

SUPREME COURT OF ARKANSAS

No. 09-622

KETAN BULSARA, Individually and as
Administrator of the Estate of SIMI
BULSARA, deceased, and on Behalf of the
Wrongful-Death Beneficiaries of SIMI
BULSARA,

APPELLANT,

VS.

JULIA MORTIMER WATKINS, M.D.,
APPELLEE,

Opinion Delivered November 18, 2010

APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT,
NO. CV-04-4691,
HON. MARION A. HUMPHREY,
JUDGE,

DISMISSED WITHOUT PREJUDICE.

JIM GUNTER, Associate Justice

Appellant Ketan Bulsara appeals a judgment in favor of appellee Julia Watkins, M.D., in his medical-malpractice and wrongful-death case against her. Appellant contends that the circuit court erred in refusing to disqualify attorney Phil Malcom, who represented Dr. Watkins. The court of appeals issued a unanimous opinion affirming the circuit court; however, this court has granted appellant's petition for review pursuant to Ark. Sup. Ct. R. 1-2(e). Upon a petition for review, this court considers a case as though it had been originally filed in this court. *Texarkana Sch. Dist. v. Conner*, 373 Ark. 372, 284 S.W.3d 57 (2008). We hold that this case must be dismissed without prejudice for lack of a final order.

On November 9, 2003, Mrs. Nita Bulsara, appellant's wife, presented at St. Vincent Doctors Hospital in the early stages of labor. The obstetrician on call was appellee, Dr.

Watkins; she and Dr. Rosey Seguin, Nita Bulsara's regular obstetrician, practiced as the "Arkansas Women's Center." Throughout the evening, St. Vincent nurses kept Dr. Watkins apprised by telephone of Mrs. Bulsara's and the baby's condition, particularly the baby's heart-rate decelerations. At 1:40 a.m., Nurse Allison Bratton asked Dr. Watkins to come to the hospital based on concerns expressed by the baby's father, appellant, who is a neurosurgeon. Dr. Watkins arrived within minutes and performed an amnio-infusion procedure, which she believed stabilized the baby's heart rate. Dr. Watkins left the hospital at 3:00 a.m., and instructed the nurses to call her if necessary. Moments later, the baby's decelerations dropped to precipitous levels. Nurse Bratton performed several interventions but, unbeknownst to her, the baby continued to be in severe distress. Later that morning, Dr. Seguin arrived at the hospital and noted a lack of fetal activity. At 9:40 a.m. on November 10, 2003, Dr. Seguin delivered the child stillborn, due to asphyxiation by the umbilical cord.

Upon learning of the stillbirth, Dr. Watkins returned to the hospital to consult with Dr. Seguin. According to the doctors, appellant confronted them in a manner that led them to believe they would need legal counsel. Later that day, Dr. Watkins called attorney Phil Malcom, who had previously represented her and Dr. Seguin. On this occasion, Dr. Watkins asked Mr. Malcom to represent her, Dr. Seguin, and the Arkansas Women's Center with regard to any claims or litigation that might arise surrounding the stillbirth of the Bulsara baby. Mr. Malcom accepted representation. Thereafter, he communicated with each doctor about the events of November 10, 2003, and gave each doctor legal advice.

On April 19, 2004, appellant filed a medical-malpractice and wrongful-death suit against Dr. Watkins and St. Vincent Doctor's Hospital. The complaint did not name Dr. Seguin as a defendant. In August 2004, appellant's attorneys attempted to schedule a meeting with Dr. Seguin. She relayed the meeting request to Malcom, and he informed appellant's attorneys that he objected to their meeting with his client, Dr. Seguin, outside of his presence. This prompted a letter from appellant's attorney, Melody Piazza, asserting that Malcom's communications with Dr. Seguin constituted improper ex parte contact with an opposing party's treating physician, in violation of Arkansas Rule of Civil Procedure 35(c)(2) and Arkansas Rule of Evidence 503(d)(3)(B).

