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# ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2020-2021

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**Wendelin L. Duncan**

v.

**Bradley J. Duncan**

**Appeal from Montgomery Circuit Court  
(DR-16-900895)**

FRIDY, Judge.

Wendelin L. Duncan ("the wife") appeals from a postjudgment order of the Montgomery Circuit Court ("the trial court") awarding Bradley J.

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Duncan ("the husband") attorney's fees in the parties' divorce action pursuant to Rule 37(a)(4), Ala. R. Civ. P., in connection with discovery disputes that arose during the course of the divorce action. We reverse the postjudgment order.

### Procedural History

Litigation of the parties' divorce action was especially contentious. Relevant information in the record indicates that, during the course of the litigation, disputes arose between the parties regarding the timeliness and thoroughness of the husband's responses to the wife's discovery requests, as well as whether the husband could take the wife's deposition before she completed his deposition. On February 23, 2017, the wife filed a motion to compel the husband to respond to the discovery she had propounded to him on December 21, 2016. She also sought sanctions against the husband. On July 26 2017, the husband filed a motion seeking to hold the wife in contempt, alleging, among other things, that the wife had refused to attend her deposition, which the husband had scheduled over her objection. The husband also claimed that the wife had "harassed" him with "a barrage of irrelevant subpoenas and discovery requests."

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The trial court held a hearing on the motions on July 31, 2017. At that hearing, the wife's attorney argued that the husband had failed to provide requested documents regarding the rent and utilities he claimed to be paying. The wife's attorney told the trial court that the house at the address where the husband said he lived was boarded up and that no utilities were turned on at that address. The husband's attorney said that there were boards across the door to the house but insisted that the husband stayed there several nights a week. The house belonged to a family member of the husband's attorney. The wife's attorney explained that he was seeking corroboration of the amounts the husband was claiming he paid for rent and utilities each month but that the husband had failed to provide such documentation, which had been requested in the discovery propounded to him. In addition, the husband had been directed to bring documents to his deposition.

At the hearing, the trial court ordered the husband to provide the requested documentation. The trial court added that each party was to provide to the other any outstanding documents within 14 days. The trial court also told the husband that he had to allow the wife to finish taking

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his deposition before he could take the wife's deposition. The husband's attorney wanted to know which rule required that course, and the trial court advised him that it was standard practice. The trial court admonished both parties to work with each other and to provide the requested discovery.

Despite the trial court's instructions, discovery disputes continued. On August 24, 2017, the wife re-noticed the husband's deposition for August 29, 2017. The husband did not object to the date, but he did not appear for the second day of his deposition. On August 30, 2017, the wife filed a motion seeking to hold the husband in contempt and for sanctions, alleging that the husband had provided some but not all the documents requested. Additionally, the wife said, she had attempted to obtain dates from the husband's attorney regarding the husband's availability to continue with his deposition, in response to which the husband's attorney had told her to respond to his contempt motion, which had been filed before the July 31 hearing, and that he would "consider [her] request after [he got] a ruling."

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On February 16, 2018, the husband filed a motion seeking to hold the wife in contempt in which, among other things, he again accused the wife of harassment because of the "barrage" of discovery requests he said that she had propounded. He did not elaborate on that accusation in the motion. A hearing was held on May 9, 2018, after which the trial court entered an order directing that all discovery was to be completed within ten days and that both parties were to "fully comply with discovery requests."

On June 15, 2018, the trial court entered an order regarding the issues taken up at the July 31, 2017, hearing. The record does not indicate why there was such a long delay between the hearing and the entry of the order. In the June 15 order, the trial court noted that, at the hearing, it had directed the husband to "fully comply" with the wife's requests for documents, including those contained in any deposition notices previously served on the husband, by no later than August 14, 2017. The trial court then ordered that the husband "shall FULLY comply with any document requests contained in any future deposition notices served on the husband." (Capitalization in original.) Once the husband had responded

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to the wife's requests for documents, the trial court held, the parties were to coordinate a mutually agreeable date to reconvene the husband's deposition. The trial court also sustained the wife's objection to the husband's attempt to take her deposition before she had completed his deposition. The trial court reserved the issue of award of attorney's fees and other sanctions against the husband for his refusal or failure to comply with the court's orders and the wife's discovery requests.

