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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2018-2019

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Zachariah Cowart

v.

Misty Cowart

Appeal from Mobile Circuit Court
(DR-15-900031)

THOMAS, Judge.

Zachariah Cowart ("the husband") appeals from a judgment of the Mobile Circuit Court ("the trial court") that, among other things, divorced him from Misty Cowart ("the wife"),

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divided the marital property, ordered the husband to pay for certain medical bills, and awarded the wife child support. We affirm the trial court's judgment in part, reverse it in part, and remand the cause for further proceedings.

Background

The parties were married in 2011. In January 2015, the wife filed a verified complaint in the trial court seeking a divorce from the husband. In her complaint, the wife averred that the husband had adopted her son ("the child"), who was born in 2002; she requested an award of the child's custody and an award of child support. The wife also averred that the husband had physically abused her and had committed adultery. The wife requested, among other things, an award of periodic alimony, an award of alimony in gross, and equitable divisions of the marital assets and debts. The wife's complaint also included specific requests regarding health insurance and life insurance.

The record contains numerous filings and orders regarding, among other things, pendente lite relief,

bankruptcy,¹ contempt,² discovery, and an order

¹The record contains a September 15, 2016, order of the United States Bankruptcy Court for the Southern District of Alabama ("the bankruptcy court") indicating that it had retained jurisdiction to review the trial court's divorce judgment and to adjudicate certain matters regarding its enforcement. We issued an order asking the parties to submit letter briefs regarding whether this court should stay or dismiss the husband's appeal based on a retention of jurisdiction by the bankruptcy court. The wife asserts that the bankruptcy court has lost jurisdiction to review the terms of the divorce judgment and that the husband's appeal is properly before this court. The husband's attorney asserts that he inquired of the trustee associated with the husband's bankruptcy case regarding our question. He has provided what he contends is correspondence from the trustee, explaining, in relevant part: "I believe the [b]ankruptcy [c]ourt would only be interested in a property settlement awarded to the [husband]. I have never known an [o]rder like this to stop an appeal." This court is aware of the jurisdictional issues that can arise between a state court adjudicating domestic-relations matters and bankruptcy courts. See, e.g., Egleston v. Egleston (In re Egleston), 448 F.3d 803 (5th Cir. 2006). Based on the information available to us, the trial court's exercise of jurisdiction does not appear to be at issue in this case. However, for reasons explained infra, we are reversing the trial court's judgment and remanding the cause for further proceedings. On remand, we encourage the trial court and the parties to be mindful of any jurisdictional issues to the extent they are present.

²During the pendency of this action, the wife sought numerous contempt findings against the husband, and the trial court entered several orders finding the husband in contempt of pendente lite orders it had entered. At the trial, evidence was presented demonstrating that the husband had failed to meet various financial obligations imposed by the trial court's pendente lite orders. In her testimony, the wife did not, however, request new findings of contempt and asked only that the husband be ordered to meet those financial

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"transfer[ring]" a protection-from-abuse action that had been initiated by the husband to the divorce action.³ A trial was conducted on September, 7, 2017. The trial court entered a judgment on September 18, 2017, that, in relevant part, awarded the wife "full physical and legal custody" of the child; ordered the husband to pay child support of \$944 per month "as previously ordered by th[e trial] court," stating that the award "is in compliance with the guidelines of Rule 32, [Ala. R. Jud. Admin.]"; ordered the husband to pay the wife \$11,376.73 for "medical bills she ha[d] paid"; ordered the husband to pay her \$11,774.49 for other "outstanding medical bills"; and provided:

"19. THAT during the pendency of this trial the court was presented with the [husband]'s father's will and codicil to same, which indicated that a revocable trust had been set up for the benefit of the [husband]. Testimony indicates that the revocable trust was CZE, L.L.C., and said L.L.C.

obligations, which request the trial court's judgment resolved. Thus, it appears that no contempt claims remained pending at the time the trial court entered its judgment. See Harley v. Anderson, 167 So. 3d 355, 360 n.5 (Ala. Civ. App. 2014). The trial court's judgment was therefore a final judgment.