On April 15, 2005, appellant filed a motion for withdrawal of opposing counsel, for sanctions, and to prohibit further informal ex parte contact between Malcom and Dr. Seguin. Malcom responded that his representation of Dr. Seguin and their ensuing confidential communications pre-dated appellant's lawsuit and were undertaken in response to a credible threat of litigation. Malcom also pointed out that Dr. Seguin and the Arkansas Women's Center remained vulnerable to suit because the statute of limitations had not yet run as to them. The circuit court denied appellant's motion, and Malcom continued to represent Dr. Watkins as a defendant and to represent Dr. Seguin and the Arkansas Women's Center as potential defendants.

In November 2005, appellant added the Arkansas Women's Center as a defendant. Malcom answered on behalf of the Arkansas Women's Center, but appellant dismissed the

Center as a defendant prior to trial.¹ On October 13, 2006, Dr. Watkins filed a cross-claim against St. Vincent Doctor's Hospital seeking indemnity and contribution in the event a judgment was entered against her. St. Vincent filed an answer to this cross-claim, and the cross-claim was discussed by the parties at a pretrial hearing held October 18, 2006, including the possible withdrawal of the cross-claim. The complaint against Dr. Watkins proceeded to trial, and Malcom served as Dr. Watkins's attorney through nine days of trial in October and November 2006. The jury found in favor of Dr. Watkins, and on November 3, 2006, a judgment was entered dismissing with prejudice appellant's claim against Dr. Watkins. There appears to be no order in the record, however, disposing of Dr. Watkins's cross-claim against St. Vincent.

While none of the parties raise this issue, the question of whether an order is final and subject to appeal is a jurisdictional question that this court will raise sua sponte. *See Jones v. Huckabee*, 363 Ark. 239, 213 S.W.3d 11 (2005). Rule 2(a)(1) of the Arkansas Rules of Appellate Procedure—Civil provides that an appeal may be taken only from a final judgment or decree entered by the trial court. Rule 54(b) of the Arkansas Rules of Civil Procedure deals with the finality of orders in connection with judgments upon multiple claims or involving multiple parties and states in relevant part:

¹An order dismissing appellant's claim against Arkansas Women's Center without prejudice was entered on April 10, 2006. Appellant also apparently settled with St. Vincent prior to trial, although an order dismissing appellant's claim against St. Vincent with prejudice was not entered until February 23, 2007. This order was not in the addendum but was in the record.

(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. . . .

. . . .

(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.

Thus, our court has held that under Rule 54(b), an order is not final that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties. *See S. Farm Bureau Cas. Ins. Co. v. Easter*, 369 Ark. 101, 251 S.W.3d 251 (2007). Specifically, this court has held that an order that fails to address a pending cross-claim is not a final order. *See Office of Child Support Enforcement v. Willis*, 341 Ark. 378, 17 S.W.3d 85 (2000). Consequently, we are without jurisdiction and must dismiss this appeal without prejudice so that the circuit court may enter a final order as to the pending cross-claim.

Finally, we take this opportunity to note that appellant has filed a brief that is potentially not in compliance with Arkansas Supreme Court Rule 4-2(a)(8), as the addendum appears to be deficient. For example, appellant's first point on appeal concerns whether Malcom should have been disqualified; however, the addendum contains only the motion for withdrawal of counsel and the order denying the motion. Watkins's response is in her

supplemental addendum, but appellant's reply to this response is not in either addendum. Another point on appeal concerns Malcom's alleged violation of an order from a motion in limine regarding a related Arkansas State Medical Board investigation, but the motion, response, and reply, as well as any order entered, are not in the addendum.

We remind counsel that the addendum is required to contain all relevant documents that are essential to an understanding of the case and this court's jurisdiction on appeal. Ark. Sup. Ct. R. 4-2(a)(8) (2008).² While we have noted the above examples of possible deficiencies in the addendum, this is in no way to be construed as an exhaustive list of all possible deficiencies, and we encourage appellant, prior to filing its substituted brief, to review our rules, the entire record, and his substituted brief to ensure that no additional deficiencies are present.

Dismissed without prejudice.

CORBIN, J., not participating.

²Appellant's brief in this case was originally filed in 2008; therefore, we will apply the version of the Rules of the Supreme Court in effect at the time the brief was filed.