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ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2021

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Delisa B. Ash

v.

**Fitzgerald Washington, commissioner of the Alabama
Department of Labor**

(Baldwin Circuit Court, CV-19-901293)

EDWARDS, Judge.

Delisa B. Ash appeals from a judgment entered by the Baldwin Circuit Court dismissing, with prejudice, her claim for unemployment-compensation benefits based on her alleged failure to prosecute that

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claim. See Rule 41(b), Ala. R. Civ. P. We reverse the judgment and remand the cause for further proceedings.

On February 12, 2019, Ash filed an employment application with, and was hired by, Gulf Coast Home Care, LLC ("GCHC"), d/b/a First Light Home Care, as an as-needed certified nursing assistant. According to GCHC, Ash was allowed to serve as an as-needed replacement for caretakers in the Baldwin County area. Notices of the available caretaker positions were apparently sent to numerous persons who worked for GCHC, and those positions were filled based on the first person to accept an available position.

According to Ash, she could have worked full-time provided she had a set schedule, but, she said, it was her understanding that a part-time position was all that GCHC had available.¹ Ash's employment application with GCHC stated that she was not looking for full-time employment, that she was available for work "Approx. (Mon., Wed., Fri.) 6A-2P," that she

¹Ash stated that she had had to leave a full-time position working for a previous employer based on her own health issues and to care for her husband, who also purportedly had health issues.

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was not willing to work night shifts, and that she was not willing to work different shifts in the same week. However, she further indicated that the hours that worked best for her were 6:00 a.m. until 2:00 p.m. on Mondays, Thursdays, and Saturdays.

Ash worked for GCHC for three hours on March 9, 2019 -- the only day she accepted a caretaker position -- and she thereafter filed a claim for unemployment-compensation benefits with the Alabama Department of Labor ("the department"). A claims examiner for the department reviewed Ash's unemployment-compensation claim and issued a determination stating that Ash was eligible for unemployment-compensation benefits, with a weekly benefit amount of \$265 and a maximum benefit amount of \$6,890, notice of which the department mailed to Ash and GCHC on April 24, 2019. GCHC timely appealed to the department's appeals tribunal from the claims examiner's determination, see Ala. Code 1975, § 25-4-92(a), specifically regarding the issue whether Ash was available for work for purposes of determining her eligibility for unemployment-compensation benefits, as required by Ala. Code 1975, § 25-4-77(a)(3).

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On May 21, 2019, the appeals tribunal held a telephone hearing regarding Ash's unemployment-compensation claim. Ash and a representative from GCHC testified at that hearing. According to GCHC, Ash remained in their "system" for purposes of work assignments, but she apparently had not attempted to "pick up" any available shifts.

On May 22, 2019, the appeals tribunal mailed Ash an order that reversed the claims examiner's determination and denied her unemployment-compensation claim on the ground that she was not fully available for work and, thus, was ineligible for benefits pursuant to § 25-4-77(a)(3). Specifically, the appeals tribunal determined that

"[Ash] worked one day, March 9, 2019. [She] provided her availability schedule to [GCHC]. She is available to work 20 hours each week, working from 6:00 a.m, until 2:00 p.m. on Mondays, Thursdays and Saturdays. [GCHC] sends out a schedule once per week and also sends out available shifts, via mass text message. [Ash] has not picked up any shifts and was not available when contacted. [GCHC] has work available.

"... Section 25-4-77(a)(3) ... provides that eligibility for benefits requires that the claimant is fully available and willing to accept work during the full-time hours, full work week, and for the shifts normally worked in the trade or industry for which she is qualified based on past training or experience. Evidence in this case shows [that Ash] is not

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making herself available for work, nor is she seeking full-time work in her trade or industry. The evidence also shows [that Ash] limited her availability. There is insufficient evidence to support [that Ash] is available for full-time work. ...

"... [Ash] is ineligible for benefits ... effective March 10, 2019. This decision of ineligibility continues until [she] adequately demonstrates ... that the availability requirements ... are being satisfied."

Also, on May 23, 2019, the department issued a notice of overpayment to Ash; the notice of overpayment stated that Ash was required to repay the department \$2,385 for the unemployment-compensation benefits she had received for the weeks beginning March 23, 2019, through May 18, 2019 ("the repayment determination"). See Ala. Code 1975, § 25-4-91(d)(1)(a). The notice of overpayment informed Ash that she could request a waiver of repayment but that such a request could not be considered until "all appeal rights have become final."

On May 30, 2019, Ash sent a letter to the hearings and appeals division of the department, i.e., the division for the appeals tribunal, challenging the repayment determination and mentioning her disagreement with the denial of her unemployment-compensation claim. The hearings and appeals division forwarded that letter to the

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department's Board of Appeals ("the board"), which treated the letter as an application for leave to appeal the denial of her unemployment-compensation claim. See Donaldson v. State Dep't of Indus. Rels., 439 So. 2d 1301, 1303 (Ala. Civ. App. 1983) (rejecting an argument that a letter "was insufficient to constitute an appeal" and concluding that "[p]articularity in pleading is not required as to such appeals").

