

REL: October 29, 2021

Notice: This opinion is subject to formal revision before publication in the advance sheets of Southern Reporter. Readers are requested to notify the **Reporter of Decisions**, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 229-0649), of any typographical or other errors, in order that corrections may be made before the opinion is printed in Southern Reporter.

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2021-2022

2200109

W.W.H.

v.

D.L.H.

**Appeal from Jefferson Circuit Court, Bessemer Division
(DR-18-900203)**

HANSON, Judge.

This appeal arises from a civil action originally initiated by D.L.H. ("the wife") in July 2018 in the Bessemer Division of the Jefferson Circuit Court; the wife's complaint sought a judgment divorcing her from W.W.H.

2200109

("the husband") on the grounds of an incompatibility of temperament and an irretrievable breakdown of the parties' marriage (see generally Ala. Code 1975, § 30-2-1, subsections (7) and (9), recognizing those as grounds supporting a judgment of divorce under Alabama law). In response, the husband, acting through his retained trial counsel, served and filed a verified responsive pleading denying certain allegations made by the wife and asserting a counterclaim seeking a divorce judgment on the same grounds asserted by the wife. In August 2018, the parties reached an agreement under which, among other things, the wife was permitted to occupy the marital home, the husband was permitted to remove items of personal property from the marital home, the husband's daughters were barred from the marital home, and the parties were permitted to contact each other solely through counsel as necessary; the trial court ratified that agreement in a September 2018 pendente lite order.

In June 2019, the wife filed a motion seeking the appointment of a guardian ad litem for the husband. In that motion, the wife observed that the parties had previously participated in a mediation session; averred that the husband's daughters (who were born during a previous marriage

2200109

of the husband) had accompanied the husband to that session and had "advised the mediator that they held [a] power of attorney" as to the husband; stated that "the mediation could not move forward" because the daughters had "demanded that they be allowed to be involved on behalf of" the husband; and opined that the husband was "experiencing at least some level of diminished capacity as far as being able to discuss or decide matters relative to the parties, their marriage, and marital property." The husband's retained trial counsel filed a verified objection to the wife's motion, asserting, among other things, that the wife had illicitly obtained information regarding the husband's medical conditions by impersonating one of his daughters. After a hearing, the trial court entered an order appointing a guardian ad litem for the husband in September 2019 and, among other things, ensured the guardian ad litem's access to the husband's medical and psychological records and ordered the guardian ad litem to file a report of her findings within five days of trial.

In January 2020, the guardian ad litem filed a notice with the trial court in which she stated that the husband was "suffering from some form of diminished capacity which is growing more serious as time goes by" and

2200109

opined that the husband was "unable to answer the questions submitted to him" by the wife during discovery in the case. In response, the trial court set a hearing to address the guardian ad litem's notice, after which the trial court entered an order setting a trial date but also directing the parties' counsel to address whether one can be divorced from an incompetent person and whether an incompetent person can proceed with prosecuting a counterclaim upon the dismissal of the initial claim. Counsel for the wife filed a response indicating that she intended to dismiss her divorce claim and contending both that the husband lacked a representative who could prosecute his counterclaim and that, based upon the husband's condition, it was likely that the wife would not be able to obtain discovery responses and that dismissal of the action would, therefore, be an appropriate sanction under Rule 37(b)(2)(C), Ala. R. Civ. P. Retained trial counsel for the husband, however, argued that no medical professional or tribunal had determined the husband to be incompetent; contended that any actual incompetency of the husband had been alleviated through the appointment of the guardian ad litem; and stated that the husband's counterclaim was due to remain "pending for

2200109

adjudication by the court" under Rule 41(a)(2), Ala. R. Civ. P., even if the wife were to move for dismissal of her own claim.

