REL: January 11, 2019

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2018-2019

2171046

Juan R. Pace, Sr.

v.

Rosanna Smith

Appeal from Madison Circuit Court
(DR-11-77.01)

THOMAS, Judge.

This is the second time these parties have appeared before this court. See Smith v. Pace (No. 2130075, May 9,

2014), 187 So. 3d 815 (Ala. Civ. App. 2014) (table) ("Pace").[1] Rosanna Smith ("the mother") and Juan R. Pace, Sr. ("the father"), are the parents of two children; the mother and the father were never married. After their relationship ended in 2010, the mother sought a paternity adjudication, an award of sole legal and physical custody of the children, and an award of child support. In September 2013, after some delays resulting from the father's deployments overseas in service to our country, the Madison Circuit Court ("the trial court") entered a judgment awarding the parties joint custody ("the September 2013 custody judgment").[2] The trial court did not order either party to pay child support. The mother appealed the September 2013 custody judgment, complaining, among other

[1]We have taken judicial notice of the record in the previous appeal. "'"This court takes judicial notice or has judicial knowledge of contents of its records with reference to its previous consideration of litigation presently before it."'" Veteto v. Swanson Servs. Corp., 886 So. 2d 756, 764 n.1 (Ala. 2003) (quoting Morrow v. Gibson, 827 So. 2d 756, 762 (Ala. 2002), quoting in turn Federal Deposit Ins. Corp. v. Equitable Life Assurance Soc'y, 289 Ala. 192, 194, 266 So. 2d 752, 753 (1972)).

[2]The September 2013 custody judgment was not final until, on remand from this court in April 2014, the trial court entered an order incorporating a parenting plan. However, for ease of discussion, we will refer to the custody judgment as the September 2013 custody judgment.

things, that the father should not have been awarded joint custody of the children because he might again be deployed for a significant period. On May 9, 2014, we affirmed the trial court's judgment without issuing an opinion. Pace.

Meanwhile, in November 2013, the mother provided notice to the father that she intended to move to North Carolina. The father filed a complaint objecting to the mother's intended relocation in December 2013, in which he sought an order denying the mother the right to relocate and, if the mother did relocate, a modification of custody and an award of child support. The father also sought a determination that the mother was in contempt of certain provisions of the September 2013 custody judgment. The mother answered the father's complaint and filed a counterclaim, in which she sought a modification of custody based on her stated need to move to North Carolina and an award of child support.

On February 8, 2014, the trial court entered an order "granting" the father's objection to the mother's relocation. The mother sought clarification of that order, questioning whether the order was a final judgment. The trial court entered an order on March 12, 2014, clarifying that the mother

was not permitted to relocate and that, because the father's request for modification had been predicated on the mother's relocation, that issue had become moot; the trial court requested that either party notify it within seven days if he or she believed that other issues remained pending.

On March 18, 2014, the father amended his complaint insofar as it sought to have the mother held in contempt by specifying certain dates on which the mother had denied the father his custodial rights. The mother answered the father's amended complaint and filed a new counterclaim, in which she sought to have the father held in contempt for his alleged violations of certain provisions in the September 2013 custody judgment. She also amended her claim seeking a modification of custody; her amended counterclaim contained conclusory statements that a material change of circumstances had occurred and that the mother could present evidence that an award of sole physical custody to her would be in the children's best interest. The mother continued to amend her contempt claim throughout the pendency of the action to add additional allegations that the father was not complying with various provisions of the September 2013 custody judgment.

The father answered the mother's amended pleadings and also amended his complaint to add a claim for damages under the Alabama Litigation Accountability Act, codified at Ala. Code 1975, § 12-19-270 et seq.

After this point, the parties began discovery. The father did not initially respond to the mother's interrogatories, so the trial court granted the mother's motion to compel his response. The mother failed to timely answer the father's interrogatories, as well. The trial court set and continued contempt hearings several times.