³The husband had obtained an ex parte protection-from-abuse order against the wife. The trial court eventually set aside the order.

owns the twenty (20) acres that was originally supposed to be given to the [parties]. Additionally, the [husband] indicated that numerous items on the property list were owned by CZE, L.L.C. [The] Court finds throughout the marriage the real or personal property owned by CZE, L.L.C., w[as] used for the benefit of the marriage[;] therefore, [they] became marital assets upon the death of the [husband]'s father. Therefore, the Court has jurisdiction over CZE, L.L.C., and [the] alleged revocable trust.

"20. THAT Don Foster ... is hereby appointed commissioner to sell the property in the name of CZE, L.L.C., located at 4000 Wilmer Road, Wilmer, Alabama, in accordance with the laws of the State of Alabama for the best possible price, subject to the approval of the Court. ... After all liens, mortgages, encumbrances, and commission fees have been satisfied, the net proceeds derived therefrom shall be divided two-thirds to the [husband], less any outstanding judgments, and one-third to the [wife]. The [husband] shall have first right of refusal to purchase said property at the fair market value.

"21. THAT the manufactured home located at 4400 -A Wilmer Road, Wilmer, Alabama shall be sold and profits divided between the parties evenly."

On September 25, 2017, the trial court entered an order amending a clerical error in its judgment that is not relevant to this appeal. The wife filed a postjudgment motion on September 29, 2017. The husband filed a postjudgment motion on October 18, 2017. The trial court conducted a postjudgment hearing on December 14, 2017, and, on December 18, 2017,

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entered an order denying the parties' postjudgment motions. The husband filed a notice of appeal to this court on January 24, 2017.

Analysis

We first consider the husband's argument regarding the real property addressed in the trial court's judgment. He argues that the trial court improperly awarded the wife proceeds from the sale of the property. Our review of the record indicates that two parcels of real property were at issue during the trial: a parcel located at 4400 Wilmer Road, which consisted of approximately 20 acres, and a parcel located at 4400-A Wilmer Road, which consisted of roughly 5 acres or less and contained a house that the parties had, before their separation, intended to become the marital residence. It appears that the reference in the trial court's judgment to 4000 Wilmer Road was a mistake because the record contains no evidence regarding a parcel located at that address; the parties have not addressed that discrepancy, however.

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The husband's argument is predicated primarily upon the language of § 30-2-51(a), Ala. Code 1975, which provides, in its entirety:

"If either spouse has no separate estate or if it is insufficient for the maintenance of a spouse, the judge, upon granting a divorce, at his or her discretion, may order to a spouse an allowance out of the estate of the other spouse, taking into consideration the value thereof and the condition of the spouse's family. Notwithstanding the foregoing, the judge may not take into consideration any property acquired prior to the marriage of the parties or by inheritance or gift unless the judge finds from the evidence that the property, or income produced by the property, has been used regularly for the common benefit of the parties during their marriage."

Specifically, the husband contends that at least a portion of the real property fell within his separate estate and that the trial court exceeded its discretion by awarding the wife a share of the proceeds from the sale of the property.

Regarding the parcel of real property located at 4400 Wilmer Road, the exact nature of the husband's interest in the property is unclear. Certain portions of the testimony indicate that the property was being held in trust for the husband's benefit, and other portions of the testimony and record indicate that the real property was owned by an entity, CZE, LLC ("CZE"), of which the husband appears to be the sole

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owner. The trial court's judgment and statements made by the trial-court judge at the postjudgment hearing indicate that the trial court determined that the parcel was owned by CZE and that it was not part of a trust. Regarding the parcel of real property located at 4400-A Wilmer Road, the husband contends in his reply brief that "the bank" owns that property. He says: "The property is not owned by either of the parties, and therefore the [t]rial [c]ourt lacks jurisdiction to divide it."

During the trial, the wife responded affirmatively when her attorney asked: "The Judge had ordered a commissioner appointed on October 6th, 2016[,] to sell the house[,] and the house was in bankruptcy -- the house was in foreclosure; is that correct?" The record contains an October 6, 2016, order of the trial court directing, in relevant part, that "the homeplace of the parties located at 4400A Wilmer Road" be sold. During the husband's testimony, he stated: "The house has been sold, it belongs to the bank." He also testified: "The bank owns the house, Community Bank"; he said that he was renting the house from the bank at the time of the trial.

