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ARKANSAS COURT OF APPEALS

DIVISION II
No. CV-21-397

HUDSON REVOCABLE TRUST APPELLANT V. DEWAYNE EVANS, MARK WHITE, AND BILLY TAYLOR APPELLEES	Opinion Delivered October 5, 2022 APPEAL FROM THE BENTON COUNTY CIRCUIT COURT [NO. 04CV-17-402] HONORABLE THOMAS SMTH, JUDGE APPEAL DISMISSED

KENNETH S. HIXSON, Judge

Appellant Hudson Revocable Trust (the Trust) appeals from an order denying its motion for summary judgment against appellees Dewayne Evans, Mark White, and Billy Taylor. Because the order denying summary judgment is not an appealable order, we must dismiss the appeal.

This case arose from an incident on December 1, 2015, when Benjamin Hudson shot and killed two coon dogs on property owned by the Trust.[1] The dog owners, Dewayne Evans, Mark White, and Billy Taylor, subsequently filed a complaint against Benjamin[2] and the

[1]There was also a third dog involved that was not shot but was allegedly traumatized by the event.

[2]Although Benjamin is a defendant in the litigation, he did not join in the Trust's summary-judgment motion nor is he a party to this appeal.

Trust, raising claims for destruction of property, negligence, and tort of outrage and seeking compensatory and punitive damages. The allegations in the complaint against the Trust were that Benjamin was employed to oversee the Trust property, that he was acting in a scope of that authority, and that his outrageous conduct was ratified by the Trust.

The Trust filed a motion for summary judgment asserting that it was entitled to judgment as a matter of law because the undisputed facts demonstrated that Benjamin was not employed to oversee the Trust property, that he was not authorized to act on behalf of the Trust, and that his criminal conduct was not ratified by the Trust. Among other evidentiary items, the Trust submitted the affidavit of Norma Hudson, who is the trustee of the Trust. In Norma's affidavit, she stated that Benjamin is her grandson and that Benjamin was not employed by the Trust, that he was not authorized to act on behalf of the Trust, and that his conduct was not ratified by the Trust. In opposition to the Trust's summary-judgment motion, the appellees argued that there was a genuine issue of material fact as to whether there was a master-servant relationship between the Trust and Benjamin. As support for this claim, the appellees attached a criminal incident report where Benjamin had reportedly stated to a deputy sheriff that he was looking after the Trust property at the time he shot the dogs.

After a hearing on the Trust's summary-judgment motion, the trial court entered an order denying the motion. The trial court found that summary judgment was not proper because there were material facts in dispute on the issues raised in the motion. Although the denial of summary judgment is generally not an appealable order, in its order the trial

court issued a Rule 54(b) certificate stating that there was no just reason for delay of entry of a final judgment and directed that the order be final.[3]

On appeal from the denial of its summary-judgment motion, the Trust argues that summary judgment should have been granted because its proof established that Benjamin had no authority to act on behalf of the Trust, and there was no competent evidence to the contrary. The Trust asserts that Benjamin's alleged statements in the incident report were inadmissible hearsay and further notes that in a sworn deposition, Benjamin stated that he was acting under his own volition when he shot the dogs.

While the appellants raise an interesting question, our review is foreclosed, and we must dismiss this appeal for lack of jurisdiction based on settled supreme court precedent. Whether an order is subject to an appeal is a jurisdictional issue that the appellate court has the duty to raise, even if the parties do not. *Myers v. McAdams*, 366 Ark. 435, 236 S.W.3d 504 (2006).

[3]The Rule 54(b) certificate purported to be premised on a companion case, *Hudson v. Farm Bureau Mutual Insurance Co. of Arkansas, Inc.*, CV-21-396, that was submitted to our court on appeal and which we have affirmed today by written opinion. *See Hudson v. Farm Bureau Mut. Ins. Co. of Ark., Inc.*, 2022 Ark. App. 393. The companion case arose from the same incident as the present case, and the issue there was whether Norma's insurer had a duty to defend and indemnify against the dog owners' claims. The trial court in that case granted summary judgment to the insurer based on its finding that that insurance coverage was excluded because, whether or not Benjamin acted at the direction of Norma or the Trust when he shot the dogs, the insurance policies at issue plainly excluded coverage for intentional acts. The companion case in CV-21-396 was clearly appealable because the granting of a summary judgment is a final order.

