**REL: December 11, 2020**



# ALABAMA COURT OF CIVIL APPEALS

## OCTOBER TERM, 2020-2021

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## 2190213

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**E. Lee Tucker and Elizabeth Tucker**

**v.**

**Stan McNabb and Jamie McNabb**

**Appeal from Marshall Circuit Court**
**(CV-15-900380)**

DONALDSON, Judge.

E. Lee Tucker and his wife, Elizabeth Tucker ("the Tuckers"), appeal from an interlocutory order made final by the Marshall Circuit Court ("the

trial court") pursuant to Rule 54(b), Ala. R. Civ. P. We hold that the order should not have been certified as final and, thus, that we lack jurisdiction to decide this appeal. Accordingly, we dismiss the appeal.

Facts and Procedural History

The Tuckers own Lot 34 in the Brown's Creek Subdivision in Marshall County ("Brown's Creek"). Stan McNabb and his wife, Jamie McNabb ("the McNabbs"), own the adjacent Lot 35. After Brown's Creek was developed in 1951, the Tennessee Valley Authority ("the TVA") sold lots in the subdivision by auction. The TVA required potential buyers to agree to a document entitled "Terms of Auction Sale Conducted by TVA at the End of the Causeway Near Entrance to Brown's Creek Subdivision Guntersville, Alabama October 9, 1951, at 11:00 A.M., CST" ("the Terms of Auction"). Paragraph 15 of the Terms of Auction, entitled "Building Restrictions," contained a 25-foot sideline-setback requirement for Lots 1-77 in Brown's Creek. After each lot was purchased, the TVA deeded that lot subject to certain restrictive covenants, one of which incorporated the 25-foot sideline-setback requirement. Each deed also provided that, "[i]n accepting this conveyance, however, the Grantee, for himself, his heirs,

successors and assigns, covenants and agrees to and with the Grantor that the following shall constitute real covenants which shall attach to and run with the above described land and shall be binding upon anyone who may hereafter come into ownership thereof, whether by purchase, devise, descent, or succession."

The Tuckers purchased Lot 34 in 1999 or 2000 from Lee Tucker's father. At that time, the house and an outbuilding on Lot 34 violated the sideline-setback requirement. In 2002, the house on Lot 34 was damaged by a storm. When the Tuckers rebuilt the house in 2003-2004, the new house also violated the sideline-setback requirement. At some point before 2013, Lee Tucker's brothers, Steven M. Tucker and William D. Tucker III, purchased Lots 35 and 36, respectively. The McNabbs purchased Lot 35 from Steven Tucker on May 7, 2013.

In the spring of 2015, the McNabbs began planning the construction of a garage on Lot 35. They hired a contractor, who consulted with a surveyor and an attorney to determine whether there were any restrictions governing the placement of a garage on the property. The McNabbs stated that their contractor was informed that, because the

general practice in Marshall County was to require 10-foot sideline setbacks, honoring a 10-foot sideline setback would be sufficient. Therefore, the McNabbs said, their contractor advised them that he did not believe that any "official" sideline-setback restriction controlled the location of the garage. The McNabbs decided to build the garage 13 feet from the adjoining Lot 34 rather than the 25 feet required by the Brown's Creek restrictive covenants. They began construction in early May 2015 and poured the slab for the garage in early June.

The Tuckers stated that, before the slab for the McNabbs' garage was poured, Lee Tucker informed Stan McNabb in a conversation that the sideline-setback restriction might be greater than 10 feet. In mid June, Lee Tucker e-mailed the McNabbs to inform them that their garage was too close to his property. The McNabbs stated that that e-mail was their first notice about a potential 25-foot sideline-setback requirement. At that time, the garage was over 50% complete. The McNabbs finished the construction of the garage over the Tuckers' objections.

On September 22, 2015, the Tuckers filed a complaint against the McNabbs in the trial court seeking declaratory and injunctive relief. The

Tuckers requested a judgment declaring, among other things, that the Brown's Creek restrictive covenants were enforceable. The Tuckers also requested an injunction restraining the McNabbs from maintaining any structures on Lot 35 that violated the 25-foot sideline-setback requirement and requiring them to remove the garage. On October 23, 2015, the McNabbs filed an answer to the complaint and added as parties to the action Steven Tucker and William Tucker ("the other Tucker brothers"). The McNabbs also asserted claims against the Tuckers and against the other Tucker brothers alleging extortion, "breach of warranty in deed," and fraud and demanded a jury trial on those claims. The McNabbs amended their pleadings three times to add claims alleging intentional infliction of emotional distress (i.e., the tort of outrage) against the Tuckers and the other Tucker brothers, trespass against Lee Tucker and the other Tucker brothers, and violation of the restrictive covenant containing the 25-foot sideline-setback requirement against the Tuckers.

