Cite as 2012 Ark. 268

SUPREME COURT OF ARKANSAS

No. 11-495

LENNY JOE KYLE AND LENNY JOE KYLE FARMS

APPELLANTS

V.

GRAY, RITTER & GRAHAM, P.C.; WOLF, HALDENSTEIN, ADLER, FREEMAN & HERZ, LLC; SEEGER WEISS, LLP; NEBLETT, BEARD & ARSENAULT, LLP; EMERSON, POYNTER, LLP; WHATLEY, DRAKE & KALLAS, LLP; LOOPER, REED & MCGRAW; CHAPMAN, LEWIS & SWAN

APPELLEES

Opinion Delivered June 14, 2012

APPEAL FROM THE WOODRUFF COUNTY CIRCUIT COURT, NO. [CV-2008-107]

HON. BENTLEY E. STORY, JUDGE

APPEAL DISMISSED.

COURTNEY HUDSON GOODSON, Associate Justice

Appellants Lenny Joe Kyle and Lenny Joe Kyle Farms (Kyle) appeal the decision of the Woodruff County Circuit Court ruling that appellees, Gray, Ritter & Graham, P.C.; Wolf, Haldenstein, Adler, Freeman & Herz, LLC; Seeger, Weiss, LLP; Neblett, Beard & Arsenault, LLP; Emerson, Poynter, LLP; Whatley, Drake & Kallas, LLP; Looper, Reed & McGraw; Chapman, Lewis & Swan (collectively "leadership group"), were entitled to a percentage of Kyle's total recovery as attorney's fees and costs in the underlying tort action against Bayer CropScience, LP, and Bayer Holding, Inc. (Bayer). For reversal, Kyle argues that (1) the post-judgment-intervention orders are void; (2) Arkansas law does not permit the recovery of attorney's fees and expenses in a single-plaintiff case by attorneys who had no attorney-

client contract or relationship with the plaintiff; (3) the motion to intervene was untimely; (4) intervention is not authorized under Rule 24 of the Arkansas Rules of Civil Procedure; and (5) if intervention is allowed, then a jury should determine the amount, if any, of the fees. We must dismiss the appeal without prejudice for the lack of a proper certification under Rule 54(b) of the Arkansas Rules of Civil Procedure.

In terms of background information, the United States Department of Agriculture announced in August 2006 that the American long-grain rice supply was contaminated with genetically modified rice developed by Bayer. The announcement caused the price of American rice to plunge, as foreign markets either banned or restricted the importation of rice from the United States. The contamination spawned numerous lawsuits against Bayer in federal and state courts. In December 2006, the Judicial Panel for Multidistrict Litigation centralized all of the federal lawsuits in the United States District Court for the Eastern District of Missouri (MDL court). *See In re LLRICE 601 Contamination Litig.*, 466 F. Supp. 2d 1351 (J.P.M.L. 2006). In April 2007, the MDL court appointed appellees as a leadership group to coordinate pretrial preparations for the federal litigation. *See In re Genetically Modified Rice Litig.*, No. 4:06 MD 1811 CDP, 2010 WL 716190 (E.D. Mo. Feb. 24, 2010). The MDL court subsequently established a common-benefit trust fund to compensate the leadership group for its efforts. *Id.* To that end, the MDL court ordered Bayer to "hold back" certain percentages of any plaintiff's recovery for placement in the fund. *Id.* The MDL court ruled that it did not have jurisdiction to order like contributions from state-court plaintiffs, but the court urged "state court judges handling the cases to consider requiring participation in the

fund by the parties over whom they have jurisdiction." *Id.* at 1.

Kyle filed his complaint against Bayer in the Woodruff County Circuit Court in August 2008. The fifteen-day trial began in February 2010, and at its conclusion, the jury awarded Kyle $532,643 in compensatory damages and $500,000 in punitive damages. Before the entry of judgment, appellees filed a motion to intervene seeking to collect eleven percent of Kyle's total recovery for placement in the common fund. They alleged that Kyle and his counsel benefited from the extensive work performed by the leadership group and claimed that Kyle would be unjustly enriched if they were not compensated for their efforts.[1] Although Kyle opposed the motion, the circuit court granted appellees' motion to intervene on April 21, 2010.

The circuit court held a hearing on appellees' complaint in intervention on May 27, 2010. By an order dated June 22, 2010, the court granted the complaint in intervention. The court found that Kyle's attorneys benefited from the work performed by the leadership group and ruled that appellees were entitled to a five-percent hold-back from Kyle's gross recovery to be transferred to the MDL court for distribution. Kyle moved for reconsideration, and the circuit court granted the motion in part, as reflected by an order entered on August 4, 2010.