Notwithstanding Rule 41(a)(2), however, counsel for the wife filed on March 25, 2020, a motion seeking dismissal of both her claim and the husband's counterclaim, averring, among other things, that it would be "a miscarriage of justice" for her to be required to defend against the husband's counterclaim given his inability to participate in discovery. In a written response, retained trial counsel for the husband contended that she had planned to conduct a deposition of her client but had not been able to specify a firm date therefor because of the COVID-19 pandemic, and she asserted that the husband would be "severely prejudiced should [the trial court] dismiss this action in its entirety and leave him to live out his days married when he does not wish to be." The trial court, on May 11, 2020, ordered the husband to undergo a psychological evaluation within 30 days, and counsel for the wife and the husband consented to the trial court's appointment of a particular neuropsychologist based in Jefferson County for that purpose. Following the appointment of that neuropsychologist and the conducting of that evaluation, the

2200109

neuropsychologist submitted to the trial court and to counsel a report of the husband's condition. The trial court then entered a judgment on October 27, 2020, granting the wife's motion seeking dismissal of the action, stating, in pertinent part:

"This Court takes note that [the husband] has filed a Counterclaim and wishes to pursue said Counterclaim. However, [the husband] has recently undergone forensic counseling by [the appointed neuropsychologist]. The [forensic impressions reported] by [the neuropsychologist] revealed the following [concerning the husband's] cognitive ability.

" 'Given the nature, severity, and extent of [the husband's] Major Neurocognitive disorder, it appears unlikely that he would be able to contribute to ongoing court proceedings regarding his divorce. Primarily, his receptive language difficulties would create considerable difficulty in understanding such proceedings, even if explained to him several times. He also appears unable to use alternative communication methods, as his reading abilities were considerably impaired as well. He would also have severe difficulties in providing information to his counsel and to the court, given his expressive language impairments. Lastly, his ability to reason appears considerably impaired.'

"This Court further takes note that ... the Guardian Ad Litem [who] was appointed to assist with representing [the husband's] interest ... advises the Court that she is unable to adequately assist [the husband] with responding to basic

2200109

discovery propounded to [him] due to the impairment of [his] cognitive ability."

The husband, through new retained counsel, timely appealed from the trial court's October 27, 2020, judgment to the extent that it had dismissed his counterclaim.¹ The appeal has been submitted on only the husband's brief, although counsel for the wife has filed a motion seeking the dismissal of the husband's appeal on the authority of Bevill v. Owen, 364 So. 2d 1201 (Ala. 1979). In Bevill, our supreme court considered an appeal brought by a defendant after a trial court had granted a motion filed by a plaintiff pursuant to Rule 41(a)(2), Ala. R. Civ. P., seeking a dismissal without prejudice of the action the plaintiff had brought against the defendant;² the judgment of dismissal without prejudice was affirmed on the basis that the defendant had not challenged in the trial court, before or after the entry of the judgment of dismissal, the propriety of a dismissal without prejudice. 364 So. 2d at 1203. In contrast, at the time that the trial court in this case entered its judgment dismissing both the

¹Because the trial court has ordered that the underlying action be marked confidential, this court has not identified the parties by name.

²No counterclaim was asserted by the defendant in Bevill.

2200109

wife's claim and the husband's counterclaim, the filings of retained trial counsel for the husband had advised the trial court of her position that dismissal of the husband's counterclaim would not be proper. Although the husband did not file a postjudgment motion challenging the dismissal of the counterclaim, "[a]ny error or ground of reversal ... of a judgment ... which was asserted in the trial court may be asserted on appeal without regard to whether such error or ground has been raised by" a postjudgment motion filed under Rule 52 or Rule 59, Ala. R. Civ. P. Rule 4(a)(3), Ala. R. App. P. (emphasis added). We thus deny the wife's motion to dismiss the husband's appeal.

