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SUPREME COURT OF ARKANSAS

No. 12-457

THERESA HOLBROOK, INDIVIDUALLY AND ON BEHALF OF A CLASS OF ALL OTHER ARKANSANS SIMILARLY SITUATED
APPELLANT

V.

HEALTHPORT, INC.; HEALTHPORT TECHNOLOGIES, LLC F/K/A SMART DOCUMENT SOLUTIONS, LLC; HEALTHPORT INCORPORATED F/K/A COMPANION TECHNOLOGIES CORPORATION; AND RICHARD WEISS, IN HIS OFFICIAL CAPACITY AS DIRECTOR; AND ARKANSAS DEPARTMENT OF FINANCE AND ADMINISTRATION, AS AGENCY OF THE STATE OF ARKANSAS
APPELLEES

Opinion Delivered February 28, 2013

APPEAL FROM THE POPE COUNTY CIRCUIT COURT
[NO. CV-10-588]

HONORABLE KEN D. COKER, JR., JUDGE

DISMISSED WITHOUT PREJUDICE.

COURTNEY HUDSON GOODSON, Associate Justice

Appellant Theresa Holbrook, individually and on behalf of a class of all other Arkansans similarly situated, appeals an order of the Pope County Circuit Court granting a motion for partial summary judgment in favor of appellees Healthport, Inc.; Healthport Technologies, LLC f/k/a Smart Document Solutions, LLC; Healthport Incorporated f/k/a Companion Technologies Corporation (collectively "Healthport"); and Richard Weiss, in his official capacity as director of the Arkansas Department of Finance and Administration

(DF&A). We dismiss without prejudice for lack of a proper 54(b) certificate.

On May 14, 2010, Holbrook requested her medical records from the Millard Henry Clinic located in Russellville. Pursuant to its contract with Holbrook's medical-care provider, Healthport, a private company that fulfills such requests for medical records, obtained and sold Holbrook the copies of her requested medical records. Healthport sent Holbrook two invoices. The first invoice related to the production of seven pages of medical records and reflected that Healthport charged Holbrook sales tax for these records. The second invoice related to the production of three pages of medical records, and again, Healthport charged sales tax. On May 27, 2010, Holbrook remitted two money orders to Healthport, paying both invoices in full.

On October 12, 2010, Holbrook, individually and on behalf of other Arkansans similarly situated, filed a class-action complaint, alleging one count of Healthport's violation of the Arkansas Deceptive Trade Practices Act (ADTPA), one count of declaratory judgment, and one count of unjust enrichment. Specifically, in her complaint, Holbrook sought damages and requested the court (1) to declare that Healthport, in violation of section 16-46-106 (Repl. 1999), illegally collected sales tax on charges for services rendered in retrieving and copying medical records; (2) to find that Healthport's practice of billing for and collecting the sales tax violated the ADTPA; and (3) to find that appellees were unjustly enriched by the sales tax collected. On March 23, 2011, Healthport impleaded Weiss and DF&A by filing a counterclaim and a third-party complaint seeking declaratory judgment on whether our tax statutes require the collection of sales tax on labor and copy charges

associated with the production of medical records pursuant to section 16-46-106. On May 24, 2011, Holbrook amended her complaint to include an alternative count for illegal exaction and class allegations against DF&A. Subsequently, on Holbrook's motion, the circuit court dismissed her cause of action for illegal exaction against DF&A without prejudice, thereby leaving a declaratory-judgment claim against DF&A.

The parties filed cross-motions for summary judgment on the declaratory-judgment count of Healthport's third-party complaint. The parties later filed a stipulation that allowed class-certification proceedings to follow the circuit court's adjudication of the pending cross-motions. On February 8, 2012, after hearing the cross-motions for summary judgment, the circuit court entered an order granting Healthport's and DF&A's motions for summary judgment and denying Holbrook's motion for summary judgment. Specifically, the circuit court found that sales tax applied to the sale of copies of medical records, pursuant to section 16-46-106. The court further found that ruling in appellees' favor rendered the remainder of Holbrook's claims moot and attached a Rule 54(b) certificate. Holbrook timely filed its notice of appeal and now appeals the February 8, 2012 order.

Before we reach the merits of Holbrook's argument, we must determine whether the Rule 54(b) certificate is sufficient. 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. *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 as 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. *Id.*; *Blackman v. Glidewell*, 2011 Ark. 23; *Kowalski v. Rose Drugs of Dardanelle, Inc.*, 2009 Ark. 524, 357 S.W.3d 432.

