

2022 WL 1222751

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Court of Appeals of Mississippi.

Elton HARTZLER, Appellant

v.

Randy BOSARGE, Appellee

No. 2019-CT-01606-COA

FILED APRIL 11, 2022

#### Synopsis

**Background:** Homeowner brought action against contractor for breach of contract, breach of warranty, and negligent construction, and added declaratory-judgment claim against contractor's insurance carrier. Parties agreed to dismissal and binding arbitration, in which homeowner was awarded damages and attorney fees. The Circuit Court, Jackson County, [Kathy King Jackson, J.](#), confirmed award. The Court of Appeals, [2021 WL 973069](#), reversed and denied homeowner's motion for rehearing. Homeowner filed petition for writ of certiorari, but the Supreme Court suspended proceedings and remanded for resolution of insurance carrier's moved to dismiss appeal as interlocutory.

**[Holding:]** The Court of Appeals, [McCarty, J.](#), held that declaratory-judgment claim remained pending.

Motion granted.

West Headnotes (5)

- [1] [Appeal and Error](#) → [Determination of questions of jurisdiction in general](#)  
[Appeal and Error](#) → [Organization and Jurisdiction of Lower Court](#)

Jurisdictional issues may be raised by an appellate court sua sponte or by any party at any time.

- [2] [Insurance](#) → [Decisions reviewable](#)

Homeowner's declaratory-judgment claim against contractor's insurance carrier remained pending after arbitrator entered award in favor of homeowner, and thus appellate court lacked jurisdiction over appeal from trial court judgment confirming award; award stated that it was a "full resolution of all claims and counterclaims pending between [homeowner] and [contractor]," but no specific finding was made as to application of insurance policy or declaratory judgment. [Miss. R. App. P. 5](#); [Miss. R. Civ. P. 54\(b\)](#).

- [3] [Appeal and Error](#) → [Necessity of final determination](#)

Only final judgments are generally appealable.

- [4] [Appeal and Error](#) → [Final Judgments or Decrees](#)

A "final judgment" is one that adjudicates the merits of the controversy and settles all issues as to all the parties and requires no further action by the trial court.

- [5] [Appeal and Error](#) → [Finality as to All Parties](#)

[Appeal and Error](#) → [Determination of part of controversy](#)

When all issues in a case or claims against all parties are not resolved in a judgment, the judgment is interlocutory, and no appeal of right can be taken.

Serial: 241088

**EN BANC ORDER**

[DAVID NEIL McCARTY](#), JUDGE FOR THE COURT

\*1 This matter comes before the Court en banc on the motion of Amicus Curiae Superior Builders & Developers Inc. to dismiss this appeal as interlocutory, Appellee Randy Bosarge’s joinder in the motion, and Appellant Elton Hartzler’s response in opposition to the motion. Also before the Court are the supplemental responses ordered by this Court.

On March 16, 2021, this Court handed down a decision in this case reversing and rendering the circuit court’s modification of its order confirming the final award of arbitration. Bosarge moved for rehearing, which we denied, and on August 3, 2021, he filed a petition for writ of certiorari in the Mississippi Supreme Court. On September 15, 2021, Superior Builders moved to dismiss this appeal as interlocutory, arguing for the first time in this matter that the circuit court’s judgment was not final because it did not address Hartzler’s claim in his December 2013 amended complaint for declaratory judgment against Superior Builders’ insurance carrier, National Builders & Contractors Insurance Company (NBCIC).

On October 8, 2021, the Supreme Court entered an order consistent with [Mississippi Rule of Appellate Procedure 17\(k\)](#) suspending the certiorari proceedings and remanding the case to the Court of Appeals to address Superior Builders’ motion to dismiss the appeal as

interlocutory.

<sup>11</sup>Although this Court has issued an opinion on the merits of the appeal, it is well settled that jurisdictional issues “may be raised by the Court sua sponte or by any party at any time, and the standard of review is de novo.” [Davis v. City of Jackson](#), 240 So. 3d 381,383 (¶9) (Miss. 2018). In due diligence in the execution of the Supreme Court’s remand order, this Court ordered the appellant and appellee, as well as Amicus Superior Builders and NBCIC, to file responses on whether the circuit court had resolved all issues between all parties such that the judgment on appeal was final. [M.R.C.P. 54\(b\)](#). Hartzler, Bosarge, Superior Builders, and NBCIC have filed responses.

<sup>12</sup>Hartzler takes the position that the final arbitration award, which was adopted by the circuit court, “adjudicated all claims and the rights and liabilities of all the parties” as required by [Mississippi Rule of Civil Procedure 54\(b\)](#). Hartzler argues that all parties, including NBCIC, participated in the arbitration, and NBCIC specifically submitted special interrogatories so the arbitrator could “determine coverage.” Hartzler points out that the arbitrator’s final award “references two NBCIC general liability policies and attaches the Arbitrator’s Answers to Special Interrogatories.” He admits that the arbitrator did not make a direct finding on the declaratory-judgment claim. However, he argues that the declaratory-judgment claim was denied by a catchall provision in the final arbitration award, which states as follows: “This Final Award is in full settlement of all claims submitted in this arbitration. **All claims not expressly granted herein are hereby denied.**” (Emphasis added). Hartzler argues that “[i]t is abundantly clear from the record that the Arbitrator denied all claims except the ones on which it explicitly enumerated findings. This decision by the Arbitrator was confirmed in a judgment on April 30, 2018,” and “[t]here were no issues reserved by the [c]ourt’s [o]rder.” Hartzler emphasizes that if any party was aggrieved by the April 30, 2018 order, they could have appealed, but “[n]one did.”

