

ARKANSAS COURT OF APPEALS

DIVISION III
No. CV-17-945

DAVID L. BARNES AND
ARKANSAWYER SAWMILL, INC.

APPELLANTS

V.

ROBERT WAGONER AND
RHONDA WAGONER

APPELLEES

Opinion Delivered: May 9, 2018

APPEAL FROM THE MARION
COUNTY CIRCUIT COURT
[NO. 45CV-12-86]

HONORABLE GORDON WEBB,
JUDGE

DISMISSED WITHOUT PREJUDICE

MIKE MURPHY, Judge

David Barnes appeals from an order of the Marion County Circuit Court awarding the appellees a \$77,700 judgment against him. The appellees had contracted with David to build a home for \$100,000, but the lower court found that David had breached the contract. This is the second time this case has come before this court. We previously dismissed it without prejudice, in case number CV-16-506, for lack of a final order. We must again dismiss this case for lack of appellate jurisdiction.

This case has an interesting procedural history and warrants a brief discussion. In July 2012, Robert and Rhonda Wagoner filed a complaint against David; his wife, Yvonne Barnes; and his company, Arkansawyer Sawmill, Inc., for breach of a construction contract. The Wagoners alleged that they had contracted with David to build a home for \$100,000 but the home was only 15 percent complete after thirteen months, and the work that had

been completed was shoddy. At the time of the breach, the Wagoners had paid David \$60,000. The Wagoners had to hire a new contractor, whom they ended up paying \$117,700 to correct the existing mistakes and complete the home. A hearing was held, and on February 10, 2016, an order was entered finding for the Wagoners and awarding them the difference in the contracted price and the amounts they had paid David and the new contractor.

David timely appealed; however, his appellate counsel noticed some problems that precluded our review. David filed a motion in this court asking us to remand the case so that the problems could be addressed. We dismissed the appeal without prejudice on August 17, 2016. An order to amend judgment was then entered on August 30, 2017. That order dismissed Yvonne Barnes from the case and directed that the judgment was awarded to the Wagoners against David as a separate defendant. An Arkansas Rule of Civil Procedure 54(b) certificate then followed the court's signature. David again appeals.

The question of whether an order is final for appeal purposes is a jurisdictional point that we must often raise on our own. See *Jacobs v. Collison*, 2016 Ark. App. 547, 505 S.W.3d 254. Our rules state that an appeal may be taken from a final judgment or decree. Ark. R. App. P.–Civ. 2(a)(1) (2017). Our supreme court has held that “for an order to be final and appealable, it must terminate the action, end the litigation, and conclude the rights to the matter in controversy.” *Beverly Enters.-Ark., Inc. v. Hillier*, 341 Ark. 1, 3, 14 S.W.3d 487, 488 (2000). Here, the court dismissed Yvonne and directed judgment against David separately, but it was silent as to Arkansawyer Sawmill, Inc. Thus, there is still an outstanding defendant.

We have previously held that a circuit court's order granting judgment to only one party when there are other parties or additional litigation to be had is not a final order or an adjudication on the merits because the merits of the cause are not finally determined. *Id.*; *see also Brookewood, Ltd. P'ship v. DeQueen Physical Therapy & Occupational Therapy, Inc.*, 2017 Ark. App. 84. As a result, the order being appealed is not a final, appealable order.

Even so, our rules do allow some nonfinal orders to be immediately appealable if the circuit court makes an express determination, supported by factual findings, that there is no just reason for delay and if the court has executed a proper Rule 54(b) certificate. Ark. R. App. P.–Civ. 2(a)(11). Our supreme court has held that the execution of a proper Rule 54(b) certificate is very precise: it must include specific findings of any danger of hardship or injustice that could be alleviated by an immediate appeal and set out the factual underpinnings that establish such hardship or injustice, *Holbrook v. Healthport, Inc.*, 2013 Ark. 87, and when a certificate is void of specific factual findings as to the existence of danger of hardship or injustice that could be alleviated by an immediate appeal, the appellate court dismisses the appeal for lack of appellate jurisdiction. *Robinson v. Villines*, 2012 Ark. 211.

Here, the circuit court's order contained the following purported Rule 54(b) certification:

Separate Defendant, David Barnes, was obligated to construct a home built out of insulated concrete forms (ICF) in return for the Plaintiffs paying him the sum of \$100,000.00. By December 2010 the Plaintiffs had paid the Defendant \$60,000.00. The Plaintiff had to pay another contractor \$117,700.00 to complete the home. The Plaintiffs contracted to have a home built for \$100,000.00 yet paid \$177,700.00 to another contractor and \$60,000.00 to Separate Defendant, David Barnes. The

Plaintiffs are entitled to Judgment against the Defendant, David Barnes, for the difference which is \$77,700.00.¹

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.

This certification tracks the language of Rule 54(b), but it does not contain any factual findings explaining why hardship or injustice would result if an immediate appeal is not permitted. Without specific findings to support this conclusion, the order does not satisfy the requirements of Rule 54(b). *See Gray v. White River Health Sys., Inc.*, 2016 Ark. 73, 483 S.W.3d 293; *Kyle v. Gray, Ritter & Graham, P.C.*, 2012 Ark. 268. Accordingly, we do not have appellate jurisdiction and dismiss without prejudice.

Dismissed without prejudice.

WHITEAKER and HIXSON, JJ., agree.

¹We note, without comment, that the order recites the judgment amount as \$77,000 in some places and \$77,700 in others. The 54(b) certificate also recites \$177,700.00 as the amount the Wagoners paid “to another contractor” despite the preceding sentence using the \$117,700.00 figure.