"The absence of an indispensable party is a jurisdictional defect that renders the

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proceeding void. See Gilbert v. Nicholson, 845 So. 2d 785, 790 (Ala. 2002). Although no party to this appeal has raised the issue of indispensable parties, the absence of an indispensable party can be raised for the first time on appeal by the appellate court ex mero motu, even if the parties failed to present the issue to the trial court. Id.'

"Allbritton v. Dawkins, 19 So. 3d 241, 243 (Ala. Civ. App. 2009)."

Chandler v. Branch Banking & Trust Co., [Ms. 2160999, Oct. 19, 2018] ____ So. 3d ____, ____ (Ala. Civ. App. 2018) (acknowledging also that the absence of an indispensable party does not impact the trial court's subject-matter jurisdiction).

In this case, the record indicates that at least one party other than the parties to the divorce action possessed some interest in some portion of the real property addressed in the trial court's judgment. Insufficient evidence demonstrating the exact identity or identities of the absent party or parties is available; however, it appears undisputed that "the bank" -- most likely "Community Bank" -- has foreclosed upon the parcel located at 4400-A Wilmer Road and apparently "owns" that property. Evidence was also presented indicating that CZE or a trust possesses some interest in the

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parcel located at 4400 Wilmer Road. See id. at ____ ("From our reading of Allbritton [v. Dawkins], 19 So. 3d 241 (Ala. Civ. App. 2009),] and Rule 24(a)(2), [Ala. R. Civ. P.,] we conclude that those authorities mandate the joinder or intervention of a property owner whose rights in certain property are being litigated. This is so even when a party already named in the action is protecting rights aligned with those of the nonparty property owner. Such joinder is not discretionary.").

""[The supreme court] has also held ... that in cases where the final judgment will affect ownership of an interest in real property, all parties claiming an interest in the real property must be joined."

"Byrd Cos. v. Smith, 591 So. 2d 844, 846 (Ala. 1991) (citations omitted). See also Johnston v. White-Spunner, 342 So. 2d 754 (Ala. 1977) (when a trial court is asked to determine property rights of property owners not before the court, the absent property owners are indispensable parties and any judgment entered in the absence of those parties is void)."

"Albritton v. Dawkins], 19 So. 3d [241,] 244 [(Ala. Civ. App. 2009)]."

Id. at ____ . Notwithstanding the absence of at least one party with an interest in at least a portion of the real

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property at issue, the trial court's judgment orders that the property be sold.

"'The absence of a necessary and indispensable party necessitates the dismissal of the cause without prejudice or a reversal with directions to allow the cause to stand over for amendment. Rogers v. Smith, 287 Ala. 118, 248 So. 2d 713 (1971).' J.C. Jacobs Banking Co. v. Campbell, 406 So. 2d 834, 850-51 (Ala. 1981)."

Id. at _____. We therefore reverse the portion of the trial court's judgment regarding real property and remand the cause for the trial court to consider whether an indispensable party should be joined in the action and, if so, whether the trial court's property division should be altered.

We next consider the husband's argument that the trial court erred by requiring him to pay the wife's outstanding medical bills and to reimburse her for medical bills she had already paid. The husband initially became obligated to pay the wife's medical bills by virtue of an April 5, 2016, order entered by the trial court. In relevant part, that order required the husband to maintain health insurance for the benefit of the wife and the child and provided that he would be responsible for "all uncovered medical bills for the [wife] and [the] child." On May 22, 2017, the trial court entered an

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order again providing, in relevant part: "[T]he [husband] shall be responsible for all uncovered medical bills for the [wife] and the ... child as previously ordered." A major source of conflict between the parties arose from an altercation they had in November 2014, during which the husband drove a vehicle over the wife's body, causing her severe injuries. At the trial, the wife testified that, as of that time, she had personally paid \$11,376.73 for medical bills and that she owed an additional \$11,774.49 for unpaid medical bills.

The husband argues that the trial court erred by requiring him to pay those amounts because the wife received compensatory damages against him in a separate civil action regarding the injuries that necessitated the wife's treatments and resulting medical expenses. On August 30, 2016, the wife filed in the divorce action a "motion to sever," in which she stated, in relevant part:

"The [wife] avers that she received injuries as the result of an altercation which occurred during the marriage. The [wife] avers that she has chosen to seek damages through the Circuit Court of Mobile County, Alabama, through a separate lawsuit. The [wife] requests the Court to sever the civil action containing any damages to [her] as a result of the physical injury received during the marriage and

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allow her to file said action with the Circuit Court of Mobile County, Alabama."

