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SUPREME COURT OF ARKANSAS

No. 09-290

MIKE E. CARR; MICHAEL L. CARR, SON OF MIKE E. CARR; TAHOE GAMING, LLC; C.L. CARR; AND C.L. CARR, JR.,
APPELLANTS,

VS.

STEWART NANCE, INDIVIDUALLY AND AS PARENT OF JOHN PRUETT NANCE; AND JOHN PRUETT NANCE,
APPELLEES,

Opinion Delivered JANUARY 21, 2010

APPEAL FROM THE NEWTON COUNTY CIRCUIT COURT,
NO. CV-2005-59-1,
HON. ROGER V. LOGAN, JUDGE,

APPEAL DISMISSED WITHOUT PREJUDICE.

DONALD L. CORBIN, Associate Justice

The present appeal arises from a jury verdict entered in favor of Appellees Stewart Nance, individually and as parent of John Pruett Nance, and John Pruett Nance. Appellants are individuals and corporations connected to certain real property, located in Newton County, Arkansas, that was formerly the site of the theme park, Dogpatch U.S.A. On appeal, the Appellants argue that the circuit court erred in denying their motion for judgment notwithstanding the verdict (JNOV), and in instructing the jury with regard to punitive damages. Because there are parties who were orally dismissed from this case without entry of subsequent written orders of dismissal, this court lacks jurisdiction and, therefore, we dismiss the appeal without prejudice.

The facts giving rise to the instant appeal are these. On or about, September 10, 2005, Appellees, accompanied by Jessica Voros, entered the Dogpatch property for the purpose of

riding their all-terrain vehicles. Earlier that day, Appellant Michael Carr, then sixteen years old, placed a steel cable between two trees near the edge of the property that was adjacent to Highway 7. Michael, who was helping his father, Appellant Mike E. Carr, clean up and renovate part of the property, strung the cable in an attempt to prevent unauthorized entry upon the property by people riding ATVs. According to Stewart, once on the property, he went looking for the elder Carr to seek permission for his group to ride their ATVs on the property. While Stewart was talking with the elder Carr, his son and Ms. Voros continued to ride their ATV. John Pruett did not see the cable that had been placed between the trees and drove directly into it, sustaining serious injuries as a result of the accident.

On November 2, 2005, Appellees, along with Lynn Larson, John Pruett's mother, filed a complaint against Westek Corporation, Inc., and Mike E. Carr, alleging that the parties acted with willful and wanton disregard for the safety of John Pruett, that the hazard was open and obvious and created an unreasonable risk of harm, and that Westek and Carr knew or should have known that their conduct would have resulted in injury and continued that conduct with malice in reckless disregard of the consequences.[1] Westek and Carr answered, denying liability, pursuant to the Arkansas Recreational Use Statute, and asserting that the complaint should be dismissed for failure to state a cause of action under Ark. R. Civ. 12(b)(6). John Pruett and his parents subsequently filed two amended complaints, ultimately

[1] Appellees alleged that Westek owned the Dogpatch property and that Mike Carr was an agent or owner of Westek.

adding as defendants the younger Carr, Appellant Tahoe Gaming, LLC, Appellant C.L. Carr, Appellant C.L. Carr, Jr., Leisuretek, LTD, Ford Carr, and Alberta Carr, as well as John Does 1–50. As the litigation progressed, each of the named defendants filed answers and other pleadings. A couple of weeks prior to trial, a hearing was held, and one of the issues discussed was the failure of Ford Carr, Alberta Carr, and Leisuretek to comply with discovery propounded by Appellees; thus, at the last transcribed hearing all the named defendants remained in the case.

A trial was held in Newton County on September 16–17, 2008. At the beginning of the jury trial, the circuit court announced the parties to the litigation as

> *Stewart Nance and Lynn Larson Individually and as parents of John Pruett Nance, and John Pruett Nance, Plaintiffs vs. Westek Corporation and Mike Carr; Michael Carr, son of Mike Carr; Tahoe Gaming, LLC; Leisuretek, LTD; C.L. Carr and C.L. Carr, Jr., and Ford Carr and Alberta Carr.* Now, that has been changed. And the ones that remain are the Stewart Nance, individually and as parent of John Pruett Nance. I believe now that has changed because of his age.
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> . . . .
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> All right, Stewart Nance individually, as parent of John Pruett Nance and John Pruett Nance himself, personally vs. – and then the ones that remain of the list of people that I mentioned earlier are C.L. Carr, Jr., C.L. Carr, Michael E. Carr, Michael L. Carr, and Tahoe Gaming. And so that is the full name of the current status of this.

The court then asked if there were any objections, and there were none. At the conclusion of the trial, the jury returned a verdict in favor of Stewart and John Pruett. John Pruett was awarded $100,000 in compensatory damages and $150,000 in punitive damages. The jury awarded Stewart $400,000 in compensatory damages. Appellants filed a motion, seeking

remittitur and asserting that the proof adduced at trial established that Stewart's compensatory damages totaled $233,762.22. The circuit court granted the motion for remittitur and reduced the verdict in Stewart's favor accordingly. The circuit court entered a judgment on October 21, 2008.

