Cite as 2013 Ark. App. 248

ARKANSAS COURT OF APPEALS

DIVISION IV
No. CA12-695

JERRY WILSON, LILLIE WILSON, and TERRY WILSON
APPELLANTS

V.

GREG WILLIAMS FARM, INC., and GREG WILLIAMS, individually
APPELLEES

Opinion Delivered APRIL 17, 2013

APPEAL FROM THE LAFAYETTE COUNTY CIRCUIT COURT
[NO. CV 2010-56-2]

HONORABLE BRENT HALTOM, JUDGE

APPEAL DISMISSED

DAVID M. GLOVER, Judge

Jerry Wilson, Lillie Wilson, and Terry Wilson (collectively, the Wilsons) bring this appeal from the directed verdicts granted in favor of Greg Williams Farm, Inc. (GWF), and Greg Williams, individually. We cannot reach the merits of this appeal because of internal inconsistencies in the order from which the appeal is taken; nor can we tell whether we have a final order and, thus, jurisdiction to hear this appeal. Accordingly, we dismiss the appeal.

On May 11, 2010, the Wilsons and Claude Eugene Rowe filed suit against GWF, Williams, and Donnie Smith d/b/a River Bottom Aviation for damages resulting from the spray drift of a pesticide that was applied by Smith to the GWF property. The Wilsons contended that, after the pesticide was sprayed, their trees began showing signs of damage, and the State Plant Board documented pesticide damage to their property. Rowe, another nearby property owner, claimed that his cattle died as a result of the pesticide drift. The

complaint asserted claims for negligence, trespass, and nuisance and sought damages for restoration of the Wilsons' property to the pre-drift condition, discomfort and annoyance, pain and suffering and mental anguish, treble damages under Ark. Code Ann. § 18-60-102(a), compensation for Rowe's dead cattle, and punitive damages for reckless disregard and malice.

Williams and GWF answered, denying the material allegations of the complaint and moving for dismissal for failure to plead facts. Smith answered separately.

The Wilsons and Rowe settled with Smith, and their claims were dismissed with prejudice by order entered on December 22, 2011.

On December 27, 2011, the plaintiffs moved for partial summary judgment as to the liability of GWF and Williams for the negligent acts of Smith. Williams and GWF filed their own motion for summary judgment, asserting that, because the aerial application of pesticides was not ultrahazardous, they were not responsible for the negligence of the independent contractor Smith. The circuit court denied both motions for summary judgment, but failed to memorialize its ruling with a written order.

On May 9, 2012, plaintiffs filed a motion requesting judicial notice of Environmental Protection Agency documents concerning the pesticide 2,4-D and the two component chemicals in the pesticide Surmount.[1] The court declined to take judicial notice of a June 2005 document for the pesticide 2,4-D. The court did take judicial notice about the drift information for the chemicals in the Surmount pesticide.

[1]The Wilsons alleged that Surmount was sprayed on their property. There were no allegations that 2,4-D was used.

The case proceeded to trial. The Wilsons and Rowe moved to dismiss their claims for nuisance, pain and suffering, and treble damages against Williams and GWF, and Rowe moved to dismiss his claim for damage for deceased cattle. The court dismissed those claims without prejudice. Also, because Rowe was in the hospital, the court granted the defendants' motion to sever Rowe's claims and continued his case. Rowe later filed a written motion to voluntarily dismiss his claims. That motion was granted.

At the conclusion of the Wilsons' proof, the court granted a directed verdict in favor of Williams and GWF on the Wilsons' claims that the aerial application of Surmount was an inherently dangerous activity that may be imputed to the employer. It also granted a directed verdict against the Wilsons on all of their claims against Greg Williams. The court granted a directed verdict on the Wilsons' claims for negligence and trespass and dismissed them with prejudice. This appeal followed.

The finality problem arises because of the lack of clarity in the circuit court's order. Immediately before trial, the Wilsons dismissed their nuisance claims, as well as their claims for pain and suffering and treble damages *without* prejudice. The court noted that it had granted the nonsuit of those claims. However, in the decretal portion of the order, the court stated that the Wilsons' claims and causes of action against Williams and GWF were dismissed *with* prejudice. There is no mention made of some of the Wilsons' claims being preserved by a nonsuit. This inconsistency must be resolved by the circuit court.