\*2 In contrast, Superior Builders asserts that Hartzler’s declaratory-judgment claim against NBCIC has never been resolved and that the appeal is interlocutory. It asserts that it would be prejudiced by a finding to the contrary because it did not appeal the April 2018 ruling “precisely because that judgment was not final,” and if this Court were to find the current appeal is permissible as the “one and only appeal” from Hartzler’s suit against it, “it would eliminate Superior’s appellate rights and punish them for following rules against appeal from a non-final judgment.”

NBCIC takes the position that Hartzler’s “claim against NBCIC remains pending and unresolved” because “[n]either the [circuit] court’s order confirming the arbitration award, nor the court’s judgment (or modified judgment), make any findings related to Hartzler’s declaratory judgment action against NBCIC.” NBCIC states that “[i]f the order and judgments are not final, and do not make findings required under [Rule 54\(b\)](#), this Court does not have jurisdiction over Hartzler’s appeal.” Finally, Bosarge “asserts there is insurance coverage, or at least a claim against [NBCIC],” but he “takes no position” on whether that claim was resolved by the circuit court.

<sup>131</sup> <sup>14</sup> <sup>15</sup>“Generally, only final judgments are appealable.” [Brown v. Collections Inc.](#), 188 So. 3d 1171, 1174 (¶ 11) (Miss. 2016). A final judgment is one that “adjudicates the merits of the controversy and settles all issues as to all the parties and requires no further action by the trial court.” *Id.* “When all issues in a case or claims against all parties are not resolved in a judgment,” the judgment is interlocutory, and “no appeal of right can be taken.” *Id.* at 1174-75 (¶11). [Rule 54\(b\)](#) provides an exception to the final-judgment rule whereby the trial court may “direct the entry of a final judgment as to one or more but fewer than all of the claims or parties.” However, in doing so, the trial court must make “an expressed determination that there is no just reason for delay and ... an expressed direction for the entry of the judgment.” [M.R.C.P. 54\(b\)](#).

Based on our review of the record and the parties’ responses, we cannot find that the circuit court has disposed of the claim against NBCIC. The parties do not dispute the fact that the circuit court’s order does not make a specific finding regarding the claim against NBCIC. The judgment confirming the final arbitration award in favor of Hartzler “ordered and adjudged” as follows in full:

that Plaintiff Elton Hartzler takes a Judgment of and from Randy Bosarge/Superior Builders & Developers, Inc. for the sum and amount of \$100,513.68 with interest at the rate of 8% due on any amount not paid within fourteen (14) days of the Final Arbitration Award dated August 21, 2017, plus all taxable court costs. Interest will continue to accrue until this Judgment is paid in full.

NBCIC is not mentioned in the judgment.

We do not find convincing Hartzler’s argument that the arbitrator denied the claim against NBCIC by generally stating in the final arbitration award that “[a]ll claims not

expressly granted herein are hereby denied” or that the circuit court implicitly confirmed the alleged denial by its silence on the issue. In the interim arbitrator’s award, the arbitrator explains that “[t]he final award will be a full resolution of all claims and counterclaims *pending between Elton Hartzler and Randy Bosarge/Superior Builders and Developers, Inc.*” (Emphasis added). The interim award states that NBCIC was a “respondent” to the arbitration and submitted special interrogatories. It does not appear that NBCIC shared in any of the arbitrator’s fees and expenses, which the arbitrator states were paid “one half each” by Hartzler and Bosarge. The arbitrator answered NBCIC’s special interrogatories by stating, “I find that Bosarge’s design services may have been defective in omitting the french drain that may have caused water damage to the retaining wall by saturating the retaining wall, but I do not find any other damage to the work itself or any resulting damage as of this date.” However, no specific finding was made on the application of the insurance policy or on the declaratory-judgment claim.

\*3 The declaratory-judgment claim against NBCIC remains pending, and the circuit court has not certified the judgment as appealable under [Rule 54\(b\)](#). Because the circuit court has not disposed of all claims against all parties or otherwise certified the judgment as final under [Rule 54\(b\)](#), nor was permission sought to file an interlocutory appeal under [Mississippi Rule of Appellate Procedure 5](#), this Court lacks jurisdiction and must dismiss this appeal as interlocutory. [M.W.F. v. D.D.F.](#), 926 So. 2d 897, 900 (¶6) (Miss. 2006).

IT IS THEREFORE ORDERED that Superior Builders & Developers Inc.’s motion to dismiss this appeal as interlocutory is granted. The opinion issued on March 16, 2021, is withdrawn, and this appeal is dismissed for lack of jurisdiction. All costs of this appeal are assessed to the appellant.

SO ORDERED, this the 11 day of April, 2022.

[Lawrence](#) and [Emfinger](#), JJ., not participating.

All Citations

--- So.3d ----, 2022 WL 1222751

