REL: May 10, 2019

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2018-2019

1170650

Emma Armstrong

v.

Betty Hill

Appeal from Montgomery Circuit Court
(CV-16-759)

PER CURIAM.

This is a dog-bite case that is procedurally unique. Betty Hill sued Emma Armstrong and another defendant after Hill was bitten by three dogs. When Armstrong and her trial counsel failed to appear at trial at the appointed time, the

trial court declared from the bench that a default would be entered against Armstrong for liability and that Hill would have an opportunity to put on evidence of damages. Approximately 13 minutes after the trial began, however, Armstrong appeared in the courtroom (her trial counsel never arrived). When the trial court noted Armstrong's appearance, it proceeded to hold a nonjury trial on the merits -- though the conditions under which evidence would be taken were never made clear. The trial court thereafter entered a judgment in favor of Hill and against Armstrong in the amount of $75,000. This appeal followed.

We have been asked by Armstrong to determine whether the evidence presented at trial was sufficient to sustain the judgment against her. Based on our review of the applicable law and the evidence taken at trial, it is clear, even under a standard of review that is deferential to the trial court, that the evidence presented was insufficient to support the judgment. Accordingly, we reverse the judgment of the trial court and remand the cause with instructions for the trial court to enter a judgment in favor of Armstrong.

Facts and Procedural History

Armstrong owned a house on Kelly Lane in Montgomery ("the Armstrong property"), which she leased to Michelle McKithen. Hill lived across the street from the Armstrong property. On May 21, 2016, Hill was watering plants outside her house when she noticed dogs barking at children in the vicinity of the Armstrong property. She yelled to the children, warning them to stay away from the dogs. Three dogs then ran across the street and attacked her. The attack caused injuries to Hill's right hand and left elbow, requiring surgery and physical therapy. On December 8, 2016, Hill sued Armstrong and McKithen, asserting negligence, wantonness, and premises-liability claims.[1]

On December 4, 2017, the Montgomery Circuit Court held a nonjury trial. When the trial began, neither Armstrong nor her attorney was present. Although there is no indication in the record that Hill moved for a default against Armstrong,[2] the trial court announced: "No one having appeared for Ms.

[1]The trial court entered a default judgment against McKithen. That judgment is not at issue in this appeal.

[2]In her brief to this Court, Hill states that she moved the trial court for an entry of default. The record, however, contains no evidence of such a motion.

Armstrong, I will grant [Hill's] motion for a default against Ms. Armstrong." The trial court then told those present: "If [Hill] want[s] to create some record as to the damages associated with the injuries, we can do that at this time, and I think that will probably conclude the proceeding." After the trial court gave those instructions, Hill took the witness stand.

Hill testified that three dogs resembling pit bulls approached her from the vicinity of the Armstrong property and attacked her in her yard. She introduced a deed from 2008 showing that Armstrong was the owner of the Armstrong property and a humane-society animal-bite incident report. In accordance with the trial court's instruction, all other evidence that Hill presented went to the issue of damages.

Approximately 13 minutes after the trial began, Armstrong entered the courtroom.[3] Armstrong's trial attorney was not with her and never appeared at trial. When Hill's direct testimony concluded, the trial court discovered that Armstrong had entered the courtroom. The trial court welcomed Armstrong

[3]According to the trial transcript, Armstrong entered the courtroom at 10:13 a.m. The trial court's subsequent comments suggest that the trial began at 10:00 a.m. and that Armstrong was present for most of Hill's direct examination.

but never informed her of its entry of default against her or that the only issue before the court was the issue of damages. The trial court told Armstrong that she had "the right to come forward and ask Hill any questions that [she] want[ed]." The trial court did not tell Armstrong that she should limit her cross-examination of Hill to the issue of damages.

Armstrong proceeded to cross-examine Hill. Hill testified that she knew that the Armstrong property was being rented and that the tenant kept dogs on the property. Hill admitted that she did not know to whom the dogs belonged. Counsel for Hill did not object to any portion of Armstrong's cross-examination of Hill and at no point requested that the scope of the cross-examination be limited to damages.

Following Hill's testimony, the trial court explained to Armstrong her options: "Now, Ms. Armstrong, that was their witness that they called to prove their case. Now it's your turn. ... If you want to take the stand and tell your side of the story, you are welcome to sit in the [witness] box." Armstrong was reluctant, stating that she did not "really have a side of the story." The trial court then reminded her twice that it was her "day in court." It explained to Armstrong that "the purpose of this lawsuit is to determine whether or not

you ... are at fault and if you are at fault, what are the damages .... [S]o that's the purpose of this day." Armstrong then took the witness stand.