During the trial in the divorce action, the following exchange occurred between the wife, the parties' attorneys, and the trial-court judge:

"[The husband's attorney]: And [the civil action] was to compensate you for the economic losses that you suffered as a result of that incident?

"[The wife]: Yes, ma'am.

"[The husband's attorney]: So your purpose in filing that civil suit was to recover some of the money that you spent on medical care, correct?

"[The wife]: Yes, ma'am.

"[The husband's attorney]: Okay. And recover some of the money that you had spent -- that you've had to take time off work and that you've lost wages?

"[The wife]: Yes, ma'am.

"[The husband's attorney]: And you did state that you are receiving unemployment benefits though?

"[The wife]: Yes, ma'am.

"[The husband's attorney]: Okay. So the purpose of the civil suit was to financially rehabilitate you from these events in November, correct?

"[The wife]: For the past, yes, ma'am.

"[The husband's attorney]: And you were compensated, weren't you?

"[The wife]: I have not received anything yet as of today.

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"[The husband's attorney]: But you were awarded \$100,000, correct? I'm not asking you whether you got it on you now or whether it's been delivered to you, but that agreement was made where the insurance company was going to pay you \$100,000?

"[The wife]: Yes, ma'am.

"[The husband's attorney]: You asked -- you're asking the Court for periodic alimony to address the injuries that you received and the lost wages that you've received, aren't you?

"[The wife]: Yes, ma'am.

"[The husband's attorney]: But your testimony is that you entered into a civil suit with the purpose of being rehabilitated financially and getting some compensation and now you've got it, so you are double-dipping now. You want it here, as well as in the civil suit?

". . . .

"[The husband's attorney]: You're asking this Court to give you a judgment for money, just like you asked another court to give you a judgment for money regarding the same incident?

"[The wife]: No, ma'am.

"[The wife's attorney]: Objection, Judge. I don't think she can legally define what is alimony. She can ask for alimony, that's the question --

"[The trial-court judge]: I think the civil suit -- and we had Mr. Perloff here who is her attorney in the civil suit, was for [the husband's] negligence in running her over with the vehicle. That's the only reason the insurance company would pay would be for negligence.

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"[The husband's attorney]: But she testified -- she did testify, Judge, that she wanted periodic alimony specifically to address those injuries.

"[The trial-court judge]: Yes.

"[The husband's attorney]: Okay. Can I -- I'll rephrase it.

"[The trial-court judge]: Go ahead. Go ahead.

"[The husband's attorney]: And you are asking this Court, though, for a money judgment to address those same injuries that were addressed in Circuit Court, correct?

"[The wife's attorney]: Objection, Judge. She hasn't -- what she has testified to is what she has asked for. She hasn't asked for anything --

"[The trial-court judge]: Well if she asked for it -- whether she is asking for -- you know, she can ask for it. Whether it's the same or not, I mean, I think alimony is different than compensation. Go ahead.

"[The husband's attorney]: I'll move on."

In his appellate brief, regarding the wife's personal-injury action, the husband states:

"The lawsuit was filed and styled as Misty Cowart, plaintiff, v. Zachariah N. Cowart and Geico Insurance Company, defendants, and docketed as case no. CV-2016-902314 (JAY). [The wife] settled her personal injury claims for policy limits against [the husband] and filed a Pro Tanto Joint Stipulation of Dismissal with the Trial Court on October 16, 2017."

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He later states: "It was a pro tanto dismissal because [the wife] continues her lawsuit against Geico in an effort to recover uninsured motorist benefits." Citing, among other cases, Ex parte Barnett, 978 So. 2d 729, 732 (Ala. 2007), the husband argues that the wife is not entitled to a double recovery for her injuries, which he also characterizes as "estoppel by election."

Of course, "[s]tatements made in briefs are not evidence," Cameron v. Cameron, [Ms. 2150546, Nov. 10, 2016] ____ So. 3d ____, ____ (Ala. Civ. App. 2016), but we note that pro tanto satisfaction is a defense that must be proven. See Hardman v. Freeman, 337 So. 2d 325, 326-27 (Ala. 1976). Moreover, § 12-21-109, Ala. Code 1975, provides: "All receipts, releases and discharges in writing, whether of a debt of record, a contract under seal or otherwise, and all judgments entered pursuant to pro tanto settlements, must have effect according to their terms and the intentions of the parties thereto."

