

Cite as 2018 Ark. App. 484  
**ARKANSAS COURT OF APPEALS**  
DIVISION II  
No. CV-17-843

ANDERSON-TULLY COMPANY APPELLANT	Opinion Delivered: October 17, 2018
V.	APPEAL FROM THE DESHA COUNTY CIRCUIT COURT, SOUTHERN DISTRICT [NO. 21ACV-03-31]
PATRICIA SCALES VADEN AND JAMES MICHAEL MONCRIEF APPELLEES	HONORABLE ROBERT BYNUM GIBSON, JR., JUDGE
	APPEAL DISMISSED WITHOUT PREJUDICE

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**RITA W. GRUBER, Chief Judge**

Anderson-Tully Company (ATCO) appeals from two orders of the Desha County Circuit Court entered on June 23 and July 13, 2017.<sup>1</sup> The orders from which ATCO appeals resulted from appellees Patricia Vaden and Michael Moncrief seeking a writ of assistance for them to be placed in possession of certain real property they purchased years earlier at a partition sale. ATCO argues six points for reversal. However, we cannot reach the merits of this appeal because the orders appealed from lack finality. Accordingly, we dismiss the appeal.

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<sup>1</sup>We previously ordered rebriefing of this case. *Anderson-Tully Co. v. Vaden*, 2018 Ark. App. 240. The defects noted in that opinion have now been corrected.

This case is one in a series of litigation dealing with ownership of land located along the old bed of the Arkansas River between Arkansas County and Desha County. See *Dye v. Anderson-Tully Co.*, 2011 Ark. App. 503, 385 S.W.3d. 342; *Scales v. Vaden*, 2010 Ark. App. 418, 376 S.W.3d 471. In *Scales*, we affirmed the circuit court's April 23, 2009 order, which adopted a survey by Jim Cannatella and authorized appellees to identify their boundary lines on the land specified in the order. We held that the circuit court did not err in denying a Rule 60 motion to modify the legal description because the orders in question were entered in 2005, and the final hearing was in 2009, long past the ninety-day limitation. ATCO was not a party to *Scales*, as its motion to intervene had been denied.

We handed down our opinion in *Scales* on May 12, 2010. Shortly thereafter, appellees filed an application for writ of assistance to place them in possession of the property. They asserted that Billy Scales and Sammy Scales, two of the defendants in *Scales*, had denied them access to their property. After the case languished for several years, appellees filed a second application for writ of assistance and motion for contempt in May 2013. This application alleged that Billy and Sammy acted in concert with ATCO to prevent appellees from identifying and taking possession of lands confirmed in appellees and affirmed on appeal. It was further alleged that ATCO should be made a party to this action and that ATCO, Billy, and Sammy be held in contempt.

After an August 2013 hearing was adjourned without a resolution, another hearing was held on May 11, 2015. The court announced that the sole issue being addressed by the court at that hearing was whether to direct a surveyor to set monuments to locate the

boundaries found by Jim Cannatella in his 2009 survey. The court decided that it wanted Cannatella to locate the survey points he had found in his 2009 survey. The court also directed the issuance of a writ of assistance so Cannatella would have access to the property. Inexplicably, an order was not entered until June 23, 2017.<sup>2</sup> At that time, the court entered an order memorializing its bench ruling from the May 2015 hearing.

On July 7, 2017, ATCO filed a motion to vacate or for a new trial pursuant to Rules 59 and 60 of the Arkansas Rules of Civil Procedure alleging that the circuit court's order of June 23, 2017, was void and that the court lacked jurisdiction over both ATCO and its property. ATCO further argued that the court's findings were erroneous and against the preponderance of the evidence.

The circuit court denied ATCO's motion to vacate or for a new trial by order entered on July 13, 2017. The court made a comment that "[c]ertain parties simply cannot stop rehashing this age old dispute between members of the same family over some Desha County land." The court also stated that it "believes that it has decided all of the issues and declines any invitation to revisit this case." This appeal followed.

Although ATCO argues six points on appeal, including one that argues the orders entered by the circuit court are final and appealable, we hold that the orders lack finality for multiple reasons.

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<sup>2</sup>In fact, nothing happened for more than two years. The case was dismissed for lack of prosecution under Ark. R. Civ. P. 41(b) in June 2017. The court set aside the dismissal order on June 23, 2017.

ATCO argues that the orders are final because the court effectively determined the rights of the parties to the disputed property by ruling that appellees were entitled to possession of property in Desha County. ATCO asserts that the court's language that it believed that it had decided all the issues indicates that the orders are final. ATCO further argues that the orders are appealable because the July 13 order denied its motion for a new trial. Appellees argue that the orders are not final because the circuit court has yet to address the motion for contempt against ATCO. They further argue that the court's June 23 order contemplates further hearings after the boundary monuments are set. We hold that the orders on appeal lack finality.

We have held that when contempt issues remain pending before the circuit court, the circuit court's order is not final and appealable. See *John v. Bolinder*, 2016 Ark. App. 357, 498 S.W.3d 307; *Burton v. Templeman*, 2015 Ark. App. 101. This is because the issue is not merely a collateral issue, such as attorney's fees. *John*, *supra*. ATCO argues, however, that the court's declaration that it had decided all the issues and would not revisit the matter was a final disposition of the contempt action. We disagree. The circuit court stated that counsel for appellees was not yet asking for contempt sanctions at the time of the May 2015 hearing. Moreover, the circuit court acknowledged that appellees were setting the foundation for a future hearing on contempt after the boundary lines were marked. An order that contemplates further action by a party or the court is not a final, appealable order. *Blackman v. Glidewell*, 2011 Ark. 23.

