

# ARKANSAS COURT OF APPEALS

DIVISION II  
No. CA11-1065

PEARL JENKINS and DONLEY &  
ASSOCIATES INSURANCE, LLC  
APPELLANTS

V.

APS INSURANCE, LLC  
APPELLEE

Opinion Delivered May 30, 2012

APPEAL FROM THE PULASKI  
COUNTY CIRCUIT COURT,  
SIXTH DIVISION  
[NO. CV08-9799]

HONORABLE JAY MOODY, JUDGE

APPEAL DISMISSED

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## ROBERT J. GLADWIN, Judge

Appellants, Pearl Jenkins and Donley & Associates Insurance, LLC (D&A), appeal from jury verdicts in favor of appellee, APS Insurance, LLC. APS has filed a motion to dismiss this appeal and asserts that the judgment appealed from is not final because not all of its claims against all of the defendants were disposed of and because Jenkins had nonsuited her counterclaim, which could be refiled. We agree that the order appealed from is not final. Accordingly, we must dismiss this appeal.

### *Background*

In 2003, David Donley joined Steve Perry to form appellee, APS Insurance. They also hired a mutual friend, Jenkins, to be APS's customer-service representative. On Friday, June 13, 2008, Donley removed four files from APS's office, along with electronic files and software, and formed his own firm, D&A. Donley also had Jenkins email him the list of all



of APS's clients and then delete the list from APS's computer. When Perry returned to work the following Monday, he discovered the missing and deleted files and was notified that Donley had established D&A and that Jenkins had left APS's employment to join D&A.

*Proceedings in the Circuit Court*

On August 28, 2008, APS sued Donley for injunctive relief and other damages. APS later amended its complaint to add Jenkins and D&A as defendants. Among the claims set out in APS's complaint were claims for violation of the Theft of Trade Secrets Act; computer fraud and computer trespass; breach of fiduciary duty; conversion; trespass on the case; violation of the Deceptive Trade Practices Act; tortious interference with contractual relations and business expectancies; and civil conspiracy. APS also requested an accounting, that a constructive trust and/or equitable lien be imposed against all defendants, and reserved the right to plead further. Donley and D&A filed a joint answer, while Jenkins answered separately.

Donley and Jenkins, but not D&A, filed separate counterclaims against APS and Perry, asserting causes of action for malicious prosecution, defamation, and abuse of process. The circuit court dismissed both counterclaims without prejudice.<sup>1</sup>

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<sup>1</sup>The trial court granted APS's motion to dismiss Donley's counterclaim, while Jenkins voluntarily nonsuited her counterclaim. Jenkins later filed a similar counterclaim and motion to file a third-party complaint against Perry. The trial court granted APS's motion to strike the counterclaim and motion. The pleadings and orders pertaining to Jenkins's two counterclaims are not contained in the record; however, the copies attached to APS's motion to dismiss the appeal have file marks showing that they were filed with the circuit court.



APS filed its second motion for summary judgment on November 17, 2010.<sup>2</sup> The motion sought summary judgment against Jenkins and D&A, but not Donley due to his bankruptcy filing on August 26, 2010. The motion is not included in the addendum. Jenkins and D&A filed separate replies to the motion for summary judgment. Jenkins's motion also sought summary judgment for herself, asserting that all of APS's tort claims were preempted and displaced by the statutory claim for theft of trade secrets. The circuit court entered an order on January 31, 2011, that denied the second motion for summary judgment filed by APS but reserved judgment on the issue of whether "Trespass on the Case" remained a viable cause of action, and denied Jenkins's countermotion for summary judgment.

The case against Jenkins and D&A proceeded to trial. After APS rested its case, it "withdrew" its claims for breach of fiduciary duty, trespass, and violation of the Deceptive Trade Practices Act.<sup>3</sup> The jury found in favor of APS and awarded compensatory damages of \$50,062.98 and punitive damages of \$100,000 against D&A. The jury also awarded compensatory damages of \$29,066.22 and punitive damages of \$15,000 against Jenkins. Judgment on the jury's verdict was entered on June 3, 2011. The judgment noted that the issues against separate defendant David Donley could not be tried because of Donley's bankruptcy, and that APS had reserved its rights to proceed against Donley "consistent with further orders and proceedings of the United States Bankruptcy Court."