In January 2016, the father filed a motion seeking a continuance of the pending action under the federal Servicemembers' Civil Relief Act, codified at 50 U.S.C. 3901 et seq., because he had received orders requiring him to deploy overseas beginning February 1, 2016. In that motion, the father requested that the mother be given full custodial rights over the children during the term of his deployment and that, upon his return from deployment, the joint-custody arrangement be reinstated. The trial court granted the father's motion, staying the proceedings during the full term of his deployment and awarding the mother custody of the

children during the same period. In the trial court's January 12, 2016, order, it specifically stated that "the parties shall revert back to the joint legal and joint physical custody" provisions in the September 2013 custody judgment upon the termination of the father's deployment. The mother sought reconsideration of this order, arguing that she was entitled to an award of child support and that the appellate courts disfavor automatic reversionary clauses.[3] After a hearing, the trial court deleted that part of its order allowing for the automatic resumption of the joint-custody arrangement upon the termination of the father's deployment.

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[3]This court has expressed disfavor with automatic custody reversionary clauses in final judgments, which, by their nature, provide for a modification of custody without proof that the circumstances warrant such a potentially disruptive change and that such change will actually benefit the child involved at the time of the change. See, e.g., Hovater v. Hovater, 577 So. 2d 461, 463 (Ala. Civ. App. 1990) (indicating that such provisions are "premised on a mere speculation of what the best interests of the children may be at a future date"). However, the January 2016 order was a pendente lite order entered at the father's request during necessitous times, i.e., while the father was deployed overseas, and, thus, its entry was not based on a final, factual determination regarding the best interest of the children. This court has never considered whether a pendente lite order entered pursuant to the parties' agreement during necessitous times can contain what amounts to a custodial reversionary clause to terminate that pendente lite custody order upon the conclusion of the circumstances giving rise to it.

After the parties exchanged the necessary information, the trial court calculated pendente lite child support.

In January 2017, after his return from deployment, the father filed a motion seeking reinstatement of the joint-custody provisions of the September 2013 custody judgment. The mother opposed that motion, but the trial court did not immediately rule. Instead, on March 9, 2017, the trial court set the matter for trial on March 20, 2017.

The mother had served on the father a notice to take his deposition on March 7, 2017. That notice requested the production of certain documents, including tax returns, credit-card statements, and bank statements; the mother also requested information pertaining to the money the father spent on the children and documentation relating to his travel. The deposition was rescheduled for March 9, 2017, but the father failed to produce the requested documents at the deposition. Thus, the mother filed a motion on March 9, 2017, seeking to compel production of those documents and to continue the March 20, 2017, trial.

The trial court entered an order continuing the trial to July 17, 2017. In that same order, the trial court stated:

"motion to compel filed by [the mother] is granted." No other instructions appeared in the trial court's order.

On April 12, 2017, the mother filed a motion for sanctions. In that motion, the mother explained that she had again requested of the father the documents she had requested he produce at his March 2017 deposition and that, as of April 12, 2017, the father had not produced those documents, despite having been compelled to do so. The trial court ordered the father to respond to the mother's motion for sanctions by April 21, 2017.

On April 21, 2017, the father filed a response to the mother's most recent amended counterclaim for contempt (as noted above, the mother frequently amended her contempt claim to add additional alleged violations of the September 2013 custody judgment). However, the father did not comply with the trial court's order to respond to the motion for sanctions. Thus, the mother filed a renewed motion for sanctions on May 3, 2017, in which she pointed out that the father had not replied to her initial motion for sanctions and that she had still not received the requested documents despite the fact that the trial court had compelled their

production. The father immediately responded to the mother's renewed motion for sanctions, complaining in that response that "opposing counsel continues to file motions for discovery for items that have already been produced" and that he "continues to have depositions to ask the same questions that have no legitimate substantive bearing on any issues related to this cause." As pointed out in the mother's reply to the father's response to the renewed motion for sanctions, as of the date of the father's response to the mother's renewed motion for sanctions, the record does not contain any objections to the mother's discovery requests. The record also does not contain any order of the trial court relating to the mother's April 2017 request for discovery sanctions.

On May 19, 2017, the mother filed a motion seeking the entry of a default judgment on her modification claim as a discovery sanction for the father's continued failure to produce the requested documents. On May 25, 2017, for the first time, the father filed objections to the mother's discovery requests. Specifically, the father objected to some requests as "overbroad" without further elaboration, to some requests as "not germane to this action," and to some requests

as having been "previously provided." In addition, the father indicated that certain documents would be produced to the mother. On June 16, 2017, the mother amended her motion seeking the entry of a default judgment as a discovery sanction, explaining in the amended motion that, although the father's objection had indicated that certain requested documents would be provided, the father had still not provided those documents to the mother.