The trial of the action concluded on March 5, 2019. The trial court entered the judgment divorcing the parties on June 17, 2019. In that judgment, the trial court reserved jurisdiction over whether the husband would be required to pay those "legal fees" of the wife arising out of his failure to timely respond to the wife's discovery requests. On July 16, 2019, the wife timely filed a motion to alter, amend, or vacate the divorce judgment, asserting that, among other things, she should have been awarded attorney's fees. The husband did not file a motion to alter, amend, or vacate the divorce judgment. On October 15, 2019, the trial court entered an order granting in part the wife's postjudgment motion, ordering the husband to pay the wife \$50,000 toward her total attorney's

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fees of approximately \$77,000.<sup>1</sup> The trial court said that that award of fees was "separate and apart from any that the Court may or may not rule are due and payable regarding discovery."

On November 22, 2019, the trial court entered an order denying the wife's request for attorney's fees "over discovery disputes." On December 5, 2019, the husband for the first time filed a motion requesting attorney's fees and costs pursuant to Rule 37(a)(4), Ala. R. Civ. P., which permits an award of expenses arising from a motion to compel discovery under certain circumstances. On December 20, 2019, the wife filed a motion asserting that, among other things, the trial court had not had jurisdiction to enter the November 22, 2019, order. A hearing was held on the husband's and the wife's respective motions. On March 18, 2020, the trial court entered an order awarding the husband attorney's fees of \$17,380 and denying the

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<sup>1</sup>The ninetieth day after the filing of the wife's postjudgment motion was Monday, October 14, 2019, which was Columbus Day, a legal holiday. See Rule 6(a), Ala. R. Civ. P. Therefore the trial court had until the next day, October 15, 2019, to rule on the postjudgment motion before it would have been denied by operation of law. See Rule 59.1, Ala. R. Civ. P.; Williamson v. Fourth Ave. Supermarket, Inc., 12 So. 3d 1200, 1203-04 (Ala. 2009).

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wife relief from the November 22, 2019, order. The wife filed a timely notice of appeal regarding the March 18, 2020, order awarding the husband an attorney fee.

### Analysis

Our first task is to determine whether the trial court had jurisdiction to consider the husband's motion seeking attorney's fees and costs pursuant to Rule 37(a)(4), Ala. R. Civ. P., filed on December 5, 2019 -- nearly six months after the trial court had entered the divorce judgment.

Rule 37(a)(4) provides:

"Award Of Expenses Of Motion. If the motion [to compel] is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

"If the motion is denied, the court shall, after opportunity for hearing, require the moving party to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust."



The trial court's continuing jurisdiction to consider a request for expenses under Rule 37(a)(4) after the entry of a final judgment is an issue of first impression in Alabama.

At first blush it would appear that, because the divorce action had been completed, the trial court would no longer have had jurisdiction to consider the husband's request for attorney's fees in connection with discovery issues. However, in SMM Gulf Coast, LLC v. Dade Capital Corp., [Ms. 1170743, June 5, 2020] \_\_\_ So. 3d \_\_\_, \_\_\_ (Ala. 2020), our supreme court observed that Alabama's appellate courts have "recognized that a trial court has jurisdiction to award attorney fees and costs after entering a final judgment because such requests are collateral to the merits." See also Liberty Mut. Ins. Co. v. Greenway Enters., Inc., 23 So. 3d 52, 56 (Ala. Civ. App. 2009) (holding that a judgment regarding the collateral issues of costs and attorney's fees will support an appeal). In support of that observation, the supreme court cited Complete Cash Holdings, LLC v. Powell, 239 So. 3d 550, 555 n.6 (Ala. 2017) (noting that the appellee's request for attorney's fees and costs, which was ultimately

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granted, was still pending when the appellant filed its notice of appeal), Ford v. Jefferson County, 989 So. 2d 542, 545 (Ala. Civ. App. 2007) (affirming an award of attorney's fees, costs, and expenses entered more than five months after final judgment was entered), and Dunlap v. Regions Financial Corp., 983 So. 2d 374, 379 n.5 (Ala. 2007) (noting that "a majority of other jurisdictions have held that a trial court retains jurisdiction to award attorney fees after a notice of appeal has been filed"). Thus, in SMM Gulf Coast, our supreme court held that "a party requesting attorney fees, court costs, and litigation expenses in accordance with a prevailing-party provision [in a contract] is not required to make that request within a motion invoking Rule 59(e), [Ala. R. Civ. P.,] nor is such a party required to file that request within the 30-day postjudgment period set forth in Rule 59(e)." \_\_\_ So. 3d at \_\_\_ (emphasis added).