Armstrong testified that she was not aware of any dogs being kept at the Armstrong property. She entered into the record her lease with McKithen, which states: "No animal ... of any kind shall be kept on or about the premises, for any amount of time, without obtaining the prior written consent and meeting the requirements of [Armstrong]." On cross-examination by Hill's counsel, Armstrong testified that she had owned the Armstrong property for six or seven years and that she knew McKithen prior to leasing her the house. According to Armstrong, McKithen had resided at the Armstrong property with McKithen's boyfriend and her two children for about seven months before the dog attack. Armstrong testified that she never went to the Armstrong property to retrieve rent checks (that was done by Armstrong's boyfriend) but that she had gone to inspect the residence twice and had not seen any pets on the property.

Following the trial, the trial court issued an order entering judgment against Armstrong and McKithen for $75,000 plus costs. The order noted that a default judgment had

previously been entered against McKithen but made no mention of a default judgment against Armstrong. The order contained no findings of fact or rationale for Armstrong's liability.

On January 25, 2018, Armstrong filed what she titled as a "Motion to Set Aside Judgment." Armstrong argued that the judgment should be set aside because, she said, Hill had produced insufficient evidence demonstrating that Armstrong should have known there were animals on the Armstrong property, that Armstrong should have known those animals were dangerous, and that Armstrong had failed to exercise reasonable care in maintaining the safety of the Armstrong property. The trial court interpreted Armstrong's motion as a "motion to vacate or modify" the judgment and denied the motion.[4] Armstrong timely appealed.

Nature of the Judgment Below

In her brief on appeal, Hill contends that the trial court entered a default against Armstrong and thus relieved Hill of her obligation to present evidence of liability.

[4]Armstrong filed an almost identical motion on April 5, 2018, just four days before she filed her notice of appeal. The trial court never ruled on that motion. We treat that essentially duplicative motion as a motion to reconsider and do not consider it in this appeal.

According to Hill, after the trial court entered a default, the only issue that remained to be determined was the amount of damages to be assessed.[5] Based on the law and evidence presented, however, it is clear that no default judgment was ever entered against Armstrong. Instead, the proceeding below was a trial that resulted in a judgment on the merits against Armstrong.

Defaults and default judgments are generally governed by Rule 55, Ala. R. Civ. P. This Court has noted the distinction between defaults and default judgments. See Ex parte Family Dollar Stores of Alabama, Inc., 906 So. 2d 892, 896 (Ala. 2005) ("[I]t is probably helpful to talk in terms of an entry of 'default' and an entry of a 'judgment by default,' respectively, to differentiate between the two events."). The first event that must occur is the entry of default by the clerk of the trial court. See Rule 55(a), Ala. R. Civ. P. ("When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided

[5]With the notable exception of asking us to review this case under the standard of review for default judgments, Hill does not explicitly contend that the judgment at issue is a default judgment. Nevertheless, because her argument makes sense only if she is contending that a default judgment, not merely a default, was entered, we construe it in that manner.

by [the Alabama Rules of Civil Procedure], and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default."); see also Coke v. Family Sec. Credit Union, [Ms. 2160912, May 4, 2018] ___ So. 3d ___, ___ (Ala. Civ. App. 2018) ("'[A] party must first obtain an entry of default by the clerk or the trial court before he or she can obtain a default judgment from the trial court.'" (quoting Griffin v. Blackwell, 57 So. 3d 161, 163 (Ala. Civ. App. 2010))). An entry of default does not constitute a final judgment -- it is an interlocutory order. See Boudreaux v. Kemp, 49 So. 3d 1190, 1194 (Ala. 2010) (citing McConico v. Correctional Med. Servs., Inc., 41 So. 3d 8, 12 (Ala. Civ. App. 2009)); Alfa Auto Sales, L.L.C. v. Miller, 177 So. 3d 903, 909 (Ala. Civ. App. 2015) ("We note that the ... entry of default ... was an interlocutory order subject to being set aside at any time before a judgment was entered.").

