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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2016-2017

2150631

Brianna Horton

v.

Bria Monique Hinton

Appeal from Tuscaloosa Circuit Court
(CV-15-900165)

PITTMAN, Judge.

Brianna Horton appeals from a judgment of the Tuscaloosa Circuit Court dismissing her personal-injury action as a sanction for disregarding the requirements of the discovery process. We affirm the trial court's judgment.

In February 2015, Horton sued Bria Monique Hinton, alleging that Hinton had negligently or wantonly operated an automobile in a manner so as to strike Horton. Horton also asserted that Hinton's actions amounted to outrageous conduct and that Horton had suffered emotional distress as a result of that alleged conduct.

In June 2015, Hinton filed a motion to dismiss Horton's action, alleging that Horton had failed to respond to interrogatories and requests for production of documents, that the trial court had entered an order compelling Horton to respond to those discovery requests, and that Horton had failed to comply with the trial court's order. Apparently, after Hinton had filed her motion to dismiss, Horton responded to the discovery requests, and the trial court entered an order denying Hinton's motion to dismiss as moot.

The record indicates that, subsequently, Hinton scheduled Horton's deposition for a date in October 2015, that Hinton later canceled that deposition at Horton's request, that Hinton sent two letters to Horton's counsel requesting potential dates for the rescheduling of Horton's deposition, and that Horton failed to respond to those letters.

Accordingly, Hinton chose a new date for Horton's deposition and issued a new notice of deposition. On the date set for Horton's deposition, Hinton's counsel traveled from Birmingham to Tuscaloosa to depose Horton, but neither Horton nor her counsel appeared for the deposition. There is no explanation in the record as to why Horton and her counsel failed to appear.

In response to a motion to compel, the trial court entered an order directing Horton to make herself available for deposition within 21 days "or be subject to possible dismissal" of her action. Hinton rescheduled and re-noticed Horton's deposition, and, although Horton's counsel appeared at the scheduled time and location, Horton did not. Accordingly, Hinton filed a motion to dismiss Horton's action.

One month after Hinton had filed her motion to dismiss, to which Horton had not responded, the trial court entered a judgment dismissing the action. Thereafter, Horton filed a postjudgment motion requesting the trial court to "reconsider" that ruling. In support of her motion, Horton submitted an affidavit that had been executed by her mother, who attested that she had attempted to drive Horton to the deposition but

had gotten stuck in traffic. She also attested, somewhat vaguely, that:

> "... My phone number was [a previous telephone number], but I was having trouble with that phone and my attorney did not know.
>
> "... I was using another phone with [a different telephone number].
>
> "... My attorney did not know this number, nor that I was having trouble with the other phone.
>
> "... I called my attorney to inform him of the Interstate traffic jam and that I would be to the deposition shortly. My attorney informed me that he had attempted to call me on my old number, but he could not get me and that the deposition was cancelled."[1]

Horton's postjudgment motion also indicates that her attorney had failed to attend the hearing on Hinton's motion to dismiss.[2] The trial court denied Horton's postjudgment motion, and Horton appealed.

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[1]The court can only assume that Horton's mother's references to "my attorney" are intended to refer to Horton's attorney. There is no indication that Horton's mother is a party in this action.

[2]Horton claimed that her attorney "did not see" the order setting the date for the hearing. Although she did not submit any evidence supporting that assertion, Horton pointed out that an initial order, which had set a hearing date for Hinton's motion to dismiss, had been followed almost immediately by an order moving the hearing to an earlier date. She claimed that her counsel was aware of the first order but that the second order "was not detected for some reason."

Rule 37(b), Ala. R. Civ. P., authorizes a trial court to dismiss an action as a sanction against a party who violates an order compelling him or her to provide or permit discovery. Similarly, Rule 37(d), Ala. R. Civ. P., authorizes dismissal as a sanction for a party's failure to answer interrogatories or requests for production or to attend his or her properly noticed deposition. "The choice of discovery sanctions is within the trial court's discretion and will not be disturbed on appeal absent gross abuse of discretion." Iverson v. Xpert Tune, Inc., 553 So. 2d 82, 87 (Ala. 1989).