The issue here differs somewhat from the issue in SMM Gulf Coast, because it involves a request for attorney's fees under Rule 37(a)(4) based on a discovery dispute, rather than on a "prevailing-party" provision of a contract between the parties. Our research has revealed no Alabama case directly on point. However, a majority of jurisdictions that have

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considered the issue of an award of fees and expenses under their counterparts to Rule 37 have concluded that a trial court retains jurisdiction to consider such awards for discovery abuses after the entry of the judgment in the underlying action, reasoning that taxation of costs or attorney's fees are matters collateral to that judgment.<sup>2</sup>

For example, in Amlan, Inc. v. Detroit Diesel Corp., 651 So. 2d 701 (Fla. Dist. Ct. App. 1995), a Florida appellate court held that, after the entry of the final judgment, a trial court retained jurisdiction to entertain a motion for attorney's fees and reasonable expenses incurred as a result of discovery abuses during the course of the litigation, explaining that "[m]onetary sanctions for discovery abuses are not an element of damages, but constitute a collateral and independent claim for attorney's fees and costs arising from litigation-related discovery abuses." Amlan, 651 So. 2d at 704. It pointed to prior holdings of the Florida Supreme Court

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<sup>2</sup>Although the cases discussed herein address sanctions of the kind permitted under Rule 37(b), Ala. R. Civ. P., for violation of discovery orders, we see no practical basis on which to distinguish those forms of sanctions from attorney's fees awarded to a prevailing party under Rule 37(a)(4).

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permitting trial courts to adjudicate prevailing parties' costs and attorney's fees after an appeal has been filed or concluded, or after the time to appeal has expired. Id. (citing Roberts v. Askew, 260 So. 2d 492 (Fla. 1972), and Finkelstein v. North Broward Hosp. Dist., 484 So. 2d 1241 (Fla. 1986)). See also Giuffre v. Edwards, 226 So. 3d 1034, 1038 (Fla. Dist. Ct. App. 2017) (pointing out that, in addition to retaining jurisdiction over independent and collateral claims, "it is axiomatic and inherent that a trial court retains jurisdiction to enforce its own orders").

Likewise, the Maryland Court of Special Appeals has held that, after the entry of the final judgment in a tort action, a trial court does not surrender jurisdiction to award attorney's fees as a sanction for discovery abuses because the issue was a collateral matter. See Mullaney v. Aude, 126 Md. App. 639, 650-51, 730 A.2d 759, 764-66 (1999). The Oklahoma Supreme Court as well has held that a trial court retains jurisdiction to impose sanctions for violations of court orders entered during the litigation of an action even though the matter has already been dismissed. Barnett v. Simmons, 197 P.3d 12, 17-18 (Okla. 2008).

The United States Supreme Court has recognized that

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"motions for costs or attorney's fees are 'independent proceeding[s] supplemental to the original proceeding and not a request for a modification of the original decree.' Sprague v. Ticonic National Bank, 307 U.S. 161, 170 (1939). Thus, even 'years after the entry of a judgment on the merits' a federal court could consider an award of counsel fees. White v. New Hampshire Dept. of Employment Security, 455 U.S. 445, 451, n. 13 (1982)."

Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 395-96 (1990). Relying at least in part on that holding, the New Mexico Supreme Court held that a trial court does not lose jurisdiction to order sanctions for discovery abuses when a case is on appeal or is no longer pending before the trial court. Gonzales v. Surgidev Corp., 120 N.M. 151, 156-57, 899 P.2d 594, 598-600 (N.M. 1995).

Illinois appellate courts have offered diverging opinions on this issue. One court noted that, although a trial court generally loses jurisdiction 30 days after it enters a final judgment if no postjudgment motion is filed, it retains jurisdiction to consider sanctions for violations of pretrial-discovery orders pursuant to its inherent contempt power. Mehalko v. Doe, 110 N.E.3d 328, 335, 424 Ill. Dec. 978, 985 (Ill. App. Ct. 2018). However, in Maggi v. RAS Development, Inc., 949 N.E.2d 731, 754,

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350 Ill. Dec. 939, 962 (Ill. App. Ct. 2011), a different district of the Appellate Court of Illinois held that, under a rule of procedure, a trial court would retain "residual" jurisdiction to address sanctions after a final judgment only if the motion for sanctions had been pending before the entry of that final judgment.