The Tuckers filed a motion to bifurcate the claims asserted in their complaint -- i.e., their claims seeking injunctive and declaratory relief regarding the validity of the Brown's Creek restrictive covenants and the

McNabbs' alleged violation of the sideline-setback requirement -- from the jury claims asserted by the McNabbs. The trial court granted their motion and ordered that "the case [would be] bifurcated for trial on the merits separately." The Tuckers and the other Tucker brothers then filed a motion for a summary judgment as to the claims asserted by the McNabbs. After a hearing on the motion, on October 23, 2017, the trial court entered a summary judgment in favor of the Tuckers and the other Tucker brothers only as to the McNabbs' extortion claim. On July 24, 2018, the Tuckers filed a motion asking the trial court to reconsider its denial of their motion for a summary judgment as to the McNabbs' fraud claim. On October 22, 2018, the trial court entered a summary judgment in the Tuckers' favor as to the McNabbs' fraud claim. The trial court's order stated that "the claims as [to] misrepresentation of any restrictive covenant are dismissed and denied." The order of October 22, 2018, does not mention the other Tucker brothers, against whom the McNabbs also alleged a claim of fraud.

On July 24, 2018, the Tuckers filed a motion to set their claims regarding the McNabbs' alleged violation of the sideline-setback

requirement for a bench trial. The McNabbs opposed that motion, again requesting a jury trial or, in the alternative, that their claim regarding the Tuckers' alleged violation of the sideline-setback requirement be tried at the same time as the Tuckers' claims. On September 26, 2018, the trial court scheduled a bench trial for January 22, 2019.

Before the January 22, 2019, bench trial began, the McNabbs asked the court to clarify what the trial would address:

> "McNabbs' Lawyer: Does the Court intend to hear our [setback claim], as well as the claim of the [Tuckers]?
>
> "The Court: I set it on the setback claims, so I thought we would hear anything about a setback claim that was pending today, whether from the [Tuckers] or [the McNabbs]."

The bench trial then proceeded without objection from either side.

On April 16, 2019, the trial court entered the following order:

> "After hearing the evidence in court ore tenus, review of all exhibits, and the Court making repeated reviews of the properties in question, the Court finds:
>
> "1. All the Tucker brothers' houses and other structures are closer to the property line than the setback line called for in the restrictive covenants that they seek to enforce against the ... McNabbs.

> "2. The McNabbs continued to build their garage closer to the line after warnings by the Tuckers that they were building the new garage too close to the property line.
>
> "3. There are evergreen trees and bushes between the property making the view from the Lee Tucker home almost impossible to see the McNabb garage.
>
> "4. However, Lee Tucker states this violation by the McNabbs offends him and is an 'eyesore.' Lee Tucker demands the garage to be torn down.
>
> "Therefore, the Court finds that the McNabbs did violate a restrictive covenant, and so did the Tuckers. As for damages, the Court finds for [the Tuckers] in the amount of $5,000.00 and costs."

The McNabbs' claims against the Tuckers alleging "breach of warranty in deed," intentional infliction of emotional distress (the tort of outrage), and trespass remain pending in the trial court. Their claims against the other Tucker brothers, except for the extortion claim, also appear to remain pending.[1]

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[1]Before the trial began, the Tuckers' lawyer informed the trial court that the other Tucker brothers were "out" of the action. The McNabbs did not respond to the statement. This court cannot determine from the record whether the other Tucker brothers were ever dismissed from the case or whether a judgment was entered in their favor as to all the claims asserted against them by the McNabbs.

On May 8, 2019, the Tuckers filed a motion seeking to alter, amend, or vacate the April 16, 2019, order, to which the McNabbs responded. On August 9, 2019, the trial court summarily denied the motion. The Tuckers then filed a motion asking the trial court to certify its April 16, 2019, order as final and appealable pursuant to Rule 54(b). On October 8, 2019, the trial court entered an order stating: "The Court finds there is no just reason for delay and directs entry of the judgment previously rendered in this case [on April 16, 2019,] as final pursuant to Rule 54(b), Ala. R. Civ. P." The Tuckers filed their notice of appeal on October 25, 2019, to the supreme court, which transferred the appeal to this court. See § 12-2-7(6), Ala. Code 1975.