In July 2017, the mother sought another continuance of the trial, arguing that a witness had required surgery and would be unavailable for trial and that the father had not yet provided the requested discovery. The father objected to the requested continuance, again arguing that the documents the mother complained about had been previously produced. In response to the motion to continue, the trial court referred the matter to mediation, which, ultimately, never occurred, and reset the case for January 2018.

On January 11, 2018, the father moved for a status conference; in his motion, he asked that the parties narrow the issues to be tried before the trial court. The record does not reflect whether such conference took place, but the

trial court entered an order on January 30, 2018, continuing the trial to April 24, 2018. The record is silent as to what transpired between January 30, 2018, and March 22, 2018.

On March 22, 2018, the mother filed another motion for sanctions in which she again sought a default judgment against the father. In that motion, the mother alleged, in pertinent part:

> "(11) Th[e] Court, in response to multiple motions from the mother, ordered that depositions be held in the courthouse and that the father should produce all outstanding documents.
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> "(12) On or about February 8, 2018, the Mother filed her 'Notice of Taking Deposition, with Requests for Production of Documents.' Said depositions were scheduled for March 22, 2018, in the courthouse.
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> "(13) On March 22, 2018, the father appeared for deposition, and admitted that he did not bring any pay stubs, did not bring his 2017 W-2s, did not bring any cell phone records, did not bring any of his bank statements, and in fact, would not even answer questions relative to his banking accounts."

On March 30, 2018, the trial court entered an order granting the mother's motion for sanctions and for a default judgment against the father. That order required the mother to, within 10 days, "submit any desired affidavits or other testimony and a proposed order granting the requested relief."

The mother provided an attorney-fee affidavit and her "deposition taken before commissioner on oral examination"[4] in support of the motion for a default judgment on April 3, 2018.

Meanwhile, on March 30, 2018, the father filed a motion seeking additional time to respond to the mother's motion for a default judgment based on his counsel's upcoming surgery. On April 2, 2018, the father's new counsel filed a notice of appearance and a "Motion to Set Aside the Default Judgment." In that motion, the father asserted that he had provided most of the requested documents to his previous attorney, who, he contended, had not properly forwarded those items to opposing counsel. The father contended that he had a meritorious defense, that the mother would not be unfairly prejudiced by setting aside the default judgment, and that he had not engaged in culpable conduct warranting the default judgment. He also stated that his new counsel had offered to provide the requested documents to the mother's counsel "in an expeditious manner." Finally, he complained that he would be "extremely

[4]The mother's deposition appears in form to be much like an affidavit, although it is not notarized. However, the record contains an order appointing Patricia Swarr to administer an oath and to take down the testimony of the mother, as is permitted under Rule 28(a), Ala. R. Civ. P.

prejudiced" if the trial court modified child custody by default based on a discovery issue.

On May 3, 2018, the trial court entered a default judgment awarding sole legal and physical custody of the parties' children to the mother and ordering the father to pay child support. In that judgment, the trial court stated:

> "The point has come in this case where, simply put, enough is enough. The record herein reflects numerous motions filed by counsel for [the mother] in an effort to obtain necessary discovery in this matter. Finally, in an attempt to resolve the issues raised once and for all, the Court held a status conference with counsel of record on January 29, 2018. [The mother] insisted that despite [her] repeated efforts to depose [the father], [she] still had not been provided the requested discovery, and [the father] refused to answer all of [her] questions. In an effort to resolve the matter once and for all, the Court ordered counsel for [the mother] to re-notice [the father's] deposition, with a request for documents, to be taken in the Court's jury room so that the Court would be available to rule immediately if issues arose.
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> "Approximately 45 minutes after commencement of the deposition, the Court was notified by counsel that [the father] had produced no documents and was refusing to answer certain questions. Clearly, the deposition was an exercise in futility."

In addition, the default judgment denied all other pending claims of the parties. The trial court amended the judgment

on the same date to award the mother $7,608.18 in attorney fees.

