Rel: October 30, 2020

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2020-2021

1190382

S.C., individually, and K.C., individually and as next friend of A.C., a minor

v.

Autauga County Board of Education et al.

Appeal from Autauga Circuit Court
(CV-19-900199)

BOLIN, Justice.

This is an appeal from the Autauga Circuit Court's dismissal, with prejudice, of a complaint following an alleged sexual assault of a minor at an Autauga County school.

Facts and Procedural History

On July 15, 2019, S.C. and K.C., the parents of the minor, A.C., sued the Autauga County School System; Spencer Agee, the superintendent of the Autauga County School System, in his individual and official capacities; Brock Dunn, principal of the school at which the alleged assault occurred, in his individual and official capacities; and the Autauga County Board of Education ("the ACBOE") and its members in their official capacities (hereinafter collectively referred to as "the board defendants"). The parents also sued N.A., individually, and O.A. and A.A., individually and as next friend of N.A., a minor (hereinafter collectively referred to as "the nongovernment defendants").

On August 15, 2019, Agee and the board defendants filed a motion for a more definite statement, which the circuit court granted on September 26, 2019. On October 3, 2019, S.C. and K.C. filed an amended complaint.

On October 15, 2019, the board defendants filed a motion to dismiss, asserting sovereign immunity pursuant to Art. I, § 14, Ala. Const. 1901. They also asserted that S.C. and K.C.

nonetheless had a remedy because, they said, the State Board of Adjustment had jurisdiction to hear their claims.

On October 17, 2019, Agee and Dunn filed a motion to dismiss, incorporating the board defendants' motion and adding State-agent immunity as a bar to the claims brought against them in their individual capacity. They also asserted that S.C. and K.C.'s claims were barred by the statute of limitations.

On October 18, 2019, the circuit court set the board defendants' motion to dismiss for a hearing on November 21, 2019. That same day, the circuit court also set a hearing date for Agee and Dunn's motion for November 21, 2019. On October 25, 2019, S.C. and K.C. filed a response to the motions to dismiss.

On November 6, 2019, Agee and Dunn filed a motion to continue the hearing set for November 21, 2019. Defense counsel for Agee and Dunn asserted:

> "During the week of November 18th through 22nd, 2019, undersigned counsel is scheduled to be defending depositions in a Federal Court case pending before Honorable Myron Thompson. Said case involves six plaintiffs and nine (9) total attorneys. The week of November 18th through 22nd has been coordinated among all counsel for quite some time."

On November 7, 2019, the circuit court granted the motion to continue and rescheduled the hearing on the motions to dismiss for December 12, 2019. On November 15, 2019, the nongovernment defendants filed a motion to dismiss for failure to state a claim or, in the alternative, a motion for a more definite statement.

On December 9, 2019, Agee and Dunn filed a second motion to continue the hearing on the motions to dismiss set for December 12, 2019. The motion provided, in pertinent part:

> "1. Undersigned counsel is scheduled to be in depositions in a Federal case pending before Hon. Myron Thompson on December 11, 12 and 13. These depositions have been noticed and scheduled since October 24, 2019 and involve the coordination of nine (9) attorney and party schedules.
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> "2. Undersigned counsel has communicated this conflict to all other counsel of record who have graciously advised that there is no objection to continuing the hearing.
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> "3. In contacting the Hon. Ben Fuller's chambers, counsel was advised that civil motions will be heard in Autauga County on February 27, 2020. Undersigned counsel has conferred with all other counsel of record and can advise that all party counsel are available on this date pending Court approval.

> "4. As no party has an objection to a continuance, no prejudice will result to any party."[1]

On December 10, 2019, the circuit court granted Agee and Dunn's motion to continue, but scheduled the hearing for December 20, 2019. The circuit court's order provided that "[t]his hearing will not be further continued absent a showing of extraordinary circumstances."

On December 16, 2019, S.C. and K.C. filed a motion to continue, citing a scheduling conflict involving mediation in a separate case in another county. Counsel for S.C. and K.C. stated that the motion to continue was made in good faith and not for the purpose of delay. The circuit court did not rule on the motion.

On December 20, 2019, the circuit court entered the following order:

> "This case was scheduled for and called for hearing on Defendants' Motion[s] to Dismiss at 8:30 a.m. on December 20, 2019. Counsel for the Defendants were present at the time of the scheduled hearing. None of Plaintiffs counsel appeared for the said hearing at 8:30 a.m. as scheduled by the Court. The Court waited until 9:00 a.m. to convene the hearing and counsel for the Plaintiffs having still not arrived, it is ORDERED as follows:

[1]Agee and Dunn attached a proposed order for the circuit court, rescheduling the hearing.

> "1. That the Defendants' Motions to Dismiss are hereby granted in their entirety and this case is dismissed with prejudice. The costs are taxed as paid."