Standard of Review

" 'If a trial court certifies a judgment as final pursuant to Rule 54(b), an appeal will generally lie from that judgment.' Bargus v. City of Florence, 968 So. 2d 529, 531 (Ala. 2007)." Centennial Assocs. v. Guthrie, 20 So. 3d 1277, 1279 (Ala. 2009). "A trial court's conclusion [that Rule 54(b) certification is appropriate] is subject to review by this Court to

determine whether the trial court exceeded its discretion in so concluding." 20 So. 3d at 1279.

Analysis

As a threshold matter, we first consider whether the Tuckers' notice of appeal invoked this court's appellate jurisdiction. "The timely filing of the notice of appeal is a jurisdictional act." Rudd v. Rudd, 467 So. 2d 964, 965 (Ala. Civ. App. 1985); see Harden v. Laney, 118 So. 3d 186, 187 (Ala. 2013); see also Committee Comments to Rule 3, Ala. R. App. P.[2] The question whether an order or judgment is final and therefore can support an appeal is also jurisdictional. Crutcher v. Williams, 12 So. 3d 631, 636 (Ala. 2008).

> " ' "[J]urisdictional matters are of such magnitude that we take notice of them at any time and do so even ex mero motu." ' Wallace v. Tee Jays Mfg. Co., 689 So. 2d 210, 211 (Ala. Civ. App. 1997) (quoting Nunn v. Baker, 518 So. 2d 711, 712 (Ala. 1987))."

[2]On October 2, 2020, this court requested that the parties file letter briefs addressing whether the notice of appeal in this case was timely. The McNabbs submitted a letter brief in which they contend that the Tuckers' notice of appeal was not timely filed. The Tuckers did not respond to this court's request.

McCaskill v. McCaskill, 111 So. 3d 736, 737 (Ala. Civ. App. 2012).

The order of April 16, 2019, did not explicitly address the injunctive relief requested by the Tuckers. On appeal, the parties construe the April 16, 2019, order as having denied the Tuckers' request for injunctive relief. We agree. We also note that Rule 4(a)(1)(A), Ala. R. App. P., provides that a notice of appeal must be filed within 14 days of the date of the entry of an "interlocutory order granting, continuing, modifying, refusing, or dissolving an injunction, or refusing to dissolve or to modify an injunction." (Emphasis added.) See Welch v. Nunnally's Glass & Framing Co., 127 So. 3d 1242, 1244 n.3 (Ala. Civ. App. 2013) ("Rule 4(a)(1)(A), Ala. R. App. P., requires an appeal from an interlocutory order denying a request for an injunction to be filed within 14 days of the date of entry of the order or judgment ...."). The notice of appeal was filed by the Tuckers several months after the entry of the April 16, 2019, order and 17 days after the trial court entered the October 8, 2019, order certifying the April order as final.

In Jefferson County Commission v. ECO Preservation Services, L.L.C., 788 So. 2d 121 (Ala. 2000), the trial court in that case entered an

interlocutory order granting injunctive relief to ECO Preservation Services, L.L.C., on November 29, 1999. On December 17, 1999, more than 14 days afer the entry of the order, the trial court certified the order of November 29, 1999, as final pursuant to Rule 54(b). The Jefferson County Commission appealed 33 days after the trial court's December 17, 1999, Rule 54(b) certification. Our supreme court concluded that the trial court's December 17, 1999, Rule 54(b) certification of its November 29, 1999, order altered the interlocutory nature of that order and converted it to a final judgment for purposes of computing the time for taking an appeal. In holding that the appeal was timely under the facts of that case, our supreme court stated:

> "[T]he 14–day limit prescribed by Rule 4(a)(1)(A), Ala. R. App. P., applies only to interlocutory orders granting an injunction -- orders that are not otherwise appealable. We conclude that the trial court's December 1999 order was not an 'interlocutory order' as that phrase is used in Rule 4. While it is true that after the court entered its December 1999 order there were apparently other claims pending in the trial court, the order was not 'interlocutory', because the trial court made the order final pursuant to Rule 54(b), Ala. R. Civ. P. If an injunction order has been made final by a Rule 54(b) certification, as has happened in this case, then the 14–day provision of Rule 4(a)(1)(A) does not apply, because the injunction order is not

> an 'interlocutory order' and is appealable without regard to the provisions of Rule 4(a)(1)(A)."