Our supreme court has made it clear that "'willfulness' on the part of the noncomplying party is a key factor supporting a dismissal" as a sanction for failing to respond to discovery requests or to comply with orders compelling discovery. Id. at 87. "If one party has acted with willful and deliberate disregard of reasonable and necessary requests for the efficient administration of justice, the application of even so stringent a sanction as dismissal is fully justified and should not be disturbed." Id.

Early in the present action, Horton failed to timely respond to Hinton's written discovery requests, forcing the

trial court to become involved and to issue an order compelling Horton to provide responses. Horton, however, failed to comply with that order until after Hinton had filed a motion to dismiss Horton's action, causing the trial court to again become involved.

After Hinton had noticed Horton's deposition the first time, Horton asked that it be rescheduled, a request that Hinton accommodated by canceling the deposition. Horton, however, failed to respond to multiple requests for convenient dates for the rescheduling of her deposition, which prompted Hinton to unilaterally choose a date and to issue a new notice of deposition. Horton and her counsel, however, failed to appear for the deposition as noticed, after Hinton's counsel had traveled from Birmingham to Tuscaloosa to depose Horton. There is absolutely no explanation in the record (or in Horton's appellant's brief to this court) as to why she failed to attend that deposition.

Horton's failure to attend her deposition prompted yet another motion to compel and the trial court's involvement in the discovery process. The trial court entered an order compelling Horton to appear for deposition, but Horton failed

to comply with that order, forcing Hinton to file another motion to dismiss. Horton, however, did not respond to that motion until after the trial court had granted it. See generally Bradley v. Town of Argo, 2 So. 3d 819, 823 (Ala. 2008) (suggesting that a motion to alter, amend, or vacate a judgment should not, without a reasonable explanation, be utilized to submit evidence that could have been submitted before the judgment was entered). Even then, Horton herself did not provide an affidavit explaining her failure to attend her deposition. Rather, her mother submitted an affidavit indicating that Horton had failed to provide her attorney with accurate contact information and referencing a telephone call Horton's mother had made to Horton's attorney at some unspecified point in time after the deposition had been canceled.

In Napier v. McDougall, 601 So. 2d 446, 448 (Ala. 1992), our supreme court affirmed the dismissal of an action as a sanction for the plaintiff's failure to provide answers to written discovery requests, noting that "nothing was filed with the court (no answers, no explanation for past failures to answer, and no request for additional time) until 9 days

after the case had been dismissed, when [the plaintiff] filed [a] motion for relief from judgment." As in Napier, the record in the present case demonstrates a consistent failure on Horton's part, without adequate excuse, to properly comply with the requirements of the discovery process. See also Tri-Shelters, Inc. v. A.G. Gaston Constr. Co., 622 So. 2d 329, 330 (Ala. 1993) (affirming a trial court's entry of a default judgment against a defendant as a sanction for failing to provide discovery, which the trial court had described as typifying "'an absolute disregard for any time standards regarding discovery, differential case management or docketing'"); and Bowman v. May, 678 So. 2d 1135, 1136 (Ala. Civ. App. 1996) (affirming dismissal of an action as a sanction for the plaintiff's failure to make himself available for deposition, noting that the plaintiff had "not complied with many discovery requests except upon orders from the [trial] court" and that, even after such orders had been entered, the plaintiff, without adequate excuse, had "been less than diligent in responding to discovery requests").

Based on the record and Horton's arguments, we cannot conclude that the trial court erred in finding that Horton's

conduct rose to the level of "willfulness" recognized by the supreme court in Iverson, Napier, and their progeny. Accordingly, the trial court did not act outside its discretion in dismissing Horton's action, and its judgment is due to be affirmed.

AFFIRMED.

Thompson, P.J., and Thomas, Moore, and Donaldson, JJ., concur.