of the court or any party, with prior notice to all parties, within ninety days of its having been filed with the clerk.

Ark. R. Civ. P. 60(a) (2001) (emphasis added).

First, we would have to consider the court's order of dismissal an "error" or "mistake" or "miscarriage of justice." To do so here would be speculation. Furthermore, we do not consider a consent judgment in a case that has been dismissed a modification or the equivalent of an order to vacate. In *Taylor*, we held that the appellant did not properly attempt to vacate the order of dismissal until too late and stated that "the trial court was without jurisdiction to entertain the motion and enter the order reinstating the case." *Taylor*, 346 Ark. at 263, 57

S.W.3d at 161. While this suggests that, if the appellant had been within the ninety-day limitation, the circuit court would have had jurisdiction to reinstate the case, it also suggests that would only have been after considering a motion to vacate and entering an order doing so.

In the instant case, the circuit court lost jurisdiction when it dismissed the case. Therefore, the remedies that remained were to either file a timely motion pursuant to Rule 60(a) or to timely file a new lawsuit. The plaintiff here did neither. The record reveals no motion to vacate, nor any order to set aside or reinstate the case—only a consent judgment entered in a case that had previously been dismissed and effectively no longer existed on the circuit court’s docket. The fact that it was a “consent judgment” is of no moment because jurisdiction may not be created by consent of the parties. *See Gailey v. Allstate Ins. Co.*, 362 Ark. 568, 210 S.W.3d 40 (2005).

For these reasons, we hold that the circuit court did not have jurisdiction to enter the consent judgment, thus, making the consent judgment invalid. Because the consent judgment was invalid, it could not be revived. Even were Crews’s second issue on appeal to properly seek some form of relief, we would need not address it because we reverse and dismiss based on the first argument presented.

Reversed and dismissed.

BAKER and HART, JJ., dissent.

KAREN R. BAKER, Justice, dissenting. Because the circuit court retained jurisdiction to modify its dismissal order for ninety days after it was entered, I respectfully

dissent.

Arkansas Rule of Civil Procedure 60(a) states:

To correct errors or mistakes or to prevent miscarriage of justice, the court may modify or vacate a judgment, order or decree on the motion of the court or any party, with prior notice to all parties, within ninety days of its having been filed with the clerk.

The majority asserts that to consider the court's order of dismissal an error, mistake, or miscarriage of justice would be "speculation." I disagree. The order of dismissal without prejudice entered on February 28, 2001, specifically states that the case was dismissed because it had been on file for more than one year and that no action of record had taken place within the previous twelve months. However, the record contains a letter of confirmation dated February 7, 2001, that a trial was scheduled on March 23, 2001. The scheduling of a trial is an action of record. This court is not required to speculate that a mistake was made when a case was dismissed for inaction where the record clearly shows that action was taken.

The majority further states that the circuit court lost its jurisdiction when it dismissed the case. However, the majority is unclear which type of jurisdiction the court lost on the entry of its dismissal: personal jurisdiction or subject-matter jurisdiction. The circuit court could not have lost personal jurisdiction, because both parties consented to judgment and Crews was a resident of Craighead County. Therefore, the majority must be asserting that the circuit court lost subject-matter jurisdiction.¹

¹The majority also states that the fact that the judgment was a consent judgment is of no moment because jurisdiction cannot be created by consent of the parties. It is true that subject-matter jurisdiction cannot be created by consent. However, Ark. Code Ann.

Subject matter jurisdiction is the authority of the court to exercise judicial power. *Hargis v. Hargis*, 292 Ark. 487, 731 S.W.2d 198 (1987). Clearly, the circuit court retains the authority to exercise judicial power and control over its judgments during the ninety days after the judgment is filed. *Loyd v. City of Russellville*, 287 Ark. 95, 696 S.W.2d 741 (1985). The power of the courts to modify or set aside a judgment exists as an inherent power. *Blissard Mgt. & Realty, Inc. v. Kremer*, 284 Ark. 136, 680 S.W.2d 694 (1984). The majority's holding here abridges the power of the circuit court to modify its own order.

The majority's holding also sets form over substance by indicating that a court must file a physical motion to vacate its own order dismissing the case. Arkansas Rule of Civil Procedure 60 allows a court to modify or vacate a judgment on its own motion within ninety days. It is uncontested that the consent judgment was filed by the circuit court within ninety days of the entry of the order dismissing the case. While the majority places a great deal emphasis on the fact that the record contains no motion to vacate the order, the consent judgment certainly modifies the order of dismissal. The holding of the majority appears to require that the court must file a motion asking to modify an order of dismissal, grant that motion, then modify the order. This is a ludicrous process which requires pointless work by the circuit court.

The majority cites *Wal-Mart Stores, Inc. v. Taylor*, 346 Ark. 259, 57 S.W.3d 158 (2001), as suggesting that a circuit court only has jurisdiction after considering a motion to vacate and

§ 16-65-301 (Repl. 2005) independently establishes the circuit court's authority to enter a consent judgment.

entering an order doing so. However, *Taylor* is easily distinguished. In *Taylor*, the appellee filed a motion for revocation seventeen months after the order of dismissal was filed. The circuit court granted the motion. This court held that the circuit court was in error to do so because the motion for revocation was filed after the ninety days had elapsed. The circuit court only lost jurisdiction after the ninety days had expired. *Id.* at 263, 57 S.W.3d at 161. Here, the circuit court, within ninety days, modified the order dismissing the case on its own. Because the ninety days had not expired, the circuit court retained jurisdiction over the order.

Because the consent judgment was a modification of the order dismissing the case without prejudice filed within ninety days to correct a mistake, I would hold that the consent judgment was valid and the circuit court was within its authority to revive it.

HART, J., joins.

Brian G. Brooks, Attorney at Law, PLLC, by: *Brian G. Brooks*, for appellant.

The Key Firm, PLLC, by: *Shawn Key*, for appellee.