

Rel: August 12, 2022

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SUPREME COURT OF ALABAMA

SPECIAL TERM, 2022

1210222

Gary Womble and Sheila Womble

v.

Collie Moore III

**Appeal from Jefferson Circuit Court
(CV-20-900884)**

SHAW, Justice.

Gary Womble and Sheila Womble, the plaintiffs below, appeal, challenging the Jefferson Circuit Court's purported denial by operation

of law of their motion filed pursuant to Rule 60(b), Ala. R. Civ. P., and its judgment dismissing their tort action against Collie Moore III based on their failure to prosecute the action. We dismiss the appeal.

Facts and Procedural History

In March 2018, the Wombles were injured as the result of a motor-vehicle accident in which Moore's vehicle rear-ended the Wombles' vehicle. The Wombles subsequently filed a complaint in the trial court asserting claims of negligence, wantonness, and loss of consortium against Moore.

Following additional filings by the parties, the trial court, on August 24, 2020, conducted a status conference and, two days later, entered a scheduling order in which it set the trial in this case for September 13, 2021. A little more than two months after that status conference, the Wombles' attorney filed a motion to withdraw as their counsel, in which he stated that he could "no longer effectively represent" them and that he had "informed the [Wombles] that they will have to timely comply with" the trial court's orders. The trial court granted that motion.

After their trial counsel withdrew, the Wombles proceeded pro se.

According to the materials in the record, they participated in all scheduled proceedings and status conferences conducted between January and April 2021.

On September 13, 2021, per the trial court's previously entered scheduling order, the case was called for trial. Moore was present, but neither the Wombles nor an attorney on their behalf appeared. Consequently, Moore's counsel moved the trial court to dismiss the action based on the Wombles' "failure to prosecute" the case. The trial court granted that motion and dismissed the Wombles' complaint, with prejudice, on that date.

Thereafter, on October 12, 2021, the Wombles filed a motion in which they cited Rule 60(b), Ala. R. Civ. P., and asked the trial court to set aside its judgment on the basis that their failure to prosecute their case was due to their own "excusable neglect."¹ After Moore filed his response to the Wombles' motion, a virtual hearing on the motion was scheduled for December 9, 2021. The record does not indicate whether that hearing was held or, if it was, whether the trial court reached a

¹In support of their motion, the Wombles attached an affidavit from Gary Womble in which he explained why the Wombles did not appear for the previously scheduled trial on September 13, 2021.

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decision on the motion following that hearing. In any event, on January 12, 2022 -- nearly four months after the trial court dismissed the Wombles' complaint -- the Wombles filed a notice of appeal.

Discussion

On appeal, the Wombles contend that they were entitled to relief on their Rule 60(b) motion because, they say, there is "uncontroverted testimony" from Gary Womble indicating that the Wombles' failure to appear for the trial did not constitute "willful default or contumacious conduct." Moore contends, on the other hand, that the Wombles' Rule 60(b) motion has never been ruled upon by the trial court and, thus, that their appeal is "premature." Therefore, Moore contends that this Court does not have jurisdiction over the Wombles' appeal and that the appeal is due to be dismissed.

"The question of whether an order or judgment is final and therefore can support an appeal is jurisdictional." Cox v. Parrish, 292 So. 3d 312, 315 (Ala. 2019). Generally, when an appeal is premature -- i.e., when it has been taken before a final, appealable order or judgment has been entered -- our appellate courts do not have jurisdiction to hear the appeal and the appeal is due to be dismissed. See, e.g., Thompson v. State

ex rel. Jett, 318 So. 3d 1226, 1231 (Ala. Civ. App. 2020) (holding that the appellate court lacked jurisdiction over the appeal because the appellant's Rule 60(b) motion was still pending before the trial court and, thus, the appeal was premature and due to be dismissed).

According to the record before us, the trial court issued its judgment dismissing, with prejudice, the Wombles' complaint against Moore on September 13, 2021. On October 12, 2021, the Wombles filed their motion, citing Rule 60(b), in which they contended that they were entitled to "relief from [the trial court's] judgment" because their failure to appear for the previously scheduled trial was "inadvertent" and the result of "excusable neglect." That motion in substance was a motion made under Rule 60(b)(1). Despite scheduling a hearing to hear arguments on the Wombles' motion, nothing in the record indicates that the trial court ever ruled on that motion.

The Wombles contend that "by Rule no postjudgment motion can remain pending for more than ninety days and hence a motion is deemed denied at that point." The Wombles' brief at 2. Accordingly, the Wombles further contend that their Rule 60(b) motion was deemed "denied by operation of law" on January 12, 2022, and that they then had 42 days to

file their notice of appeal under Rule 4(a), Ala. R. App. P. Id. at 1.

Rule 59.1, Ala. R. Civ. P., provides:

"No postjudgment motion filed pursuant to Rules 50, 52, 55, or 59[, Ala. R. Civ. P.,] shall remain pending in the trial court for more than ninety (90) days, unless with the express consent of all the parties, which consent shall appear of record, or unless extended by the appellate court to which an appeal of the judgment would lie, and such time may be further extended for good cause shown."