On December 27, 2019, S.C. and K.C. filed a motion to set aside the circuit court's order of dismissal. The motion provided:

> "1. That the above-styled matter was scheduled for a hearing before the Honorable Judge Ben Fuller on Friday December 20, 2019 at 8:30 a.m. in the Civil Court of Autauga County.
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> "2. That there have been two continuances filed on behalf of the defendants in this matter due to conflict in cases. Both continuances were granted by the Court and new court dates were ordered. The most recent order was entered on December 10, 2019 resetting this case for a hearing on December 20, 2019.
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> "3. That counselors for the Plaintiff have filed one Motion to Continue on December 16, 2019. Our legal assistant attests that multiple calls were made to the court as follow up to the motion but received no response.
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> "4. That there was miscommunication between the attorneys in the office due to each attorney having multiple conflicts on December 20, 2019 where counsel mistakenly were under the impression the hearing had been continued.
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> "5. The undersigned counselors for the Plaintiffs are counselors of record in the matter of Shelby County Circuit Case CV-2017-135, Shirley Sadler v. Riverchase Country Club, and stated that they were scheduled to attend mediation in Jefferson

> County for the entirety of December 20, 2019 on this two year old pending case.
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> "6. That said mediation had a deadline to conduct on or before December 20, 2019 and has been difficult to schedule due to the multiple parties involved and has been continued several times."

On December 29, 2019, the circuit court denied S.C. and K.C.'s motion to set aside. S.C. and K.C. timely appealed.

Discussion

The issue presented is whether the circuit court erred in dismissing S.C. and K.C.'s claims with prejudice under Rule 41(b), Ala. R. Civ. P.[2]

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[2]Agee, Dunn, and the board defendants assert that there is no evidence indicating that the circuit court's order was entered pursuant to Rule 41(b), Ala. R. Civ. P., and that the order should be considered a Rule 12(b)(6), Ala. R. Civ. P., dismissal. In their reply brief, S.C. and K.C. state that they "are willing to concede the dismissal was in fact pursuant to Rule 12(b)." We disagree; the substance of the circuit court's order and the circumstances under which it was entered indicate that it was based on Rule 41(b). First, the general rule is that the circuit court has the inherent power to act sua sponte to dismiss an action for want of prosecution. Smith v. Wilcox Cnty. Bd. of Educ., 365 So. 2d 659 (Ala. 1978). Second, nothing in Rule 41 provides that the rule must be mentioned in the order. See generally Osborn v. Roche, 813 So. 2d 811 (Ala. 2001)(holding that this Court will consider the substance of the order and review it accordingly). Third, the circuit court dismissed S.C. and K.C.'s claims with prejudice following two continuances sought by defense counsel and a warning that no further continuances would be allowed absent extraordinary circumstances, and the dismissal order states that the dismissal was the result of

As the Court of Civil Appeals correctly noted in Kendrick v. Earl's, Inc., 987 So. 2d 589, 592-93 (Ala. Civ. App. 2007):

> "Rule 41(b), Ala. R. Civ. P., permits a trial court to dismiss an action when a plaintiff fails to prosecute that action or fails to comply with the Rules of Civil Procedure or orders of the court. Although the trial court in the present case did not specifically indicate that its dismissal of the employee's action against both the employer and the individual defendants was 'with prejudice,' the practical effect of the dismissal judgments in this case is the same as if the trial court had entered a dismissal with prejudice because the statute of limitations on each of the employee's claims had expired by the time of the entry of the April 2006 and the April 2007 dismissal judgments. See Riddlesprigger v. Ervin, 519 So. 2d 486, 487 (Ala. 1987). Typically, an appellate court will review a dismissal pursuant to Rule 41(b) to determine only whether the trial court abused its discretion. Riddlesprigger, 519 So. 2d at 487.
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> "'However, since dismissal with prejudice is a drastic sanction, it is to be applied only in extreme situations,' and 'appellate courts will carefully scrutinize such orders and occasionally will find it necessary to set them aside.' Smith v. Wilcox County Bd. of Educ., 365 So. 2d 659, 661 (Ala. 1978) (citing, among other things, 9 Wright & Miller, Federal Practice & Procedure § 2370, p. 203, n. 1). Our supreme court has explained that 'the plaintiff's conduct must mandate the dismissal,' and it has further reiterated the rule espoused by the United States Court of Appeals for the Fifth Circuit

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S.C.'s and K.C.'s failure to appear at the scheduled hearing. "[A] Rule 41(b) dismissal is deemed a sanction for disobedience, while a Rule 12(b)(6) dismissal carries no such stigma." Edwards v. Marin Park, Inc., 356 F.3d 1058, 1065 (9th Cir. 2004).

> that 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."' Smith, 365 So. 2d at 661 (quoting Durham v. Florida East Coast Ry. Co., 385 F.2d 366, 368 (5th Cir. 1967))."