In the present case, the circuit court issued a Rule 54(b) certificate with its order as follows:

> With respect to the issues determined by the above judgment, the Court finds:
>
> That [Holbrook's] other procedural and substantive claims for relief in this case not addressed in the Motions for Partial Summary Judgment, which are related to class certification and alleged violations of the Arkansas Deceptive Trade Practices Act, and which request alleged damages, costs, and fees, could only be sustained with a finding in favor of [Holbrook] and against the Defendants as to the declaratory judgment issues addressed herein. Therefore, the granting of the motions for partial summary judgment filed by Defendants Healthport Technologies, LLC and Weiss, and the denial of the motion for summary judgment filed by [Holbrook], renders every other claim by [Holbrook] moot, effectively ending the litigation.
>
> 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 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.

Here, the circuit court's Rule 54(b) certificate merely states a conclusion that the granting of the motions for partial summary judgment "renders every other claim by [Holbrook] moot, effectively ending the litigation." This one-sentence explanation does not contain any specific factual findings of any danger of hardship or injustice that could be alleviated by an immediate appeal.[1] Thus, the certificate fails to comply with Rule 54(b). *Kowalski*, *supra*. Therefore, in the absence of an effective Rule 54(b) certification or a final order, we dismiss the appeal without prejudice.

Dismissed without prejudice.

HART, J., dissents.

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[1]The dissent mistakenly criticizes this court's previous interpretation of Rule 54(b) to require "specific findings of any danger of hardship or injustice that could be alleviated by an immediate appeal . . . ." *Robinson*, 2012 Ark. 211, at 5. Here, the dissent claims that this requirement is mere "dicta, born of dicta" that should be disregarded by this court. However, this court has repeatedly and consistently interpreted Rule 54(b) as containing this requirement, and "once this court has interpreted its rules or statutes, that interpretation subsequently becomes a *part* of the rule or statute itself." *Arkco Corp. v. Askew*, 360 Ark. 222, 228, 200 S.W.3d 444, 448 (2004) (citing *Arnold v. Camden News Publ'g Co.*, 353 Ark. 522, 110 S.W.3d 268 (2003)) (emphasis in original). For almost thirty years, this court has adhered to this Rule 54(b) requirement. *Deer/Mt. Judea School Dist. v. Beebe*, 2012 Ark. 93; *Myers v. McAdams*, 366 Ark. 435, 236 S.W.3d 504 (2006); *Franklin v. Osca, Inc.*, 308 Ark. 409, 825 S.W.2d 812 (1992); *Tulio v. Ark. Blue Cross & Blue Shield, Inc.*, 283 Ark. 278, 675 S.W.2d 369 (1984). Further, this court has construed Rule 54(b) to require that the circuit court set out the factual underpinnings that establish such hardship or injustice in its order. *Robinson*, *supra*. In this case, the circuit court failed to set forth those factual findings, and moreover, the dissent neglects to acknowledge this additional requirement of our rule. Bound by the doctrine of stare decisis, we so hold in this case. *Bethany v. Jones*, 2011 Ark. 67, 378 S.W.3d 731.

JOSEPHINE LINKER HART, Justice, dissenting.

Rule 54(b) of the Arkansas Rules of Civil Procedure states in relevant part:

> (1) Certification of Final Judgment. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third party claim, or when multiple parties are involved, the 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 an express direction for the entry of judgment.

(Emphasis supplied.) In its Rule 54(b) certificate, the trial court made the following findings:

> That Plaintiff's other procedural and substantive claims for relief in this case not addressed in the Motions for Partial Summary Judgment, which are related to class certification and alleged violations of the Arkansas Deceptive Trade Practices Act, and which request alleged damages, costs, and fees, could only be sustained with a finding in favor of Plaintiff and against the Defendants as to the declaratory judgment issues addressed herein. Therefore, the granting of the motions for partial summary judgment issues addressed herein. Therefore, the granting of the motion for partial summary judgment filed by Defendants Healthport Technologies, LLC and Weiss, and the denial of the motion for summary judgment filed by Plaintiff Theresa Holbrook, renders every other claim by Plaintiff moot, effectively ending the litigation.

Essentially, the trial court has found that, given its ruling, the plaintiffs could not prevail in their remaining causes of action. I cannot understand how the majority can conclude that the trial court's findings are "mere conclusions."