(Emphasis added.) The 90-day period provided in Rule 59.1 applies only to motions filed under Rules 50, 52, 55, and 59, Ala. R. Civ. P.; it does not apply to Rule 60(b) motions to set aside a judgment. See Ex parte R.S.C., 853 So. 2d 228, 233 (Ala. Civ. App. 2002) ("It is well settled that the 90-day period for pending postjudgment motions applies only to motions filed under Rules 50, 52, 55, and 59, and that it does not apply to Rule 60(b) motions to set aside a judgment."). Because motions made pursuant to Rule 60(b) are not subject to Rule 59.1, they are "not subject to being denied by operation of law pursuant to that rule." Tucker v. Nixon, 215 So. 3d 1102, 1106 (Ala. Civ. App. 2016). Thus, contrary to the Wombles' contention, their Rule 60(b) motion was not "denied by operation of law."²

²Additionally, we note that the 90th day following the filing of the Wombles' Rule 60(b) motion was January 10, 2022, not January 12, 2022.

There is no indication in the record that the trial court ruled on the Wombles' motion, and neither side disputes that no formal ruling was ever made on the motion. In such cases, our appellate courts have held that the Rule 60(b) motion remains pending in the trial court. See Thompson, 318 So. 3d at 1231 (holding that the appellant's Rule 60(b) motion was still pending before the trial court and, thus, that the appeal was premature), and Tucker, 215 So. 3d at 1106-07 (holding that, because it was not subject to being denied by operation of law under Rule 59.1, the appellant's Rule 60(b) motion was still pending before the trial court). As a result, in such circumstances, our appellate courts have further held that an appeal concerning a still-pending Rule 60(b) motion must be dismissed for lack of appellate jurisdiction. See Thompson, 318 So. 3d at 1231 (dismissing appeal after determining that jurisdiction was lacking because the appellant's Rule 60(b) motion was still pending in the trial court), and Tucker, 215 So. 3d at 1106-07 (dismissing, in part, an appeal insofar as it concerned the appellant's Rule 60(b) motion that was still pending in the trial court). Cf. Ex parte R.S.C., 853 So. 2d at 234 (holding that a petition for a writ of mandamus seeking to set aside a purported denial by operation of law of a Rule 60(b) motion was premature because

the trial court had not yet ruled on the motion). Because the Wombles' Rule 60(b) motion remains pending before the trial court, this Court lacks jurisdiction over the Wombles' appeal insofar as it challenges the trial court's purported denial by operation of law of their Rule 60(b) motion, and, therefore, their appeal, insofar as it challenges that purported denial, is due to be dismissed.

Further, to the extent that the Wombles are appealing from the trial court's September 13, 2021, judgment dismissing their claims against Moore, we note that Rule 4(a)(1), Ala. R. App. P., provides:

"Except as otherwise provided herein, in all cases in which an appeal is permitted by law as of right to the supreme court or to a court of appeals, the notice of appeal required by Rule 3[, Ala. R. App. P.,] shall be filed with the clerk of the trial court within 42 days (6 weeks) of the date of the entry of the judgment or order appealed from, or within the time allowed by an extension pursuant to Rule 77(d), Alabama Rules of Civil Procedure."

Although Rule 4(a)(3) provides that "the running of the time for filing a notice of appeal" shall be suspended while certain types of postjudgment motions are pending in the trial court but have not yet been ruled on, a motion filed pursuant to Rule 60 is not such a motion. See Graves v. Golthy, 21 So. 3d 720, 722 (Ala. 2009) ("[A] Rule 60 motion is not included in Rule 4(a)(3), Ala. R. App. P., as one of the motions that toll the time in

which to file an appeal."); Borders v. City of Huntsville, 875 So. 2d 1168, 1175 (Ala. 2003); Alabama Farm Bureau Mut. Cas. Ins. Co. v. Boswell, 430 So. 2d 426, 428 (Ala. 1983) (holding that a Rule 60 motion "does not affect the finality of the judgment or toll the time for appeal"). Therefore, the Wombles were required to file their notice of appeal from the trial court's judgment dismissing their action within 42 days of the entry of that judgment. However, the Wombles' notice of appeal was not filed until January 12, 2022 -- nearly four months after the trial court issued its judgment. Because the notice of appeal was untimely as to the trial court's judgment of dismissal, the Wombles' appeal, insofar as it challenges that judgment, is due to be dismissed. See Lem Harris Rainwater Family Trust v. Rainwater, [Ms. 1190951, June 30, 2021] ____ So. 3d ____, ____ (Ala. 2021) ("Because the notice of appeal was untimely, we must dismiss the appeal."). See also Rule 2(a)(1), Ala. R. App. P. ("An appeal shall be dismissed if the notice of appeal was not timely filed to invoke the jurisdiction of the appellate court."). For the reasons discussed, the Wombles' appeal is dismissed in its entirety.

APPEAL DISMISSED.

Parker, C.J., and Bryan, Mendheim, and Mitchell, JJ., concur.