The Texas Supreme Court has gone a third route, refusing to adopt a rule providing that a trial court cannot impose discovery sanctions posttrial for pretrial-discovery abuse but holding that "the failure to obtain a pretrial ruling on discovery disputes that exist before commencement of trial constitutes a waiver of any claim for sanctions based on that conduct." Remington Arms Co. v. Caldwell, 850 S.W.2d 167, 170 (Tex. 1993).

Returning to our own jurisdiction, our supreme court, in SMM Gulf Coast, rejected the notion that a request for attorney's fees, court costs, and litigation expenses made under a "prevailing-party" provision of a release agreement was waived if the prevailing party failed to raise the issue before the entry of the final judgment or in a postjudgment motion filed pursuant to Rule 59, Ala. R. Civ. P. It distinguished such a claim for

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attorney's fees from a claim for attorney's fees brought pursuant to the Alabama Litigation Accountability Act ("the ALAA"), § 12-19-270 et seq., Ala. Code 1975, which provides that attorney's fees must be awarded as part of the judgment on the merits of the action. \_\_\_ So. 3d at \_\_\_; see also § 12-19-272(a), Ala. Code 1975. The supreme court explained that claims brought pursuant to the ALAA were thus an exception to the general rule that a trial court may grant a request for an award of attorney's fees even after a final judgment has been entered. Id. at \_\_\_.

In this case, the husband's December 5, 2019, motion sought attorney's fees pursuant to Rule 37(a)(4) and was not a postjudgment motion brought pursuant to Rules 50, 52, 55, or 59, Ala. R. Civ. P. As our supreme court explained in SMM Gulf Coast, such a motion involves a matter collateral to the claims raised in the divorce action, and, therefore, the husband was not required to file the motion within 30 days of the entry of the judgment. Furthermore, just as the contract-based claim for attorney's fees in SMM Gulf Coast was not required by statute to be filed before the entry of a final judgment, there is no statutory or other basis

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for requiring a motion for an award of attorney's fees under Rule 37(a)(4) to be filed before the entry of a final judgment.

Based on our supreme court's holding in SMM Gulf Coast and what we view as the better reasoned authorities from other jurisdictions cited above, we hold that the husband's motion seeking attorney's fees under Rule 37(a)(4) for work performed in connection with the parties' discovery disputes falls under the general rule that permits a trial court to entertain such a motion after the entry of a final judgment. Accordingly, we conclude that the trial court had jurisdiction to consider the husband's motion.

As to the merits of the trial court's order awarding attorney's fees to the husband, the wife argues that the award was improper because, she says, the trial court had granted her motions to compel and for sanctions in connection with the husband's discovery abuses. Thus, the wife contends, the husband was not entitled to the fees he requested pursuant to Rule 37. We agree.

Rule 37(a)(4) provides, in pertinent part, that, if a trial court enters an order granting a motion to compel discovery, the trial court can require



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the party whose conduct necessitated the motion to pay to the moving party the reasonable expenses, including attorney's fees, incurred in obtaining the order unless the court finds that circumstances would render such an award unjust. However, if the trial court denies the motion to compel, the trial court can require the moving party to pay the opposing party attorney's fees incurred in opposing the motion. Rule 37(a).

In his Rule 37 motion and in his appellate brief supporting the trial court's award of attorney's fees to him, the husband asserted that, because the trial court had entered an order on November 22, 2019, denying the wife's request for attorney's fees in connection with the husband's alleged discovery abuses, he was the prevailing party in the discovery disputes. His assertion is without merit and wholly unsupported by the record. At the July 2017 hearing on the wife's motion to compel and again in the June 2018 order arising out of that hearing, the trial court ordered the husband to "FULLY comply" with the wife's discovery requests. (Capitalization in original.) The trial court also granted the wife's request that the husband's deposition be completed before she was required to sit for her own deposition. The trial court did not explicitly "grant" the wife's

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motion to compel; however, its directives to the husband from the bench and in the June 2018 order compelled the husband to respond to the discovery that the wife had propounded to him, as the wife had sought in her motion to compel. The husband clearly did not prevail against the wife in their discovery disputes; therefore, he was not entitled to attorney's fees pursuant to Rule 37(a)(4). Accordingly, the trial court abused its discretion in awarding the husband attorney's fees, and its order of March 18, 2020, is reversed. The cause is remanded for the trial court to enter an order consistent with this opinion.

The wife's motion for attorney's fees and costs on appeal and her motion to strike are denied. The husband's motion for attorney's fees, costs, and damages on appeal is likewise denied.

**REVERSED AND REMANDED.**

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