Appellants subsequently filed a motion for JNOV, alleging that the evidence was insufficient to support the verdict. Specifically, Appellants argued that Appellees failed to present evidence of malice, the existence of an ultra-hazardous condition, or that Mike E. Carr and Michael L. Carr were acting as agents of C.L. Carr and C.L. Carr, Jr. The circuit court entered an order denying the motion for JNOV, and Appellants filed a timely, joint notice of appeal.

As a threshold issue, we must determine whether the order that is appealed is a final, appealable order pursuant to Ark. R. Civ. P. 54(b) (2009). 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, ___S.W.3d___. It is well settled that the failure to obtain a final order as to all the parties and all the claims, as required by Rule 54(b), renders the matter not final for purposes of appeal. *Ramsey v. Beverly Enters., Inc.*, 375 Ark. 424, 291 S.W.3d 185 (2009); *Nat'l Home Ctrs., Inc. v. Coleman*, 370 Ark. 119, 257 S.W.3d 862 (2007).

Pursuant to Ark. R. Civ. P. 41(a) (2009), a plaintiff may file a motion requesting a voluntary dismissal (or nonsuit) of a claim or claims against one or all of the defendants.

Pursuant to Ark. Sup. Ct. Admin. Order No. 2(b)(2) (2009), an oral order announced from the bench does not become effective until reduced to writing and filed. *McGhee v. Ark. Bd. of Collection Agencies*, 368 Ark. 60, 243 S.W.3d 278 (2006). Moreover, Ark. R. Civ. P. 58 (2009) provides that "[a] judgment or order is effective only when so set forth and entered as provided in Administrative Order No. 2." This rule eliminates or reduces disputes between litigants over what a trial court's oral decision in open court entailed. *McGhee*, 368 Ark. 60, 243 S.W.3d 278. If a circuit court's ruling from the bench is not reduced to writing and filed of record, it is free to alter its decision upon further consideration of the matter. *Id.* Stated simply, the written order controls. *Id.*

In *Shackelford v. Arkansas Power & Light Co.*, 334 Ark. 634, 976 S.W.2d 950 (1998), this court found an order granting summary judgment not to be final for purposes of appeal where two John Doe defendants had not been dismissed, stating

> we recently held that the mere filing of a motion to dismiss is insufficient to conclude the action. Instead, the claim against the defendant remains until the trial court enters an order of dismissal. Stated differently, an order of dismissal (or nonsuit) does not become effective until it is entered.

Id. at 636, 976 S.W.2d at 952 (citations omitted). *See also Beverly Enters., Inc. v. Keaton*, 2009 Ark. 431, ___ S.W.3d ___.

However, in *D'Arbonne Construction Co. v. Foster*, 348 Ark. 375, 72 S.W.3d 862 (2002), the case went to trial and the jury returned a verdict apportioning 100 percent of fault between the two named defendants. There were also two John Doe defendants, and no formal orders of dismissal as to the John Does were ever entered. This court held, however,

that the order appealed was final pursuant to Rule 54(b) "[b]ecause of the total abandonment of any claims against the John Doe defendants, because of the specific allotment of 100 percent of the liability to the named defendants on the verdict forms, and because the John Doe defendants were never made parties to this litigation." *Id.* at 381, 72 S.W.3d at 865.

Clearly, the instant case is distinguishable from *D'Arbonne*. Here, we do not have John Doe defendants who were never made parties to the action; rather, we have named parties who were served and who participated in the case right up to the time of trial. Moreover, while there was a jury trial and a subsequent verdict, it was a general verdict against "all defendants." In fact, following the jury's verdict, Appellees' counsel prepared and submitted a proposed judgment to the circuit court. In response, the circuit court sent counsel for all parties a letter, rejecting the proposed judgment and explaining

> the offered precedent does not appear to conform to the verdicts in that the Plaintiff Lynn Larson was dismissed out of the case before the conclusion of the trial and she is still listed on the proposed judgment as a plaintiff receiving a judgment. The style of the proposed also lists parties as defendants who were dismissed out of the case orally during trial and are no longer defendants in the case.

As to the dismissals referenced by the circuit court, there is no written order dismissing Lynn Larson as a plaintiff. With regard to the dismissed defendants, the circuit court stated they were orally dismissed. Although the circuit court's letter indicates these parties were dismissed during the course of the trial, it appears from the transcript, as set forth above, that the parties were dismissed sometime prior to the trial. Regardless, no written orders of dismissal were entered of record, and because the oral dismissals are not effective until reduced to writing,

the order now appealed, which does not include a Rule 54(b) certificate, is not a final order. Accordingly, we dismiss the appeal without prejudice.

SHEFFIELD, J., not participating.