Additionally, the fact that Arkansas Rule of Appellate Procedure–Civil 2(a)(3) authorizes an appeal from an order granting or refusing a new trial does not mean that an appellant such as ATCO can appeal from an order that otherwise lacks finality. See *General Motors Acceptance Corp. v. Eubanks*, 318 Ark. 640, 887 S.W.2d 292 (1994); *Rusin v. Midwest Enamellers, Inc.*, 21 Ark. App. 226, 731 S.W.2d 226 (1987). In *Eubanks*, the supreme court held that an order denying a motion for new trial was appealable only if the trial court has ruled on all claims. In *Rusin*, we said that Rule 2(a)(3) “can have no application to cases involving multiple issues or claims in which some, but not all, are decided.” 21 Ark. App. at 228, 731 S.W.2d at 227. Here, the circuit court had not decided all the issues because the contempt issues were still outstanding. Therefore, Rule 2(a)(3) can have no application. *Id.*

We also point out that there are other issues that prevent finality. For example, appellees moved to make ATCO a party in their second application for writ of assistance. However, the circuit court never expressly ruled on this request. This court cannot presume a ruling from a circuit court’s silence, and we will not review a matter on which the circuit court has not ruled. *TEMCO Constr., LLC v. Gann*, 2013 Ark. 202, 427 S.W.3d 651.

Another example is that ATCO’s motion for summary judgment, filed June 2, 2015, was never addressed by the circuit court. That motion addressed the merits of the motion for contempt and the application for writ of assistance. The supporting brief makes the same arguments that ATCO raises on appeal. However, the circuit court did not

address the motion. Appellees responded and filed a motion to strike ATCO's motion for summary judgment. The motion to strike was likewise not ruled on.

In summary, the orders on appeal contemplate further action by the parties and the circuit court such that there is no final, appealable order before us. Consequently, we must dismiss the appeal without prejudice. *Morse v. Austin*, 2017 Ark. App. 257, 520 S.W.3d 314.

Appeal dismissed without prejudice.

BROWN, J., agrees.

WHITEAKER, J., concurs.

**PHILLIP T. WHITEAKER, Judge, concurring.** I join the majority opinion because I agree that the orders on appeal lack finality for multiple reasons: an unresolved motion for contempt, an unresolved motion for summary judgment, and an unresolved motion to add ATCO as a party. On remand, the parties can easily fix the current finality problem by adding ATCO as a party and obtaining a ruling on the pending motions for contempt and summary judgment. Doing so, however, will not resolve the more pervasive problems of proper parties, competing or conflicting court orders, and competing jurisdictions. It is axiomatic that the majority can only address the issue currently present to it; I must write separately to express my concerns that these more pervasive problems will need to be addressed before this court will ever be able to address the merits of this appeal.

First, are the proper parties before us? The majority correctly identifies this as one of the finality issues. I agree but see the issue as broader than just obtaining a ruling on an unresolved motion to add ATCO as a party. ATCO's status is a major source of our confusion. When this land dispute first arose in *Scales v. Vaden*, 2010 Ark. App. 418, 376 S.W.3d 471, ATCO filed a motion to intervene. The circuit court denied the motion when the appellees advised the circuit court that they were not claiming any of the lands their family had conveyed to ATCO in 1967. ATCO did not appeal the denial of its motion to intervene.<sup>3</sup> When appellees sought to make ATCO a party in this current appeal, ATCO argued that it was too late to add it as a party. More importantly, ATCO's president indicated that it had sold some land to the Yancopin Hunting Club. It is not clear where this land is located or if it is being claimed by appellees. How can the circuit court address any issues concerning the land when one of the claimants to that land was not and is not now before the court in any meaningful sense? If ATCO's argument is persuasive that it is too late to add it as a party, would that same argument apply to the buyers who purchased land from ATCO? Likewise, ATCO, in its brief, states that Billy and Sammy Scales, two of the defendants in *Scales*, are both deceased. Does this moot appellees' claims for a writ of assistance and for contempt? Is there even a proper basis for holding ATCO in contempt? These issues have not been addressed in any meaningful sense in circuit court.

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<sup>3</sup>The failure to appeal the denial of the motion to intervene and the basis for that denial—that appellees were not claiming ATCO's land—could both have implications going forward based on *res judicata*, collateral estoppel, and waiver, among other things.

Second, are there issues of conflicting court orders from different, competing counties that may be affecting the same property? In this litigation, the parties are in a contest about property rights pertaining to land allegedly in Desha County. However, the same parties, ATCO and appellees, litigated title to land allegedly located in Arkansas County in which ATCO prevailed. Although appellees filed a notice of appeal from the Arkansas County litigation, they did not perfect their appeal and it was dismissed on ATCO's motion. In that case, the Arkansas County Circuit Court ruled that the land at issue in that case was located in Arkansas County and belonged to ATCO. What property, exactly, are the parties fighting about? There was testimony from surveyor Jim Cannatella in *Scales* in 2009 that some of the land in Desha County may no longer exist due to having been dissolved by the flow of the Arkansas River. He also noted this on the survey plat at the heart of the present case. He further noted that the land may have become part of Arkansas County by accretion. Are the parties both claiming the same property? Where is this property located? Is it in Arkansas County or is it in Desha County? It appears that each party has a court order ruling that certain lands belong to that party. Again, the question is how does the land at issue in the Arkansas County case relate, if at all, to this case? If both cases involve the same property, then does each court order create a cloud on the other party's title? If so, does the current litigation resolve the cloud without further litigation in both Arkansas County and Desha County?



Obviously, I see many pervasive problems in this litigation that will not be eliminated by simply curing the finality issues currently presented. Without these problems being addressed I doubt that the merits of this dispute can ever be reached on appeal.

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