On May 29, 2018, the father filed an amended motion to set aside the default judgment, to which he appended his affidavit and copies of electronic-mail ("e-mail") messages between him and his former counsel. The father testified in that affidavit that he had provided many of the requested documents to his former counsel and that he had therefore not brought those items to his March 2017 deposition. He also stated that his previous counsel had informed him that she would object to certain discovery requests and told him not to worry about producing certain items for the March 2017 deposition; according to the father, he was not aware that objections to discovery were required to be made before the deposition and not at the deposition. He said that he had not been advised that he might lose custody of his children for failing to produce the requested documents and that he had never intentionally or willfully disobeyed a court order. The father also stated in his affidavit that "my service and deployment have been used to create a material change of

circumstances to warrant a changing of custody which I feel is simply wrong."

The mother filed a response to the father's amended motion to set aside the default judgment. In her response, the mother contended that the father's conduct in refusing to produce requested documents had, in fact, been willful and intentional and had unduly prolonged the proceedings. In support of her response, she attached excerpts from the March 2017 deposition.[5] On July 13, 2018, the trial court denied the father's motion to set aside the default judgment. He timely filed a notice of appeal to this court.

On appeal, the father argues that the trial court erred by failing to set aside the default judgment entered against him. He contends that a consideration of the factors set out in Kirtland v. Fort Morgan Authority Sewer Service, Inc., 524 So. 2d 600, 605 (Ala. 1988), militate in favor of setting aside the default judgment. He further argues that the trial court erred in not employing lesser sanctions against him for

[5]Although the motion refers to and quotes from a March 2018 deposition of the father, the attachments do not contain an excerpt from that deposition.

his failure to comply with the mother's discovery requests.[6] Finally, the father contends that the trial court erred in entering a default judgment awarding the mother sole physical custody of the parties' children without evidence to support the conclusion that a material change in circumstances had occurred or that the award of sole physical custody would be in the best interest of the children.

We begin our analysis by noting that the default judgment entered in this case was not a typical Rule 55(b), Ala. R. Civ. P., default judgment entered for failing to defend an action or to appear at trial. Instead, the trial court granted the mother's motion seeking a default judgment as a discovery sanction under Rule 37(b)(2)(C), Ala. R. Civ. P. Thus, the factors applicable to the consideration of a Rule 55(c), Ala. R. Civ. P., motion are not relevant here, and we will not engage in an analysis of the Kirtland factors.

[6]The father makes no specific argument concerning the trial court's award of attorney fees to the mother; because that sanction is a separate sanction a trial court may impose for failing to comply with discovery requests, see Rule 37(b)(2), Ala. R. Civ. P., we consider the father to have waived any issue relating to that award by failing to address it on appeal. See Messer v. Messer, 621 So. 2d 1343, 1344 (Ala. Civ. App. 1993).

Rule 37(b)(2) provides the methods by which a trial court may sanction a party for failing to provide requested discovery.

> "(2) Sanctions by Court in Which Action Is Pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or [Rule] 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
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> > "(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
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> > "(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;
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> > "(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;
> >
> > "(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

> "(E) Where a party has failed to comply with an order under Rule 35(a) requiring that party to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that that party is unable to produce such person for examination.
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> "In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust."

Our supreme court has explained that "[t]he choice of discovery sanctions is within the trial court's discretion and will not be disturbed on appeal absent gross abuse of discretion, ... and then only upon a showing that such abuse of discretion resulted in substantial harm to the appellant." Iverson v. Xpert Tune, Inc., 553 So. 2d 82, 87 (Ala. 1989). In addition, "[t]he discovery sanction imposed must be proportional to, and compensatory of, the discovery abuse committed." Ex parte Seaman Timber Co., 850 So. 2d 246, 257 (Ala. 2002). Furthermore, we note that severe sanctions like dismissal or the entry of a default judgment must be carefully reviewed to ensure that the sanction is merited. See Iverson, 553 So. 2d at 87. Specifically, our supreme court has said:

> "[T]he sanction of dismissal is the most severe sanction that a court may apply. See Ultracashmere House, Ltd. v. Meyer, 407 So. 2d 125 (Ala. 1981); Holt v. David G. Steven, Inc., 416 So. 2d 1071 (Ala. Civ. App. 1982). Judicial discretion must be carefully exercised to assure that the situation warrants the imposition of such a sanction. Weatherly v. Baptist Medical Center, [392 So. 2d 832 (Ala. 1981)]; Durham v. Florida East Coast Ry., 385 F.2d 366 (5th Cir. 1977); Brown v. Thompson, 430 F.2d 1214 (5th Cir. 1970). Dismissal orders must be carefully scrutinized, and the plaintiff's conduct must mandate dismissal. Smith v. Wilcox County Board of Education, 365 So. 2d 659 (Ala. 1978)."