Because an entry of default is an interlocutory order, the procedure for its entry is governed by Rule 58(c), Ala. R. Civ. P. That rule provides that an order is not deemed "entered" until it is input into the State Judicial Information System ("the SJIS"). The absence of any entry of

default in the electronic docket in this case indicates that no default was entered into the SJIS.[6] Because no entry of default preceded the judgment, we presume that the judgment from which Armstrong appeals was a judgment on the merits.[7]

This presumption is buttressed by the face of the judgment against Armstrong. The trial court's order states that it is a default judgment against McKithen but makes no such reference regarding the judgment against Armstrong.

The presumption is further strengthened by Hill's failure to follow the required procedures for obtaining a default judgment under Rule 55(b)(2), Ala. R. Civ. P. That rule requires a party seeking a default judgment to "apply to the

---

[6]Because we conclude that no default was entered, we need not discuss whether the trial court's oral pronouncement of default amounted to a valid rendering. See Rule 58(a), Ala. R. Civ. P.

[7]The Alabama Court of Civil Appeals has recognized that the failure to enter a default before entering a default judgment can be a harmless error that will not render void an otherwise appropriate default judgment. See Meares v. Meares, 437 So. 2d 578, 579 (Ala. Civ. App. 1983); Hilbish v. Hilbish, 415 So. 2d 1114, 1116 (Ala. Civ. App. 1982). Those holdings are not disturbed by today's decision. In this case, we are not addressing whether to void a default judgment based on a failure to enter a default. Rather, we are addressing whether a trial court's final judgment was a default judgment or a judgment on the merits. Whether a default was actually entered is highly probative of that question.

court therefor." Hill never applied for a default judgment.[8] In addition, Rule 55(b)(2) provides that parties like Armstrong who have appeared in an action must have three days' notice of the application for a default judgment. The only exception to this notice requirement is that a trial court may enter a default judgment on the day the case is set for trial. Here, the trial court's judgment was not entered on the day the case was set for trial; the judgment was entered 23 days after trial. The disconnect between the judgment against Armstrong and the procedural requirements of Rule 55(b)(2) demonstrates that the judgment against Armstrong is a judgment on the merits, not a default judgment.

Finally, our determination that the judgment against Armstrong is a judgment on the merits comports with what occurred at trial. No one in the courtroom was operating under the impression that a default was in place once Armstrong arrived at trial. The trial court did not notify

[8]The trial court announced on the record that it would "grant [Hill's] motion for default against Ms. Armstrong." The record contains no motion by Hill for a default against Armstrong. Even assuming Hill moved for default, however, such a motion would not be the equivalent of moving for a default judgment.

Armstrong upon her arrival that she was in default. The trial court, when instructing Armstrong about the scope of her cross-examination of Hill, did not instruct Armstrong to limit her questioning to the issue of damages. And Hill herself did not object when Armstrong cross-examined her on liability.

Once Armstrong finished cross-examining Hill, the trial court invited Armstrong to "tell [her] side of the story"; told her that "the purpose of" the trial was "to determine whether or not [she] ... [was] at fault"; and repeatedly reminded her that this was her "day in court." And when Armstrong took the stand to tell her side of the story, the trial court asked her several questions that pertained to liability rather than damages. Clearly, after Armstrong arrived, trial was conducted on the premise that the issue of liability was unresolved. Accordingly, we reject Hill's contention that she was excused from her burden of presenting evidence of liability against Armstrong.

Nature of Armstrong's Postjudgment Motion

Having determined that the trial court's judgment against Armstrong constitutes a judgment on the merits, we now examine the trial court's denial of Armstrong's postjudgment motion,

which contests the sufficiency of the evidence of her liability. As noted, Armstrong styled the motion as a "Motion to Set Aside Judgment." The trial court, in its order denying the motion, referred to the motion as a "motion to vacate or modify." On appeal, Armstrong asks us to characterize the motion as one for a new trial, presumably under Rule 59(a), Ala. R. Civ. P.

It is well settled that the substance of a motion, not its title, determines how the motion is to be considered. Brasfield & Gorrie, L.L.C. v. Soho Partners, L.L.C., 35 So. 3d 601, 604 (Ala. 2009); Pontius v. State Farm Mut. Auto Ins. Co., 915 So. 2d 557, 562 (Ala. 2005). The only relief Armstrong specifically requested in her postjudgment motion was that the trial court "set aside the judgment against her in this case." This Court has treated "motions to set aside judgments" as Rule 59(e) motions to alter, amend, or vacate the judgment when those motions are filed within 30 days of the entry of judgment. See, e.g., Ex parte Owen, 860 So. 2d 877, 879 n. 2 (Ala. 2003); J.M.H. v. J.L.W., 66 So. 3d 799, 800 n. 1 (Ala. Civ. App. 2011); McMurphy v. East Bay Clothiers, 892 So. 2d 395, 397 (Ala. Civ. App. 2004). The

trial court correctly characterized Armstrong's postjudgment motion as a Rule 59(e) motion, and we will treat the motion as such.