On June 19, 2019, the board sent Ash and GCHC an order granting Ash's application for leave to appeal the appeals tribunal's denial of her unemployment-compensation claim. Thereafter, the board issued an order setting Ash's claim for a hearing to be held on July 19, 2019. Ash and a representative from GCHC testified at that hearing. On August 12, 2019, the board issued an order affirming the decision of the appeals tribunal based upon the board's consideration of "all the evidence in this case" and of the opinion and findings of the appeals tribunal.

On September 6, 2019, Ash filed a "Notice of Appeal and Complaint" in the circuit court, naming Fitzgerald Washington, the commissioner of the department, as the defendant. Ash alleged that the board had erred by denying her unemployment-compensation claim, that she had been

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available for work, and that she was eligible for unemployment-compensation benefits. The department filed an answer denying Ash's allegations.

The trial regarding Ash's unemployment-compensation claim was initially scheduled to be held on March 18, 2020, but it was continued on several occasions. Some of the continuances were at the request of the department; as to others, the reason for the continuance is unclear. On September 4, 2020, the circuit court entered an order rescheduling the trial for October 7, 2020. Ash failed to appear at trial on October 7, 2020. On October 8, 2020, the circuit court entered an order stating that the department "was present and ready for trial. However, [Ash] did not appear for the trial. On [the department's] oral motion, this case is DISMISSED WITH PREJUDICE for [Ash's] failure to prosecute." (Capitalization in original.)

On October 15, 2020, Ash filed a postjudgment motion, requesting that the circuit court set aside the October 2020 judgment. She argued that her attorney had "inadvertently failed to open the email containing the order setting the case for trial" and had "somehow inadvertently and

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mistakenly assumed that the prior email, which was a Court notice, and the notice of trial were one and the same email." Ash further alleged that her attorney normally

"checks the case action summaries of active cases at least once a month just in case a court notice is not sent or one is sent and missed. Due to the lack of Internet service caused by Hurricane Sally[, which made landfall in Gulf Shores on the morning of September 16, 2020,] counsel was unable to take that step, which would have revealed the trial setting."²

Ash also alleged that the department would not be unduly prejudiced by the setting aside of the October 2020 judgment and argued that her claim had merit and should not have been dismissed in light of the factors set out in Kirtland v. Fort Morgan Authority Sewer Service, Inc., 524 So. 2d 600, 605 (Ala.1988), which are used to determine whether a default judgment should be set aside pursuant to Rule 55(c), Ala. R. Civ. P. The department filed a response opposing Ash's postjudgment motion.

²Ash's counsel, who works for Legal Services Alabama, prepared and filed her postjudgment motion. See Ex parte Owen, 860 So. 2d 877, 880 (Ala. 2003) (quoting Molton v. State, 651 So. 2d 663, 670 n.6 (Ala. Crim. App. 1994), quoting in turn Holloway v. Arkansas, 435 U.S. 475, 486 (1978), for the proposition that "[a]ttorneys are officers of the court and 'when they address the judge solemnly upon a matter before the court, their declarations are virtually made under oath'").

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On November 2, 2020, the circuit court entered an order denying Ash's postjudgment motion, stating, among other things, that it had considered the Kirtland factors in making that decision. One minute later, the circuit court entered an order that denied Ash's postjudgment motion and made no reference to Kirtland. We consider the latter order to reflect a correction pursuant to Rule 60(a), Ala. R. Civ. P.³ Ash appealed to this court.

Ash argues that the circuit court erred by denying her postjudgment motion challenging the dismissal of her claim for her failure to appear at trial. Rule 41(b), Ala. R. Civ. P., states:

"For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of

³The Kirtland factors are not applicable to a dismissal pursuant to Rule 41(b), Ala. R. Civ. P., although this court has considered arguments based on the culpability factor in Kirtland "as addressing the propriety of the Rule 41 dismissal ..., i.e., whether [the] conduct in failing to appear at the bench trial constituted willful or contumacious conduct." Smith v. Butler-Austin, 108 So. 3d 1014, 1021 n.1 (Ala. Civ. App. 2012) (opinion on return from remand).

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jurisdiction, for improper venue, or for failure to join a party under Rule 19, [Ala. R. Civ. P.,] operates as an adjudication upon the merits."

As 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)).

" 'In Alabama, and many federal courts, the interest in disposing of the litigation on the merits is overcome and a dismissal may be granted when there is a clear record of delay, willful default or contumacious conduct by the plaintiff. Willful default or conduct is a conscious or intentional failure to act. 'Willful' is used in contradistinction to accidental or involuntary noncompliance. No wrong motive or intent is necessary to show willful conduct." '

Id. (internal citations omitted)."