Our appellate decisions affirming Rule 41(b) dismissals involve flagrant behavior by the plaintiff. For example, Cassady v. Montgomery County Board of Education, 496 So. 2d 764 (Ala. 1986), involved the sua sponte dismissal by the circuit court when the plaintiff sought and obtained a series of continuances over a period of 20 months, failed to appear at 2 scheduled pretrial conferences, and failed to appear on the date the case was set for trial. In Ex parte Folmar Kenner, LLC, 43 So. 3d 1234 (Ala. 2009), this Court held that the trial court did not err in dismissing with prejudice a tenant's counterclaims against her landlord when the trial court repeatedly warned the tenant to confine her testimony to questions posed by the landlord's counsel and not to volunteer information and expound on her answers and the tenant ignored the court's warnings. Cartee v. Community Spirit Bank, 214 So. 3d 362 (Ala. Civ. App. 2015), involved the dismissal of the debtors' loan dispute with their bank when the debtors initially failed to initiate arbitration proceedings within 90

days as ordered by trial court. The trial court granted the debtors an additional 30 days to secure an arbitrator. The trial court did not receive a status update for almost three months, despite having ordered the debtors to provide one. The debtors then requested to cancel the scheduled arbitration based on the illness of one of the debtors, and the debtors still had not attempted to reschedule arbitration a month after the date of the canceled arbitration. This Court held that the trial court acted within its discretion in dismissing the debtors' case for failure to prosecute.

When our appellate courts have reversed an order dismissing with prejudice, it was because the record did not reveal the extreme circumstances sufficient to warrant the harsh sanction of dismissal. In Smith v. Savage, 655 So. 2d 1022 (Ala. Civ. App. 1995), the pro se plaintiffs sued the defendant alleging wrongful detainer of personal property. The plaintiffs failed to appear at trial at 8:30 a.m. as directed by the court's docket list. One of the plaintiffs was incarcerated at the time of trial, and the other plaintiff stated in her affidavit that she did not reach the courthouse until 9:30 a.m. on the morning scheduled for trial because her

automobile had a flat tire. Based on the record, there did not appear to be any undue delay, willful default, or contumacious conduct on the part of the plaintiffs, and the Court of Civil Appeals held that the trial court exceeded its discretion in dismissing the plaintiffs' action with prejudice.

State ex rel. S.M. v. A.H., 832 So. 2d 79 (Ala. Civ. App. 2002), involved the State's action brought on behalf of a mother against a putative father seeking an adjudication of paternity and child support. The Court of Civil Appeals held that the juvenile court's order of dismissal was not supported by the evidence. The mother had requested only two continuances, and those were requested because of a delay in the receipt of DNA test results, and, although it was possible that the State, at worst, was not diligent in checking on whether the DNA lab had what it needed to complete the testing, there was no indication that the mother or the State had engaged in willful delay or contumacious conduct.

In Ace American Insurance Co. v. Rouse's Enterprises, LLC, 280 So. 3d 402 (Ala. 2018), a logistics-company employee sued a grocery store on August 11, 2016, to recover damages

for injuries he sustained while making a delivery, as the result of the allegedly negligent operation of a pallet jack by a grocery-store employee. The logistic company's workers' compensation insurer, which alleged that it had paid worker's compensation benefits to the employee, intervened in the action. The trial court dismissed the action for want of prosecution, and the insurer appealed. This Court held that the trial court, while dismissing the logistics-company employee's negligence action against the grocery store for want of prosecution, could not also dismiss the claim asserted by the logistic company's insurer, which had intervened in the action as a plaintiff, to recover worker's compensation benefits that it had paid to the employee. The insurer filed its action to intervene within a reasonable time after the employee's complaint was filed to protect its own interests. Following some discovery, the employee took no action after his attorney withdrew from representing him in October 2017. The trial court ordered the employee to respond to the grocery store's motion to dismiss by April 12, 2018, and when it became apparent that the employee was not going to respond to the grocery store's motion to dismiss within the time allotted

by the trial court, the insurer promptly filed a response to the grocery store's motion to dismiss. The insurer argued that there was no evidence indicating that it or its insured (the logistics company) had engaged in any undue delay, willful default, or contumacious conduct, and this Court held that there was no clear record of delay on the insurer's part.

In the present case, the circuit court exceeded its discretion in dismissing S.C. and K.C.'s claims when there was no clear record of delay or contumacious conduct by the plaintiffs. The first two continuances were sought by Agee and Dunn. S.C. and K.C. did not object to the second continuance sought by Agee and Dunn, and the parties contacted circuit-court personnel in an attempt to find a date to schedule the hearing on the motions to dismiss that would accommodate the parties and their counsel, pending court approval. By contacting court personnel, the parties were attempting to find a date for the circuit court's convenience as well as to make sure that the case proceeded to the merits in a timely manner. S.C. and K.C. sought their first continuance following the circuit court's order rescheduling the hearing and after the parties had found a convenient date

in accordance with motion-docket dates provided by court personnel. We also note that the time for S.C. and K.C. to file their motion to continue in response to the circuit court's rescheduled hearing date was only 10 days.

"[D]ismissals with prejudice or defaults are drastic sanctions, termed 'extreme' by the Supreme Court, National Hockey League [v. Metropolitan Hockey Club, Inc.], 427 U.S. [639] at 643, 96 S.Ct. [2778] at 2781 [(1976)], and are to be reserved for comparable cases." Poulis v. State Farm Fire & Cas. Co., 747 F.2d 863, 867-68 (3d Cir. 1984). That most severe sanction in the spectrum of sanctions is not warranted in this case.

REVERSED AND REMANDED.

Parker, C.J., and Sellers, Stewart, and Mitchell, JJ., concur.

Wise, J., recuses herself.