We turn next to the merits of the husband's appeal. As we have noted, pursuant to Rule 41(a)(2), Ala. R. Civ. P., a plaintiff may properly seek dismissal of an action after a counterclaim has been pleaded by a defendant; however, that rule further specifies that, if such a dismissal is permitted by the trial court, "the counterclaim shall remain pending for adjudication by the court" (emphasis added). See also Rule 41, Ala. R. Civ. P., Committee Comments on 1973 Adoption (observing that the rule "state[s] unequivocally that a counterclaim interposed prior to dismissal

2200109

of [an] action remains pending despite the dismissal"). Because of the mandatory effect of that rule, the trial court's judgment dismissing the husband's counterclaim at the request of the wife cannot properly be attributed to the trial court's general power to set conditions upon a voluntary dismissal under Rule 41(a), Ala. R. Civ. P., at the instance of a claimant. In fact, as to the husband, the judgment of dismissal -- which judgment his retained trial counsel, far from seeking on his behalf, actively opposed -- can only be said to have been involuntary in nature. Rule 41(b), Ala. R. Civ. P., sets forth two circumstances under which a defending party, such as the wife, may seek a judgment involuntarily dismissing an action brought by, or a claim asserted in an action by, a claiming party,³ including: (1) a "failure of the [claimant] to prosecute" and (2) a failure by a claimant "to comply with these rules or any order of court."

³We note that subsection (c) of Rule 41 states that the provisions of Rule 41 "apply to the dismissal of any counterclaim, cross-claim, or third-party claim."

2200109

We perceive, on this record, no factual basis that would support the existence of either of the two bases stated in Rule 41(b) as warranting an involuntary dismissal of the husband's counterclaim. First, to the extent that the trial court may have deemed the husband's counterclaim due to be dismissed for failure of prosecution, we note that the husband's retained trial counsel vigorously and timely opposed the wife's filings seeking dismissal of that counterclaim, and there is no indication that the husband or his legal representatives (i.e., his retained trial counsel or his appointed guardian ad litem) engaged in any acts of intentional delay. Under similar circumstances -- affirmative action indicating an intent to prosecute coupled with a lack of "willful delay or contumacious conduct" -- this court reversed a judgment of dismissal with prejudice predicated upon a purported failure to prosecute in Progressive Insurance Co. v. Brown, 195 So. 3d 1007, 1012 (Ala. Civ. App. 2015). Similarly, the record in this appeal is devoid of evidence that would support the proposition

2200109

that the husband had violated any rule of civil procedure or court order at the time the trial court dismissed the counterclaim with prejudice.⁴

In the trial court, counsel for the wife suggested that the husband lacked capacity to maintain his counterclaim. However, under Rule 17(b), Ala. R. Civ. P., "[t]he capacity of a party ... to sue or be sued shall be determined by the law of this state." Although it is true that decisions in other states deem a divorce action to be of such a personal nature that a legal representative of a mentally incapacitated spouse cannot properly maintain such an action on behalf of that spouse,⁵ our supreme court has rejected that rule and held squarely to the contrary, opining that, by statute and court rule in Alabama, a guardian may act on behalf of a

⁴Because a dismissal under Rule 41(b) "operates as an adjudication upon the merits," the trial court's judgment under review will prevent the husband from again seeking a divorce from the wife on the grounds stated in his counterclaim. The preclusive effects of the trial court's judgment of dismissal prove the veracity of the statement of retained trial counsel for the husband that the husband, absent reversal, must indeed "live out his days married when he does not wish to be."

⁵See generally David E. Rigney, Annotation, Power of Incompetent Spouse's Guardian or Representative to Sue for Granting or Vacation of Divorce or Annulment of Marriage, or to Make Compromise or Settlement in Such Suit, 32 A.L.R.5th 673 at § 3(b) (1995).

2200109

mentally incompetent spouse in initiating a divorce action. See Campbell v. Campbell, 242 Ala. 141, 142-43, 5 So. 2d 401, 402 (1941) ("The court has ample power to protect the interest of the incompetent complainant, and the equity of the bill must be determined on its averments, independent of the state of the complainant's mind as if he were suing of his own volition." (emphasis added)); accord Hopson v. Hopson, 257 Ala. 140, 141 7 So. 2d 505, 505 (1952) (relying upon Campbell in rejecting propositions that a divorce action by and through a guardian "cannot be maintained" and that "there can be no voluntary assent to the proceeding by a person of unsound mind"); see also Willis v. Willis, 238 Ala. 153, 189 So. 873 (1939) (allowing marriage-annulment action to be brought by guardian of mentally incompetent party). Thus, even if the husband or his legal representative had not sought a divorce until after the husband's incompetency, a claim therefor could properly have been maintained in this state; a fortiori, the propriety of a legal representative's continuation of a spouse's divorce claim that was initially pleaded before the onset of that spouse's incompetency cannot reasonably be questioned.