Goodley v. Standard Furniture Mfg. Co., 716 So. 2d 226, 227 (Ala. Civ. App. 1998). " '[B]ecause the trial judge is in the best position to assess the conduct of the plaintiff and the degree of noncompliance, his decision to

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grant a motion to dismiss for failure to prosecute will be accorded considerable weight by a reviewing court.'" Ex parte Folmar Kenner, LLC, 43 So. 3d 1234, 1240 (Ala. 2009) (quoting Jones v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 604 So. 2d 332, 341 (Ala.1991)). This court may not substitute its judgment for that of the trial court when the record contains evidence that supports the trial court's determination. Id.

Regarding the issue whether Ash or her counsel engaged in conduct that would support dismissal of her claim pursuant to Rule 41(b), our supreme court has stated:

"In Cabaniss v. Wilson, 501 So. 2d 1177 (Ala. 1986), the plaintiffs' attorney failed to appear at a hearing on a motion for a summary judgment. At the hearing, counsel for the defendants orally moved to dismiss the plaintiffs' complaint with prejudice under Rule 41(b), Ala. R. Civ. P., for failure to prosecute. The trial court granted the defendants' Rule 41(b) motion, dismissing the plaintiffs' complaint with prejudice. Subsequently, the plaintiffs filed a motion to alter, amend, or vacate the judgment, claiming that the summary-judgment hearing was 'inadvertently left off the calendar of plaintiffs' counsel....' 501 So. 2d at 1179. The trial court denied the plaintiffs' motion, and the plaintiffs appealed. 501 So. 2d at 1179-80.

"Applying the well established rules concerning the review of a trial court's dismissal with prejudice of a plaintiff's claims, this Court held that the conduct of the plaintiffs'

attorney did not appear to be willful or contumacious because 'the failure of the plaintiffs' attorney to appear in court [at the hearing on the summary-judgment motion] was allegedly inadvertent on his part.' 501 So. 2d at 1181. Because there was no evidence to support the trial court's dismissal with prejudice, this Court reversed its order dismissing the plaintiffs' claims and remanded the cause for further proceedings.

"As was the case in Cabaniss, the record here does not reveal the presence of 'extreme circumstances' sufficient to warrant the 'harsh sanction' of a dismissal with prejudice. See Selby v. Money, 403 So. 2d 218, 220 (Ala. 1981). Although Cobern argues on appeal that many other factors could have affected the trial court's ultimate decision to dismiss Gill's action with prejudice, the record clearly indicates that the trial court dismissed Gill's action on the sole basis that Gill's attorney did not appear at the pretrial conference. In Gill's motion to alter, amend, or vacate the trial court's judgment, Gill's attorney alleged that his absence was the result of a calendaring error and that it was not the result of willful or contumacious conduct. ... Nothing in the record indicates that Gill's attorney was engaged in 'willful' delay or 'contumacious conduct.' Therefore, we hold that the trial court erred in dismissing Gill's action with prejudice."

Gill v. Cobern, 36 So. 3d 31, 33-34 (Ala. 2009) (footnote omitted).

Likewise, in Goodley, this court noted that,

"[o]ther than [Joseph] Goodley's failure to appear on the date set for trial, the case action summary reveals no delay, default, or dereliction on his part. Compare Cassady v. Montgomery County Bd. of Educ., 496 So. 2d 764 (Ala. 1986) (trial court did not err by dismissing, for lack of prosecution,

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plaintiff's claim when record showed that plaintiff had obtained numerous continuances over a 20-month period, had failed to appear at two scheduled pre-trial conferences, and had failed to appear at trial).

"Goodley's motion to set aside the dismissal alleged a facially valid reason for his failure to appear at trial. Compare Penn v. Irby, 496 So. 2d 751 (Ala. 1986) (trial court did not err by dismissing pro se plaintiff's case when record showed that copies of trial docket were sent by certified mail to plaintiff and plaintiff was also notified by telephone of his trial setting).

"Because the record reveals no delay, willful default, or contumacious conduct by Goodley, we hold that the trial court abused its discretion by dismissing Goodley's complaint."⁴

716 So. 2d at 227.

As in Gill and Goodley, the record in the present case includes no evidence that would support a finding of delay, willful default, or

⁴ "[T]wo days before the case was scheduled to be tried, Goodley's counsel filed a notice of withdrawal, stating that the lawyer and Goodley were unable to agree on 'fundamental issues regarding the claim.' That filing included a proposed order granting counsel leave to withdraw. The circuit court did not sign that order."

Goodley, 716 So. 2d at 227. Thereafter, neither Goodley nor his attorney appeared at trial, and the trial court dismissed the case for want of prosecution.

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contumacious conduct by Ash or her counsel. Accordingly, we conclude that the denial of Ash's postjudgment motion was in error. We therefore reverse the circuit court's October 2020 judgment and remand the cause for further proceedings.

REVERSED AND REMANDED.

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