Standard of Review

When a trial court, during the course of a nonjury trial, hears oral testimony, or ore tenus evidence, an appellate court must give great deference to the trial court's determinations of fact. The rationale for this ore tenus rule is that the trial court, as the finder of fact in a nonjury trial, is in the best position to evaluate the credibility of the witness providing the testimony. Board of Sch. Comm'rs of Mobile Cty. v. Weaver, 99 So. 3d 1210, 1216 (Ala. 2012) (citing Hall v. Mazzone, 486 So. 2d 408, 410 (Ala. 1986)). Thus, under the ore tenus rule, "'"'a presumption of correctness attends the trial court's conclusion on issues of fact, and this Court will not disturb the trial court's conclusion unless it is clearly erroneous and against the great weight of evidence.'"'" Id. (quoting Kennedy v. Boles Invs., Inc., 53 So. 3d 60, 68 (Ala. 2010), quoting in turn other cases). Moreover, "when a trial court makes no specific findings of fact, 'this Court will assume that the trial judge

made those findings necessary to support the judgment.'" New Props., L.L.C. v. Stewart, 905 So. 2d 797, 799 (Ala. 2004) (quoting Transamerica Commercial Fin. Corp. v. AmSouth Bank, N.A., 608 So. 2d 375, 378 (Ala. 1992)). This presumption of correctness, however, "'"has no application when the trial court is shown to have improperly applied the law to the facts,"'" Board of Sch. Comm'rs, 99 So. 3d at 1216 (quoting Kennedy, 53 So. 3d at 68, quoting in turn another case), because "[q]uestions of law are reviewed de novo." Alabama Republican Party v. McGinley, 893 So. 3d 337, 342 (Ala. 2004). "Whether to grant relief under Rule 59(e), Ala. R. Civ. P., is within the trial court's discretion." Bradley v. Town of Argo, 2 So. 3d 819, 823 (Ala. 2008).

Discussion

Despite the high degree of deference accorded to the trial court's factual findings, we can identify no evidence in the record to sustain the judgment entered against Armstrong on the basis of (1) negligence and/or wantonness or (2) premises liability.

Negligence and/or Wantonness

Hill first claimed that Armstrong's alleged negligence and/or wantonness caused her injuries. To have properly found Armstrong liable for common-law negligence, the trial court must have been presented with evidence from which it could have inferred that Hill's injuries were caused by Armstrong's breaching a duty Armstrong owed Hill. See, e.g., Armstrong Bus. Servs., Inc. v. AmSouth Bank, 817 So. 2d 665, 679 (Ala. 2001) (reciting elements of a common-law negligence claim).

Under Alabama law, only owners and keepers of dogs have a duty to prevent their dogs from biting others. Humphries v. Rice, 600 So. 2d 975, 966 (Ala. 1992). Therefore, to support a conclusion that Armstrong was negligent, there must be sufficient evidence that Armstrong owned or kept the dogs that attacked Hill. Hill does not claim that Armstrong owned the dogs.[9] Accordingly, the only way Armstrong could be found liable for negligence is if she were found to be a "keeper" of the dogs.

[9]Because there is no evidence to suggest that Armstrong owned the dogs, her liability cannot be premised on § 3-6-1, Ala. Code 1975, which imputes strict liability to dog owners in certain instances.

In Humphries, a delivery man was attacked by a pit bull that belonged to the defendant's son, who lived on the defendant's property. 600 So. 2d at 975. The defendant was not an owner of the dog; thus, she could be found liable only if it were proven that she was a keeper of the dog. Although the delivery man presented evidence that the defendant had interacted with the pit bull, he presented no evidence that the defendant cared for or took any responsibilities with regard to the pit bull. Id. at 977. Therefore, this Court held that the defendant was not the "keeper" of the dog and was not liable for negligence.