The terms of the settlement agreement in the wife's personal-injury action are not clearly articulated in the record. The husband did not offer the settlement agreement as

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evidence. Apart from her motion to sever her personal-injury action against the husband from the divorce action, the record contains no filings or orders pertaining to the personal-injury action. Sometimes, the wife's testimony indicates that the proceeds from the settlement agreement were intended to compensate her for at least some portion of her medical expenses, but she also expressly denied that the relief she had requested in the divorce action was the same relief set out in the settlement agreement. The statements of the trial-court judge that are quoted above indicate that the trial court had been presented with additional information from the wife's attorney in the personal-injury action regarding the nature of the settlement agreement and that it concluded that ordering the husband to satisfy his pendente lite obligations regarding the wife's medical bills would not result in her receipt of a double recovery for her injuries. In light of the ambiguity existing in the record before this court regarding the terms of the settlement agreement the husband relies upon, we are in no position to overturn the trial court's decision.

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The husband next argues that the trial court erred in its calculation of his child-support obligation, citing, among other cases, Martin v. Martin, 637 So. 2d 901, 902 (Ala. Civ. App. 1994) ("We hold ... that the word 'shall' in Rule 32(E), Ala. R. Jud. Admin., mandates the filing of a standardized Child Support Guidelines Form and a Child Support Obligation Income Statement/Affidavit Form."). The record contains a Child-Support-Obligation Income Statement/Affidavit ("Form CS-41") completed by each party and a proposed Child-Support Guidelines form ("Form CS-42") completed by each party, all of which were filed in open court on the day of the trial. The husband's proposed Form CS-42 yielded a monthly child-support obligation of \$831; the wife's lists a monthly obligation of \$865.

As already noted, the trial court's judgment requires the husband to pay the wife child support of \$944 per month "as previously ordered by th[e trial] court," stating that the award "is in compliance with the guidelines of Rule 32, [Ala. R. Jud. Admin.]." In response to the husband's argument, the wife asserts that the trial court's calculation mirrors the calculation set out in an October 6, 2016, order and that it

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is "[o]bviously" based on evidence that the parties presented regarding their incomes at a pendente lite hearing. In his reply brief, the husband argues that, "[e]ven if the [t]rial [c]ourt was proper in calculating child support in 2016, the difference in the pendente lite award and the calculations presented at trial warranted a change in the figures."

The record does not contain a Form CS-42 completed by the trial court, and the amount of child support set out in its judgment differs from the respective amounts proposed by the parties. Insofar as the trial court's child-support award was based on evidence presented at a pendente lite hearing, this court has previously noted that child-support obligations should be based on the evidence presented at the time of the calculation. See Farnell v. Farnell, 3 So. 3d 203, 206 (Ala. Civ. App. 2008) ("[W]e recognize that because over a year has passed since the trial court received CS-41 forms from the parties, updated income statements may be necessary for the trial court to properly compute the father's child-support obligation.").

In any event, as the wife notes in her appellate brief, "the appellate record doesn't contain the CS-42 form that the

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trial court used to set its pendente lite child support amount nor does it contain a transcript of the testimony given at said hearing." She argues that we should affirm the trial court's judgment based on a presumption of its correctness. We disagree. In Farnell, we reasoned:

"We have routinely reversed judgments based upon failures by trial judges to complete CS-42 forms when we cannot discern the basis for the child-support award from the record. See, e.g., Kirkland v. Kirkland, 860 So. 2d 1283, 1291 (Ala. Civ. App. 2003), and Fomby v. Fomby, 840 So. 2d 919, 921 (Ala. Civ. App. 2002). Because we cannot discern the basis for the trial court's child-support judgment in the present case, we must reverse the judgment and remand this case for further proceedings."

3 So. 3d at 206. In this case, we cannot discern the basis for the trial court's child-support award, which differs from the respective amounts proposed by the parties at the time of the trial, because evidence supporting the amount set by the trial court is absent from the record. We therefore reverse that portion of the trial court's judgment and remand this case for further proceedings consistent with this opinion. The husband's request for an award of attorney fees on appeal is denied.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

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