2200109

The wife's counsel also asserted in the trial court that the husband's inability to respond to interrogatories or to sit for a pretrial deposition also warranted a sanction of dismissal, hypothesizing that a failure on the husband's part to provide substantive responses to questions of the wife's counsel would amount to sanctionable conduct under Rule 37(b)(2), Ala. R. Civ. P., which addresses failures of parties to obey orders to provide or permit discovery. Among the sanctions permitted under subsection (C) of that rule is the one suggested by the wife in the trial court: "[a]n order ... dismissing the action or proceeding or any part thereof ... against the disobedient party" (emphasis added).

However, this court opined in Smith v. Davidson, 58 So. 3d 177, 181-82 (Ala. Civ. App. 2010), that a judgment of dismissal pursuant to Rule 37(b)(2)(C) must be based upon "evidence from which [the trial court] could infer that [a party's] failure to comply with [an opponent]'s discovery requests and the trial court's orders was the result of [the party's] conscious or intentional failure to act, not his accidental or involuntary noncompliance" (emphasis added). The guardian ad litem's January 2020 notice indicating that the husband was unable to respond to the wife's

2200109

interrogatories averred that the husband was "suffering from some form of diminished capacity" that was becoming "more serious as time goes by," although that notice lodged no objections to the form or content of the wife's interrogatories. Further, the report of the forensic neuropsychological evaluation undertaken by the neuropsychologist appointed by the trial court indicates that the husband has indeed suffered profound cognitive deficits, such as having become unable to write his own name or to distinguish numbers from letters, and there is no basis on this record to dispute the proposition that, by the time that the trial court entered its judgment, the husband had reached the point that he would have been unable to "contribute to ongoing court proceedings regarding his divorce." Nevertheless, the husband's inability to respond to discovery requests stemming from his cognitive decline is more in the nature of an involuntary or accidental noncompliance under Smith than "conscious" or "intentional" conduct that would justify a departure from the general legal principle that a party that is "non compos mentis" is to be "treated as a ward of the court" so as to ensure that " 'his rights are properly asserted and protected' " by a legal representative of the trial

2200109

court such as his appointed guardian ad litem. McCalley v. Finney, 198 Ala. 462, 466, 73 So. 639, 640-41 (1916) (quoting Austin v. Bean, 101 Ala. 133, 148, 16 So. 41, 46 (1894)).⁶

For the reasons stated herein, we agree with the husband's appellate counsel that the trial court erred in dismissing his counterclaim with prejudice, and we therefore reverse that judgment. The cause is remanded for further proceedings on the husband's counterclaim. In remanding the cause, we observe that, regardless of the husband's personal inability to adduce substantive evidence tending to prove or disprove the existence of the grounds for divorce set forth in subsections (7) and (9) of Ala. Code 1975, § 30-2-1, that were alleged on his behalf in his verified pleading in July 2018, those grounds may be proved or disproved on remand by other evidence, including testimony of other witnesses having knowledge of the state of the parties' marriage and the circumstances of their separation. Further, because the trial court, to its

⁶Austin was overruled on an unrelated point of law by McDonald v. Harris, 131 Ala. 359, 31 So. 548 (1901). See Schoenvogel ex rel. Schoenvogel v. Venator Grp. Retail, Inc., 895 So. 2d 225, 242 (Ala. 2004) (citing Niehuss v. Ford, 251 Ala. 529, 532, 38 So.2d 484, 487 (1949)).

2200109

credit, has already acted to protect the husband's interests by appointing him a guardian ad litem, we would add that, to the extent that the husband's capacity has been diminished by his cognitive impairment, that attorney-client relationship has been and will continue to be governed by the Alabama Rules of Professional Conduct, especially Rule 1.14.

REVERSED AND REMANDED.

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

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