Generally, there is no review of a denial of interlocutory orders such as motions for summary judgment. *Ark. Ins. Dep't v. Baker*, 358 Ark. 289, 188 S.W.3d 897 (2004). In *Williams v. Peoples Bank of Paragould*, 365 Ark. 114, 225 S.W.3d 389 (2006) (per curiam), our supreme court stated that orders denying summary judgment "are interlocutory and not subject to certification as final orders pursuant to Rule 54(b)(1)."

In *Cannady v. St. Vincent Infirmary Medical Center*, 2018 Ark. 35, 537 S.W.3d 259, the supreme court dismissed the appeal from an order denying summary judgment as to a claim of tort of outrage even though a Rule 54(b) certificate had been issued in that case. The supreme court cited *Williams*, *supra*, and explained:

> We find support for our conclusion in the language of Ark. R. Civ. P. 54(b)(1) itself, which provides:
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> > 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.
>
> (Emphasis added.)
>
> Here, the circuit court made no final judgment regarding Cannady's outrage claim but indicated only that material facts remained in dispute. Likewise, Ark. R. App. P.–Civ. 2(a)(11) provides for a properly certified Rule 54(b)(1) appeal of
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> > [a]n order or other form of decision which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties in a case involving multiple claims, multiple parties, or both, if the circuit court has directed entry of a *final* judgment as to one or more but fewer than all of the claims or parties. . . .
>
> (Emphasis added.)

> Clearly, Ark. R. App. P.–Civ. 2(a)(11) contemplates an appeal when the circuit court has entered a final judgment as to a claim or a party. Here, the circuit court made no final decision on the merits of Cannady's outrage claim; rather, it simply determined that factual questions remained. Therefore, there is no final judgment to review. Accordingly, the cross-appeal is not properly before us and must be dismissed. Rule 54(b)(1) should not prevent a litigant from having his or her day in court.

Cannady, 2018 Ark. 35, at 12–13, 537 S.W.3d at 266.

In the present case, as in *Cannady*, the trial court made no final decision on the merits of the appellees' claims but rather simply determined that factual questions remained. Therefore, there is no final judgment as contemplated by Ark. R. App. P.–Civ. 2(a)(11) from which to appeal. The trial court attempted to make the present order denying summary judgment appealable by issuing a Rule 54(b) certificate due to its finding that the result in this case and the result in the companion case (No. CV-21-396) may be "inconsistent under the law."[4] However, given our settled caselaw, the order herein denying summary judgment

[4]Contrary to appellant's arguments, the trial court's decision in the present case and its decision in the companion coverage-dispute case, *Hudson v. Farm Bureau Mutual Insurance Co. of Arkansas, Inc.*, are not inconsistent. In the present case, the underlying issue is whether Benjamin Hudson was acting within his scope of employment with the Trust at the time he shot the coon dogs. The trial court found that genuine issues remain and denied summary judgment. However, the underlying issue in the companion case was whether, assuming arguendo that Benjamin Hudson was acting within his scope of employment with the Trust, his conduct was intentional and therefore excluded from coverage. We affirmed the trial court's determination that the conduct was intentional and its grant of summary judgment denying coverage. The effect of affirming the companion coverage-dispute case is that the present case will proceed on its merits, but that the Trust will not be afforded coverage by the Farm Bureau insurance policies in question.

is not final and therefore not subject to certification as a final order pursuant to Rule 54(b)(1). *See Cannady*, *supra*; *Williams*, *supra*. That being so, we must dismiss this appeal.

Appeal dismissed.

HARRISON, C.J., and ABRAMSON, J., agree.

Cullen & Co., PLLC, by: *Tim Cullen*, for appellant.

One brief only.