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[1]The record, and thus the addendum, does not contain a file-marked copy of the motion to intervene. Similarly, appellees' brief in support of the motion to intervene that is in the record and the addendum does not bear a file mark, nor does Kyle's response to the motion to intervene. The record and addendum also do not contain a file-marked copy of appellees' complaint in intervention. Our rules require each document in the addendum to include a "legible copy of the original, clearly showing any file mark." Ark. Sup. Ct. R. 4-2(a)(8)(B). In addition, the appellants' brief on appeal contains no signature and certificate of service as required by Rule 4-2(a)(8). We trust that these deficiencies, and any others, will be remedied if the case should return to this court.

In this order, the circuit court adhered to its ruling creating a common-benefit fund in favor of appellees but rescinded its decision to transfer the fund to the MDL court. The court also vacated the award of a five-percent hold-back as being premature, as neither party had "presented evidence as to the amount requested or its justification or lack thereof." The order stated that the court would schedule a hearing on the amount to be withheld for the common-benefit fund. However, the circuit court denied Kyle's request for a jury trial, ruling that the claim of unjust enrichment sounded in equity, and thus, there was no right to a jury trial on the issue.

On January 21, 2011, the circuit court entered an order recounting the procedural history of the case and restating its rulings. This order contained a determination and certificate pursuant to Rule 54(b) of the Arkansas Rules of Civil Procedure stating in part that "[b]ecause the legal concept of a common benefit fund appears to be one of first impression in the State of Arkansas . . . disallowing an immediate appeal to review this issue would result in a hardship and injustice on the parties." Kyle filed a timely notice of appeal from this order.

Whether an order is subject to an appeal is a jurisdictional issue that this court has the duty to raise, even if the parties do not. *See Myers v. McAdams*, 366 Ark. 435, 236 S.W.3d 504 (2006). Rule 2(a)(1) of the Arkansas Rules of Appellate Procedure–Civil provides that an appeal may be taken from a final judgment or decree entered by the circuit court. Although the purpose of requiring a final order is to avoid piecemeal litigation, a circuit court may certify an otherwise nonfinal order for an immediate appeal by executing a certificate

pursuant to Rule 54(b) of the Arkansas Rules of Civil Procedure. *Robinson v. Villines*, 2012 Ark. 211. Rule 54(b) provides in part that the circuit court may direct the entry of a final judgment "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." Further, the rule provides that, if such a determination is made, the court must execute a certificate "which shall set forth the factual findings upon which the determination to enter the judgment is final is based." We have consistently held that the rule requires the order to include specific findings of any danger of hardship or injustice that could be alleviated by an immediate appeal and to set out the factual underpinnings that establish such hardship or injustice. *See id.*; *Blackman v. Glidewell*, 2011 Ark. 23; *Kowalski v. Rose Drugs of Dardanelle, Inc.*, 2009 Ark. 524, 357 S.W.3d 432.

In this case, the circuit court's order contained a "Rule 54(b) Determination" stating,

> This court finds that there is no just reason for delay of entry of judgment. Because the legal concept of a common benefit fund appears to be one of first impression in the State of Arkansas . . . disallowing an immediate appeal to review this issue would result in a hardship and injustice on the parties. Judgment is thus entered under Arkansas Rule of Civil Procedure 54(b).

The court's Rule 54(b) certificate stated,

> With respect to the issues determined by the above judgment, the court finds that there is no just reason for delay of entry of judgment. Because the legal concept of a common benefit fund appears to be one of first impression in the State of Arkansas . . . disallowing an immediate appeal to review this issue would result in a hardship and injustice on the parties.
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> Upon the basis of the foregoing factual findings, the court hereby certifies, in accordance with Rule 54(b), Ark. R. Civ. P., that it has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the judgment shall be a final judgment for all

purposes.

As is evident from reading the order, it contains no factual findings explaining why hardship or injustice would result if an immediate appeal is not permitted. The order merely states a conclusion that hardship and injustice would result on the basis that the case involves an issue of first impression. Without specific findings to support this conclusion, the order does not satisfy the requirements of Rule 54(b).

The circuit court has yet to decide the amount of the hold-back due to appellees. An order that contemplates further action by a party or the court is not a final, appealable order. *Blackman*, *supra*. The fact that a significant issue may be involved is not sufficient in itself for the appellate court to accept jurisdiction of an interlocutory appeal. *Ford Motor Co. v. Harper*, 353 Ark. 328, 107 S.W.3d 168 (2003). Because the order being appealed is not final and in the absence of an effective Rule 54(b) certification, we dismiss the appeal without prejudice.

Appeal dismissed.