Id.

The father does not convincingly argue that he did not fail to produce the requested discovery. Although he may have had valid objections to some of the requested items, the father never filed any objections until well after the discovery was requested and only after the trial court had compelled the father to produce the requested items. See Rule 30(b)(5), Ala. R. Civ. P. (setting out the time limits for objecting to a request for production of documents accompanying a deposition notice). In addition, he failed to bring the requested items to more than one deposition.

The father seeks to hide behind his former counsel's alleged failings in handling discovery issues in this matter. The father's e-mail messages, although proof that the father

had sent several items to his former counsel for production, also indicate that he desired to object to other discovery requests because he found responding to them burdensome or time-consuming. Those e-mail messages were dated November 2017, well after the mother had first requested that the father produce certain documents at the March 2017 deposition and after the trial court had compelled their production.

Furthermore,

> "'[a]n attorney is the duly authorized agent of his client and his acts are those of his client. The client is, therefore, bound by the acts of his attorney in the course of legal proceedings in the absence of fraud or collusion, and knowledge of the attorney is imputed to the client, notwithstanding the client had no actual knowledge or notice of the facts and circumstances.'"

SouthTrust Bank v. Jones, Morrison, Womack & Dearing, P.C., 939 So. 2d 885, 903 (Ala. Civ. App. 2005) (quoting Ex parte Aaron, 275 Ala. 377, 379, 155 So. 2d 334, 335 (1963) (Merrill, J., concurring specially)). "'It is elementary that omissions and commissions of an attorney at law are to be regarded as acts of the client whom he represents.'" SouthTrust Bank, 939 So. 2d at 903 (quoting Lawrence v. Gayle, 294 Ala. 91, 94, 312 So. 2d 385, 387 (1975)).

The father cannot hide behind the alleged omissions of his former counsel. The record supports the trial court's conclusion that the father failed to produce requested discovery and to comply with the trial court's order compelling production. See Tucker v. Tucker, 60 So. 3d 891, 898 (Ala. Civ. App. 2010) (concluding that the husband had not demonstrated on appeal any basis for determining that the trial court erred in concluding that he had not complied with orders compelling him to respond to outstanding discovery requests). Thus, the trial court acted within its discretion to sanction the father under Rule 37(b)(2).

However, the father argues that the trial court should have utilized a lesser sanction than the entry of a default judgment to punish his failure to provide the requested discovery. He contends that his failure to provide the requested discovery was not entirely willful because, he says, he relied on his former counsel to file objections to certain of the requests and to provide other documents to opposing counsel, neither of which tasks were performed. In addition, the father complains that the trial court failed to utilize lesser sanctions earlier in the proceedings to compel

production of the contested discovery, resulting in what he describes as its decision to "jump to the most severe sanction." According to the father, the sanction of a default judgment is not warranted in this situation. We cannot agree.

The father's failure to produce the requested discovery over a 12-month period is similar to, and perhaps more egregious than, the conduct found to warrant similar sanctions in Tri-Shelters, Inc. v. A.G. Gaston Construction Co., 622 So. 2d 329, 330 (Ala. 1993), and Smith v. Davidson, 58 So. 3d 177 (Ala. Civ. App. 2010). The defendant in Tri-Shelters, who was acting pro se for a majority of the proceedings, had failed to respond to interrogatories for a five-month period. Tri-Shelters, 622 So. 2d at 330. Our supreme court found his failure to comply with the trial court's order compelling discovery to be willful, id., noting that "it does not require considerable sophistication to understand that the trial court's order to respond was not merely aspirational." Id. The plaintiff in Smith failed to provide certain documents for one and a half years after they were first requested, even after the trial court had set aside its original dismissal of his claims for failing to provide discovery. Smith, 58 So. 3d

at 183. Thus, based on the principles espoused in both Tri-Shelters and Smith, we conclude that the trial court's entry of a default judgment against the father as a discovery sanction under these circumstances is not a gross abuse of its discretion.

