

**ARKANSAS COURT OF APPEALS**DIVISION II  
No. CV-12-860GARY JACKSON, d/b/a SUPERMART  
APPELLANT

V.

SEWELL OIL COMPANY, INC.  
APPELLEE

Opinion Delivered MAY 22, 2013

APPEAL FROM THE DALLAS  
COUNTY CIRCUIT COURT  
[NO. CV-08-86-3]HONORABLE EDWIN KEATON,  
JUDGE

APPEAL DISMISSED

**KENNETH S. HIXSON, Judge**

Gary Jackson attempts to appeal from an order that granted summary judgment in favor of appellee Sewell Oil Company on Mr. Jackson's counterclaim. We must dismiss this appeal because Sewell Oil Company's complaint against Mr. Jackson remains unresolved, and there has been no proper certification pursuant to Ark. R. Civ. P. 54(b) that would render the summary-judgment order final and appealable.

The litigation in this case originated on October 10, 2008, when Sewell Oil Company brought a complaint against Gary Jackson, d/b/a Supermart. The complaint alleged that Mr. Jackson purchased products and services from Sewell Oil Company on an open account and that Mr. Jackson owed the sum of \$158,945.74. Sewell Oil Company asked for a judgment in that amount plus interest, costs, and attorney's fees.

Mr. Jackson filed an answer and counterclaim on October 31, 2008, and in his counterclaim he brought actions against Sewell Oil Company for breach of contract, fraud, and intentional interference with Mr. Jackson's contractual relations and business expectancy. Mr. Jackson alleged that Sewell Oil Company surreptitiously and fraudulently overcharged him, and that it also enticed away two of Mr. Jackson's major commercial customers. Mr. Jackson asked that Sewell Oil Company's complaint be dismissed, and he prayed for compensatory and punitive damages on his counterclaim. Mr. Jackson filed a second amended counterclaim on October 14, 2010, wherein he repeated the allegations made in his original pleading.

On November 10, 2010, Sewell Oil Company filed a motion for summary judgment with respect to Mr. Jackson's counterclaim. After considering the depositions and the arguments of counsel at the summary-judgment hearing, the trial court entered an order of summary judgment on June 12, 2012. In its order, the trial court granted summary judgment to Sewell Oil Company as to all of the claims in Mr. Jackson's counterclaim, and the counterclaim was dismissed with prejudice.

On July 12, 2012, Mr. Jackson filed a notice of appeal as well as a motion for a Rule 54(b) certificate. On July 26, 2012, Sewell Oil Company filed a motion opposing Rule 54(b) certification.

On August 23, 2012, the trial court entered an amended order of summary judgment, wherein it made the same findings as in the original order and dismissed Mr. Jackson's

counterclaim with prejudice. The amended order contained the following Rule 54(b) certificate:

With respect to the issues determined by the above Order, the court finds:

1. The Court has jurisdiction of the parties and subject matter hereof.
2. There are no genuine issues of material fact, and Plaintiff/Counterdefendant should have judgment as a matter of law with respect to all issues raised and alleged in Defendant/Counterclaimant's Counterclaim.
3. The factual finding in the preceding paragraph includes claims for breach of contract, fraud, and interference with contract or business expectancy.

Upon the basis of the foregoing factual findings, the Court hereby certifies, in accordance with Rule 54(b)(1), Ark. R. Civ. P., that it has determined that there is no just reason for delay of entry of a final order and that the court has and does thereby direct that the order and judgment contained therein shall be a final order and judgment for all purposes.

Mr. Jackson filed a timely notice of appeal from the amended order.

Absent a valid Rule 54(b) certificate, an order that fails to adjudicate all of the claims as to all of the parties, whether presented as claims, counterclaims, cross-claims, or third-party claims, is not final for purposes of appeal. See *McCall v. Grunwald*, 2013 Ark. App. 232. Rule 54(b) provides that a trial 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 its express direction for the entry of judgment. If the court makes such a determination, it must execute a certificate in compliance with the requirements of Rule 54(b). *Rutledge v. Christ is the Answer Fellowship, Inc.*, 82 Ark. App. 221, 105 S.W.3d 816 (2003). The failure to comply with Rule 54(b) affects the subject-matter jurisdiction of this court, which this court is obligated to raise on its own. *McCall, supra*.

Rule 54(b) is intended to permit review before the entire case is concluded, but only in those exceptional situations where a compelling discernible hardship will be alleviated by an appeal at an intermediate stage. *Rutledge, supra*. The trial court must make an express determination that there is no reason to delay an appeal, and the court must factually set forth reasons in the final judgment, order, or the record, explaining why a hardship or injustice would result if an appeal is not permitted. *Id.*

In the case at bar, the order granting summary judgment against appellant on his counterclaim does not include specific findings of any likely danger of hardship or injustice that would be alleviated by an immediate appeal. The attached Rule 54(b) certificate only makes findings that the trial court had jurisdiction, that there were no genuine issues of material fact, and that Sewell Oil Company was entitled to judgment as a matter of law with respect to all issues raised in Mr. Jackson's counterclaim. The trial court recited language of Rule 54(b) that "there is no just reason for delay of entry of a final order," but merely tracking the language of Rule 54(b) will not suffice. *Fisher v. Citizens Bank of Lavaca*, 307 Ark. 258, 819 S.W.2d 8 (1991). In order to determine that there is no just reason for delay, the trial court must find that a likelihood of hardship or injustice will occur unless there is an immediate appeal and must set forth facts to support its conclusion. *Rutledge, supra*. Because the trial court did not meet these requirements, its certificate failed to comply with Rule 54(b).

The order being appealed from is not a final order because Sewell Oil Company's complaint remains unresolved and there was a lack of compliance with Rule 54(b). Because

the Rule 54(b) certificate executed in this case does not conform to the requirements of the rule and relevant case law, it is ineffective to certify the appeal. Rule 54(b) is not intended to create an avenue for two stages of review simply by citing the rule, *Cruse v. 451 Press, LLC*, 2010 Ark. App. 115 (per curiam), and in this case there appears to be no compelling reason for an intermediate appeal. Accordingly, we dismiss the appeal without prejudice to refile at a later date.<sup>1</sup>

Appeal dismissed.

GLADWIN, C.J., and BROWN, J., agree.

*Ellis Law Firm, P.A.*, by: *George D. Ellis*, for appellant.

*Matthew J. Shepherd, P.A.*, by: *Matthew J. Shepherd*, for appellee.

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<sup>1</sup>We also observe that appellant's abstract is deficient because, although he has included the depositions in his addendum, he failed to abstract the deposition testimony in compliance with our abstracting rules. See Ark. R. Sup. Ct. 4-2(a)(5). In the event Mr. Jackson files a subsequent appeal upon entry of a final order, we admonish him to review our abstracting rules before submitting his brief.