

ARKANSAS COURT OF APPEALS

DIVISION II
No. CA10-779

TOWN OF GILBERT

APPELLANT

V.

BENJAMIN F. FRUEHAUF, II

APPELLEE

Opinion Delivered MARCH 16, 2011

APPEAL FROM THE SEARCY
COUNTY CIRCUIT COURT
[NO. CV2005-86]

HONORABLE CHARLES E.
CLAWSON, JR., JUDGE

DISMISSED WITHOUT PREJUDICE

RAYMOND R. ABRAMSON, Judge

This case began in December 2005, when the Town of Gilbert (the Town) claimed that Benjamin Fruehauf II was encroaching on certain public right-of-ways in Gilbert. The Town sought injunctive relief against Fruehauf. Fruehauf moved, in a separate action, to quiet his title to at least part of the property at issue. The two cases were eventually consolidated. The Town made several attempts at summary judgment. The circuit court settled part of the parties' dispute: it quieted title in Fruehauf "to the land they have under fence in the old railroad right-of-way." This portion of property, however, was not the only property upon which the Town was alleging Fruehauf was encroaching. Thus, some of the Town's claims were left undecided.

The Town, however, filed its notice of appeal from the circuit court's May 7, 2010 order. This order included a Rule 54(b) certificate. Despite the inclusion of the certificate, however, we must dismiss the Town's appeal without prejudice.

Pursuant to Arkansas Rule of Appellate Procedure–Civil 2(a), an appeal may be taken from “[a] final judgment or decree entered by the circuit court.” Finality issues are jurisdictional; this court can raise them *sua sponte*. *Hanners v. Giant Oil Co. of Ark.*, 369 Ark. 226, 230 n.2, 253 S.W.3d 424, 427 n.2 (2007). Civil Procedure Rule 54 addresses the issue further:

(1) *Certification of Final Judgment*. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties *only upon an express determination, supported by specific factual findings, that there is no just reason for delay* and upon an express direction for the entry of judgment. In the event the court so finds, it shall execute the following certificate, which shall appear immediately after the court’s signature on the judgment, and which shall set forth the factual findings upon which the determination to enter the judgment as final is based:

Rule 54(b) Certificate

With respect to the issues determined by the above judgment, the court finds:

[Set forth specific factual findings.]

Upon the basis of the foregoing factual findings, the court hereby certifies, in accordance with Rule 54(b)(1), Ark. R. Civ. P., that it has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the judgment shall be a final judgment for all purposes.

Certified this _____ day of _____, _____.

Judge

(2) *Lack of Certification*. Absent the executed certificate required by paragraph (1) of this subdivision, any judgment, order, or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the judgment, order, or other

form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all of the parties.

Ark. R. Civ. P. 54(b)(1)–(2) (emphasis added).

Our supreme court has provided guidance as well: “the court must *factually* set forth reasons in the final judgment, order, or the record, which can then be abstracted, explaining why a hardship or injustice would result if an appeal is not permitted.” *Franklin v. Osca, Inc.*, 308 Ark. 409, 412, 825 S.W.2d 812, 814 (1992) (emphasis in original). Indeed, *Kowalski v. Rose Drugs of Dardanelle, Inc.*, 2009 Ark. 524 is on all fours with the case at bar. In *Kowalski*, the Rule 54(b) certificate did not contain any specific factual findings about the hardship or injustice that would result if an appeal was not immediately allowed. 2009 Ark. 524, at 3–4. Though the parties and the circuit court discussed those issues on the record, our supreme court held that the “[f]actual underpinnings supporting a Rule 54(b) certification must be set out in the circuit court’s order.” 2009 Ark. 524, at 4.

Like the Rule 54(b) certificate in *Kowalski*, the Rule 54(b) certificate here contains no specific findings detailing why a hardship or injustice would result if an immediate appeal is not permitted. Thus, we dismiss the Town’s appeal without prejudice. *Kowalski*, 2009 Ark. 524, at 4.

Dismissed without prejudice.

PITTMAN and MARTIN, JJ., agree.