Even if the circuit court intended to preserve the nonsuited claims, we would still not be able to reach the merits of the appeal at this time. Our courts have long held that a party

that has several claims against another party may not take a voluntary nonsuit of one claim and appeal an adverse judgment as to the other claims when it is clear that the intent is to refile the nonsuited claim and thus give rise to the possibility of piecemeal appeals. *See Haile v. Arkansas Power & Light Co.*, 322 Ark. 29, 907 S.W.2d 122 (1995); *Ratzlaff v. Franz Foods of Ark.*, 255 Ark. 373, 500 S.W.2d 379 (1973); *Pro Transp., Inc. v. Volvo Trucks N. Am., Inc.*, 96 Ark. App. 166, 239 S.W.3d 537 (2006). *See also Driggers v. Locke*, 323 Ark. 63, 913 S.W.2d 269 (1996); *Mercy Health Sys. of Nw. Ark. v. McGraw*, 2013 Ark. App. 61. Because the Wilsons nonsuited some of their claims against Williams and GWF before trial, their attempt to appeal from the directed verdict is not final and the appeal must be dismissed. *See Mountain Pure LLC v. Affiliated Foods Southwest, Inc.*, 366 Ark. 62, 233 S.W.3d 609 (2006).

Arkansas Rule of Civil Procedure 54(b) provides that, when multiple claims or parties are involved in a case, the circuit court may direct the entry of a final judgment as to fewer than all 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. Ark. R. Civ. P. 54(b)(1). In the event the court so finds, it shall execute a Rule 54(b) certificate that sets forth the factual findings upon which the determination to enter final judgment is based. *See id*. Absent the executed certificate, an order that adjudicates the rights and liabilities of fewer than all the parties is not a final, appealable order. *See* Ark. R. Civ. P. 54(b)(2). The order appealed from in this case does not contain a Rule 54(b) certificate.

We also note that this problem could have been avoided had the Wilsons' notice of appeal been in compliance with Arkansas Rule of Appellate Procedure–Civil 3. In 2010, the supreme court issued an amendment to Rule 3 to require a new statement in every notice of appeal and notice of cross-appeal from a final order or judgment. *See In re: Arkansas Rules of the Supreme Court and Court of Appeals; Rules of Appellate Procedure–Civil; and Rules of Civil Procedure*, 2010 Ark. 288 (per curiam).The amended rule provides that a notice of appeal or cross-appeal shall

> state that the appealing party abandons any pending but unresolved claim. This abandonment shall operate as a dismissal with prejudice effective on the date that the otherwise final order or judgment appealed from was entered.

Ark. R. App. P.–Civ. 3(e)(vi) (2012). Because such a statement is missing from the Wilsons' notice of appeal, we surmise that the Wilsons will refile their nonsuited claims.

If the Wilsons obtain a final order and refile their appeal, there are also problems with their addendum that would necessitate rebriefing. Arkansas Supreme Court Rule 4-2(a)(8) requires the addendum to contain all documents in the record that "are essential for the appellate court to confirm its jurisdiction, to understand the case, and to decide the issues on appeal." In the case at bar, the Wilsons have omitted from their addendum several documents contained in the record that are necessary for our review: (1) the order dismissing the claims against Donnie Smith, (2) the motion and order granting Claude Rowe a nonsuit, and (3) the motion for summary judgment filed by Williams and GWF. The orders dismissing Rowe's claims and the claims against Smith are necessary for this court to confirm our

jurisdiction.[2] Moreover, the rule requires "the pleadings . . . all motions . . . , responses, replies, exhibits, and related briefs, concerning the order, judgment or ruling challenged on appeal" to be included. Ark. Sup. Ct. R. 4-2(a)(8)(A)(i) (2012).

Appeal dismissed.

WALMSLEY and WHITEAKER, JJ., agree.

McMath Woods, P.A., by: *Ross Noland*, for appellant.

Hughes & Hughes Law Firm, by: *Eric G. Hughes*, for appellee.

[2]Rowe's motion for a nonsuit and the order granting it were both entered after entry of the order from which this appeal arises.