However, we agree with the father that the default judgment is defective because the mother did not present evidence supporting a modification of custody or relating to the best interest of the children. We have explained that a default judgments involving awards of child custody must be premised on evidence supporting the relief awarded. See Johnson v. Johnson, 168 So. 3d 61 (Ala. Civ. App 2014); Tucker v. Tucker, 60 So. 3d 891 (Ala. Civ. App. 2010); see also Rule 55(e), Ala. R. Civ. P. ("No judgment by default shall be entered against ... parties to an action for divorce ... unless the claimant establishes the party's claim or right to relief by evidence."). In both Johnson and Tucker, we reversed default judgments entered on issues of custody because those judgments lacked evidentiary support.

In order to be entitled to a modification of the parties' joint-custody arrangement, the mother would have been required

to "prove 'a material change of circumstances of the parties since the prior [judgment], which change of circumstances is such as to affect the welfare and best interest of the child or children involved.'" Watters v. Watters, 918 So. 2d 913, 916 (Ala. Civ. App. 2005) (quoting Ponder v. Ponder, 50 Ala. App. 27, 30, 276 So. 2d 613, 615 (Civ. 1973)). She would also have had to establish that the best interest of the children would be served by awarding her sole physical custody of the children. See Means v. Means, 512 So. 2d 1386, 1388 (Ala. Civ. App. 1987). Thus, in an action seeking to modify a joint custody arrangement, "the appropriate burden of proof is whether a change in circumstances has occurred such that it [is] in the child's best interests that the [judgment] be modified to [award sole] physical custody ...." Means, 512 So. 2d at 1388.

The mother's deposition testimony in support of the default judgment is sparse, to say the least. Other than a statement that the parties had joint custody under the September 2013 custody judgment and a statement requesting sole physical custody, the deposition contains only one other paragraph relevant to the custody issue, which reads: "Since

the entry of the [September 2013 custody judgment] there [has] been a material change in circumstances which calls for a modification of the Order relative to custody and child support. Specifically, the [father] has deployed on multiple occasions, and the minor children have lived with me since February 2016." The mother does not state how the alleged changed circumstances affect the welfare and best interest of the children.

As noted above, the children were placed in the mother's custody pendente lite upon the father's deployment in February 2016. "Pendente lite orders ... are only made for the 'pendency of the litigation' of the existing case." Rich v. Rich, 887 So. 2d 289, 301 (Ala. Civ. App. 2004) (citing Ex parte J.P., 641 So. 2d 276, 278 (Ala. 1994)). Certainly, the father's willingness to allow the mother to exercise sole physical custody pendente lite while he was deployed overseas should not be used as a means to prove that circumstances have changed such that the joint-custody arrangement should be modified. See Watters, 918 So. 2d at 917 (noting that "we are to encourage parents to work together for the benefit of the family"). Thus, we fail to see how the pendente lite

order is proof of the existence of a change in circumstances in the present case.

The only other change of circumstance raised by the mother is the father's "multiple" deployments. As we mentioned, these parties appeared before this court previously, and we have taken judicial notice of the record in the previous appeal, see note 1, supra, which reveals that the father had been deployed multiple times before the entry of the September 2013 custody judgment. The possibility of future deployments was present at the time the trial court originally considered the issue of custody. Thus, the father's continued military-related duty, which apparently requires overseas deployments, is not a change in the parties' circumstances.

Furthermore, Ala. Code 1975, § 30-3-9(a), provides that

> "[a] military deployment, including past, previous, or future deployments, may not be considered by the court as the sole factor when making an original child custody determination, or in modifying an existing child custody determination, in any proceeding involving any person who has sought, or is seeking, custodial rights to, or visitation rights with, a child."

The only evidence presented by the mother to support the modification of custody is evidence indicating that the father

has had multiple deployments, resulting in pendente lite custody placement with her. Because the trial court is prohibited from considering the father's deployments as the sole basis for modifying custody, the mother's evidence is insufficient to support the trial court's judgment.

Like the wife in Tucker, "the [mother in the present case] did not introduce any evidence to establish facts that would support ... the custody determination, or any other specific relief that the [mother] was awarded in the [default] judgment." Tucker, 60 So. 3d at 898. Thus, based on Johnson and Tucker, we reverse the custody award to the mother,[7] and we remand the cause to the trial court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

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

Donaldson, J., concurs in the result, without writing.

[7]Because we are reversing the award of custody, we necessarily reverse the concomitant award of child support, despite the fact that the father has made no specific argument relating to the child-support award.