I am mindful that the trial court's Rule 54(b) certificate does not refer to the phrase "there must be some danger of hardship or injustice which would be alleviated by an immediate appeal." That phrase first appeared as dicta in *Tulio v. Arkansas Blue Cross and Blue Shield, Inc.*, 283 Ark. 278, 675 S.W.2d 369 (1984). The *Tulio* court imported the phrase from *Campbell v. Westmoreland Farm, Inc.*, 403 F.2d 939 (2d Cir. 1968), where—also in dicta—Judge Joseph Smith of the Second Circuit of the United States Court of Appeals stated,

> [T]he words of Rule 54(b) require that there be "no just reason for delay." In other

> words, there must be some danger of hardship or injustice through delay which would be alleviated by immediate appeal.

However, in Judge Smith's attempt to paraphrase "no just reason for delay," he completely alters the stated intent of the plain wording of the rule. "No just reason for delay" means a party can file an interlocutory appeal, unless the interest of justice weighs against allowing it. Conversely, the required finding that "there must be some danger of hardship or injustice through delay which would be alleviated by immediate appeal" requires a finding that an interlocutory appeal should be allowed only if an immediate appeal offers a significant advantage—to alleviate the "danger" of injustice or hardship. The distinction is subtle, but quite significant—it changes the rule from favoring interlocutory appeals to discouraging them. Such is the nature of dicta.

I contend that dicta, born of dicta should never become a legitimate holding no matter how often it is repeated. This is especially true with regard to how we construe our rules. In *Arkhola Sand & Gravel Co. v. Hutchinson*, 291 Ark. 570, 726 S.W.2d 674 (1987), this court struggled to reconcile the two phrases and eventually announced that it was not sufficient to follow the plain wording of Rule 54(b). Perhaps not surprisingly, because *Hutchinson* is a case that noted there was an unsatisfactory Rule 54(b) certificate, yet was still decided on the merits, it did not draw enough attention to the *Hutchinson* court's "interpretation" to bring about satisfactory compliance. In February 1992, this court tried "interpretation" again in *Franklin v. Osca, Inc.*, 308 Ark. 409, 825 S.W.2d 812 (1992). *Franklin* purported to instruct the bench and bar that "henceforth" a Rule 54(b) certificate "must contain specific facts supporting the trial court's determination that there is some danger of hardship or injustice

which would be alleviated by an immediate appeal." However, like *Hutchinson*, this court noted the inadequacy of the Rule 54(b) certificate, yet decided the case on the merits.

It is unclear to me whether this court believed the two phrases were equivalent or whether it desired to impose a new factual-finding requirement in Rule 54(b). What is clear is that since this court handed down *Franklin*, Rule 54 has been amended six times—in 1992, 1994, 1997, 1999, 2001, and 2008, and the phrase "there must be some danger of hardship or injustice which would be alleviated by an immediate appeal" has never been incorporated.

This court currently has rule-making authority and is thus apparently empowered to modify Rule 54(b) at will. However, in my view, any entity that promulgates rules has an obligation to interpret them as they are written. To do otherwise merely creates a trap for the unwary.

Even so, in the instant case, it does not matter whether the trial court's findings must be pinned to the phrase "no just reason for delay" or the phrase "there must be some danger of hardship or injustice which would be alleviated by an immediate appeal." The trial court's findings satisfy both standards. I readily acknowledge that the trial court did not recite the thaumaturgic words that the majority was apparently looking for. Nonetheless, the trial court found that its ruling in the declaratory-judgment portion of the case made the remaining causes of action moot, which effectively ended the litigation. In so ruling, the trial court allowed the parties to avoid the hardship of seeking or opposing class certification, which itself could engender an interlocutory appeal. It also allowed the appellees to avoid the injustice of having to defend a cause of action that could not succeed without a favorable ruling by an appellate court. The trial court should not have to explain to this court that injustice lies

where a defendant faces the Hobbesian choice of settling a meritless case or expending an even greater amount of time and money to defend it.

Streett Law Firm, P.A., by: *James A. Streett* and *Alex G. Streett*; and *Price, Waicukauski & Riley*, by: *Joseph N. Williams*, for appellant.

Rose Law Firm, a Professional Association, by: *Kathryn Bennett Perkins*, *Byron J. Walker*, and *Betsy Turner-Fry*, for appellees.