Here, Hill presented no evidence that Armstrong ever had any interaction with any of the dogs that attacked her, much less evidence tending to show that Armstrong cared for or took responsibility for them. If the defendant in Humphries could not be characterized as a "keeper," neither can Armstrong.[10] Because there is not sufficient evidence that Armstrong was either an owner or a keeper of the dogs that attacked Hill, there is no basis on which to find Armstrong liable for negligence. To the extent the trial court based its judgment

[10]Indeed, even Hill, in her brief to this Court, does not appear to contend that Armstrong was a "keeper" of the dogs.

against Armstrong on a finding of negligence, it misapplied the law.

As mentioned above, Hill also claimed that her injuries were caused by Armstrong's wantonness. "Wantonness" is qualitatively different from "negligence" and involves "the conscious doing of some act or omission of some duty while knowing of the existing conditions and being conscious that, from doing or omitting to do an act, injury will likely or probably result." Ex parte Essary, 992 So. 2d 5, 9 (Ala. 2007). There is no evidence in the record that Armstrong wantonly caused Hill's injuries.

Premises Liability

Hill also claims that Armstrong is liable for her injuries under a theory of premises liability. According to the trial testimony, Hill's injuries occurred outside her house, on her own property, and across the street from the Armstrong property. Hill does not contend that she ever set foot on the Armstrong property.

This Court has never held that a landlord may be liable under a premises-liability theory for dog bites that occur on premises not owned by the landlord. The Court of Civil Appeals

recently recognized this limitation in Berg v. Nguyen, 201 So. 3d 1185, 1189 (Ala. Civ. App. 2016). Regardless of how far off premises a landlord's premises liability may reach, however, the record contains no evidence that Armstrong was ever aware of the presence of the dogs on the Armstrong property or of the danger they presented. The lease that was entered into evidence clearly prohibited Armstrong's tenant, McKithen, from keeping a dog on the premises, and Armstrong testified that she was not aware of the dogs' presence on the Armstrong property. Armstrong testified that she visited the Armstrong property twice to inspect it and that she announced each of those visits to McKithen beforehand. The mere fact that she visited the Armstrong property on two occasions cannot support the conclusion that she knew McKithen was keeping dogs, much less the conclusion that she knew the dogs constituted a dangerous condition.[11]

[11]Hill claims that evidence of fencing and "dog structures" on the Armstrong property should have put Armstrong on notice of the presence of dogs. When questioning Armstrong at trial, however, Hill did not inquire into whether Armstrong had knowledge of the fencing or "dog structures," and there is no evidence in the record indicating that Armstrong was aware of those items. Even if we were to assume, however, that Armstrong was aware of the fencing or "dog structures," it is doubtful that such evidence, by itself, would suffice to place Armstrong on notice that a

Hill's premises-liability claim cannot survive without any evidence that Armstrong was aware of a dangerous condition on the Armstrong property. See Gentle v. Pine Valley Apartments, 631 So. 2d 928, 935 (Ala. 1994) ("[N]otice to the premises owner, either direct or imputed, of the dangerous condition is the sine qua non of liability."). See also Berg, 201 So. 3d at 1189 (same); Scott v. Donkel, 671 So. 2d 741, 744 (Ala. Civ. App. 1995) (same). To the extent the trial court found Armstrong liable under a premises-liability theory, it misapplied the law.

Conclusion

For the reasons discussed above, we reverse the judgment entered by the trial court in favor of Hill and remand the cause with instructions for the trial court to enter a judgment for Armstrong.

REVERSED AND REMANDED.

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

Bolin, Bryan, and Mendheim, JJ., concur in the result.

Wise and Mitchell, JJ., concur in part and dissent in part.

---

dangerous condition existed on the Armstrong property.

MITCHELL, Justice (concurring in part and dissenting in part).

Although I concur with the Court's analysis and its conclusion that Betty Hill did not meet her evidentiary burden, I dissent from its instruction that the trial court enter a judgment in favor of Emma Armstrong. There is a reasonable likelihood that Hill was prejudiced by the trial court's instruction to limit her case-in-chief to evidence of damages. That instruction was never explicitly rescinded. And while the Court correctly concludes that the trial court conducted a trial on the merits, the ultimate classification of those proceedings would not have been apparent to Hill during most, if not the entirety of, her case-in-chief. Hill claims that, absent the trial court's instruction, she would have presented additional evidence of liability. Given the unique circumstances of this case, she should have that opportunity, either through a new trial or by other means. Therefore, I would instruct the trial court that it may not enter a judgment for Armstrong without providing Hill an opportunity to present all the evidence she may have of liability.

Wise, J., concurs.