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<sup>2</sup>APS had previously filed a motion for summary judgment against Donley that was denied by the circuit court.

<sup>3</sup>We assume that APS meant that it was nonsuiting these claims.



After separate motions for judgment notwithstanding the verdict were denied by the circuit court, Jenkins and D&A jointly filed an amended notice of appeal on July 6, 2011, which abandoned pending and unresolved claims. A second amended notice of appeal was filed on July 19, 2011, which included the circuit court's rulings on all motions preceding trial, including the motions for summary judgment. It also abandoned any pending, unresolved claims.

*Discussion*

With inapplicable exceptions, Rule 2 of the Arkansas Rules of Appellate Procedure—Civil allows appeals only from final judgments and orders. If a suit has more than one claim for relief or more than one party, an order or judgment adjudicating fewer than all claims and all parties is neither final nor appealable. Ark. R. Civ. P. 54(b)(2). On the present record, APS's claims against Donley were never adjudicated; the judgment simply "reserved" APS's claims against Donley "consistent with further orders and proceedings of the United States Bankruptcy Court." Thus, the judgment and orders now being challenged are not final. *E.g., Hambay v. Williams*, 335 Ark. 352, 980 S.W.2d 263 (1998); *Strack v. Capital Servs. Grp.*, 87 Ark. App. 202, 189 S.W.3d 484 (2004). Nor did the judgment actually dismiss the claims APS nonsuited during trial. For a nonsuit to take effect, a formal order must be "entered." *Blaylock v. Shearson Lehman Bros., Inc.*, 330 Ark. 620, 954 S.W.2d 939 (1997).

Another reason the judgment appealed from lacks finality is that it did not address APS's claims for equitable relief, i.e., accounting and imposition of a constructive trust or equitable lien. Jenkins took a voluntary nonsuit of her counterclaim, rendering the judgment



not final for purposes of appeal. *Crockett v. C.A.G. Invs., Inc.*, 2010 Ark. 90, 361 S.W.3d 262. The fact that Jenkins and D&A abandoned any pending but unresolved claims in their notice of appeal does not provide finality because they cannot abandon APS's claims, only their own.

The circuit court may certify an otherwise nonfinal order for an immediate appeal by executing a certificate pursuant to Ark. R. Civ. P. 54(b)(1); however, no such certification was made. We, therefore, must dismiss the appeal without prejudice. *State Farm Mut. Auto. Ins. Co. v. Thomas*, 312 Ark. 429, 850 S.W.2d 4 (1993); *Spill Responders, Inc. v. Felts*, 2009 Ark. App. 669.

Finally, we address the need for rebriefing in the event that Jenkins or D&A decides to pursue the appeal. Rule 4-2(a)(8) requires that an appellant's brief contain an addendum that includes the judgment from which the appeal is taken, along with any other relevant pleadings, documents, or exhibits essential to an understanding of the case and the court's jurisdiction on appeal. Here, several items are missing, including APS's second motion for summary judgment, the counterclaims, the orders dismissing the counterclaims, and the jury instructions. It appears that the counterclaims and related orders are not in either the record or the addendum. Jenkins and D&A designated the entire record in their notices of appeal. The briefs and addenda in this appeal comprise more than 1500 pages, and the parties raise numerous arguments on appeal that question not only the final judgment but also the orders disposing of motions filed throughout the proceeding. We strongly recommend that the parties review their arguments and addendum to determine whether the addendum should be supplemented with any other pleadings or documents to support its arguments on appeal.



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If anything material to either party is omitted from the record by error or accident, we may direct that the omission or misstatement be corrected, and if necessary, that a supplemental record be certified and transmitted. Ark. R. App. P.–Civ. 6(e); *Bell v. Bank of Am., N.A.*, 2012 Ark. App. 104.

Our dismissal is without prejudice to refile the appeal upon entry of a final order and the filing of a timely notice of appeal therefrom.

Appeal dismissed.

ROBBINS and GRUBER, JJ., agree.

*Rice & Adams*, by: *Scott A. Scholl*, for appellants.

*Hopkins Law Firm, a Professional Association*, by: *Gregory M. Hopkins* and *Ryan J. Caststeel*, for apellee.