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ARKANSAS COURT OF APPEALS

DIVISION III
No. CA09-1260

WANDA SCROGGINS, APPELLANT V. BRYAN L. CHESSHIR, APPELLEE	**Opinion Delivered** JUNE 30, 2010 APPEAL FROM THE HOWARD COUNTY CIRCUIT COURT, [NO. CV2009-72-2] HONORABLE CHARLES A. YEARGAN, JUDGE, APPEAL DISMISSED WITHOUT PREJUDICE

KAREN R. BAKER, Judge

Appellant Wanda Scroggins appeals the trial court's dismissal of her breach-of-contract claim pursuant to Rule 12(b)(6) of the Arkansas Rules of Civil Procedure against her attorney, appellee Bryan Chesshir. Because finality presents a jurisdictional issue, it is a matter we will consider even though the parties do not raise it. *See Haile v. Arkansas Power & Light Co.*, 322 Ark. 29, 907 S.W.2d 122 (1995). For the reasons stated herein, we must dismiss the appeal for lack of a final order.

Appellant filed her original complaint in March 2008. She sued her attorney, appellee, for negligence and breach of contract for his alleged failure to properly pursue a guardianship that would place her as the guardian of her mother. Appellant's mother resided in a nursing home, and another individual had a power of attorney regarding her mother's affairs.

Appellant asserted that as a result of her attorney's failure to pursue her petition to obtain guardianship over her mother, she was not allowed to visit her mother in the eight months before her death and that this loss of opportunity had caused her great emotional pain.

In arguments before the bench at the hearing on appellee's motion to dismiss, counsel for appellee asserted that appellant wished to nonsuit all causes of action besides the breach-of-contract claim. Appellee's counsel requested that the nonsuit needed to be affirmed on the record, before proceeding with the hearing on the motion to dismiss the contract claim, because the nonsuit had not yet been entered. The court commented that appellant's pleadings clearly indicated the intention to voluntarily dismiss all claims except the contract claim[1] and asked appellant's counsel if appellant still intended to nonsuit all other claims as appellee's counsel had just stated. Appellant's counsel agreed and said, "I will send the Court a precedent, if that's okay?" From the bench, the trial court acknowledged that the preparation of the precedent by appellant's counsel regarding the nonsuited causes of action was acceptable, and the hearing continued and was limited to the breach-of-contract claim.

In its order dismissing appellant's cause of action on the breach-of-contract claim, the trial court noted that appellant had responded in her brief that the cause of action relating to

[1]Appellant stated in her brief in support of her response to appellee's motion to dismiss that she "is not willing to concede that [appellee] is correct on his arguments related to [her] claims for emotional distress and legal-malpractice/negligence. However [she] is willing to streamline this matter and . . . will nonsuit her claims for emotional distress and legal malpractice/negligence."

negligence should be nonsuited.[2] The trial court's order also specifically referenced the fact that appellant had nonsuited her negligence case, leaving the trial court with the sole issue of deciding the allegation of contractual breach. However, no separate, written precedent entering the voluntary dismissal is in the record.

While a party has an absolute right to a nonsuit prior to submission of the case to the jury or the court, Rule 41(a) clearly states that nonsuits are effective only upon entry of a court order dismissing the action. Our supreme court has held that "a court order is necessary to grant a nonsuit and that the judgment or decree must be entered to be effective." *Blaylock v. Shearson Lehman Bros.*, 330 Ark. 620, 624, 954 S.W.2d 939, 941 (1997). While the trial court's order dismissing appellant's breach-of-contract claim references the nonsuit, it does not in and of itself specifically dismiss the negligence claim.

Thus, the negligence claim has not yet been dismissed. Moreover, parties to a lawsuit cannot create a final order by taking a voluntary nonsuit dismissing their remaining claims without prejudice. *Haile v. Arkansas Power and Light Co.*, 322 Ark. 29, 907 S.W.2d 122 (1995). Had an order been entered to that effect, it would not have created finality.

The question of whether a judgment is final and subject to appeal is a jurisdictional question that this court will raise *sua sponte*. *See Schubert v. Target Stores, Inc.*, 2009 Ark. 89, at 3, ___ S.W.3d ___, ___. Arkansas Rule of Civil Procedure 54(b) provides in relevant part:

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[2]The order added that appellant had conceded that she could not recover from [appellee] under a legal-malpractice theory because she could not prove what would have happened in the guardianship case, and that her request for nonsuit was made on the record in the August 26, 2009 hearing on the dismissal motion.

> 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)(2) (2009). Thus, a judgment is not final if it has not adjudicated all the claims against all the parties. *Schubert*, 2009 Ark. 89, at 3, ___ S.W.3d ___, ___.

In the instant case, to appeal the remaining issues appellant must comply with Ark. R. Civ. P. 54(b). There is neither a final judgment as to all the claims, nor is there a Rule 54(b) certification. Accordingly, we dismiss the appeal without prejudice.

Appeal dismissed without prejudice.

PITTMAN and HART, JJ., agree.