788 So. 2d at 125-26 (final emphasis added).

Likewise, in State v. Lawhorn, 830 So. 2d 720, 723–24 (Ala. 2002), the trial court in that case entered a preliminary injunction in favor of Phillip Lawhorn on January 25, 2001, and denied the State's "postjudgment" motion on May 1, 2001. On June 8, 2001, the trial court certified the order of January 25, 2001, granting the preliminary injunction as final pursuant to Rule 54(b). The State appealed more than 14 days after the entry of the trial court's June 8, 2001, Rule 54(b) certification order. Our supreme court stated in Lawhorn that, because the State did not appeal the entry of the preliminary injunction and because the trial court made its order final pursuant to Rule 54(b), the 14-day period in which to appeal did not apply so long as the Rule 54(b) certification was valid.

In this case, Rule 4(a)(1)(A) required the Tuckers to file a notice of appeal within 14 days of the entry of the April 16, 2019, interlocutory order denying their request for an injunction. However, the Tuckers later

filed a motion asking the trial court to certify its order of April 16, 2019, as final pursuant to Rule 54(b). The trial court granted that motion and certified the April 16, 2019, order as final pursuant to Rule 54(b) on October 8, 2019. After the October 8, 2019, certification, the April 16, 2019, order was final, not interlocutory, and, under the reasoning of Jefferson County Commission and Lawhorn, the Tuckers could assert their challenge to the April 16, 2019, order denying their request for injunctive relief by appealing with 42 days of the entry of the October 8, 2019, certification order. Thus, the Tuckers' appeal, filed 17 days after the entry of the October 8, 2019, certification order, was timely.

Even so, our inquiry does not end there. We next consider whether the trial court's order of October 8, 2019, certifying its April 16, 2019, order as "final" pursuant to Rule 54(b) was valid. "Rule 54(b) certifications are not favored by appellate courts." Robbins v. Coldwater Holdings, LLC, 184 So. 3d 1025, 1028 (Ala. Civ. App. 2015). "It bears repeating ... that ' "[c]ertifications under Rule 54(b) should be entered only in exceptional cases and should not be entered routinely." ' " Dzwonkowski v. Sonitrol of Mobile, Inc., 892 So. 2d 354, 363 (Ala. 2004) (quoting

Lawhorn, 830 So. 2d at 725 , quoting in turn Baker v. Bennett, 644 So. 2d 901, 903 (Ala. 1994), citing in turn Branch v. SouthTrust Bank of Dothan, N.A., 514 So. 2d 1373 (Ala. 1987)).

Rule 54(b) provides:

> "(b) Judgment Upon Multiple Claims or Involving Multiple Parties. 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 that there is no just reason for delay and upon an express direction for the entry of judgment. Except where judgment is entered as to defendants who have been served pursuant to Rule 4(f), [Ala. R. Civ. P.,] in the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."

In considering whether a trial court has exceeded its discretion in finding no just reason for delay in certifying a judgment as final pursuant to Rule 54(b), appellate courts have reviewed whether the claims addressed in the order certified as final and claims that remain pending in the trial court

"are so closely intertwined that separate adjudication would pose an unreasonable risk of inconsistent results," Branch, 514 So. 2d at 1374, and "whether the resolution of claims that remain pending in the trial court may moot claims presented on appeal." Lighting Fair, Inc. v. Rosenberg, 63 So. 3d 1256, 1264 (Ala. 2010).[3]

Here, the trial court certified as final its order finding that both the Tuckers and the McNabbs had violated the Brown's Creek restrictive covenant containing the sideline-setback requirement applicable to the properties in the subdivision, awarding the Tuckers $5,000 in damages, and refusing to provide the injunctive relief requested by the Tuckers. The McNabbs' claims alleging "breach of warranty in deed," intentional infliction of emotional distress (the tort of outrage), and trespass remain pending in the trial court. As previously stated, we cannot determine whether any claims remain pending against the other Tucker brothers. Those claims are based on allegations that the Tuckers' complaints about

[3]In Lighting Fair, Inc. v. Rosenberg, 63 So. 3d 1256, 1264-65 (Ala. 2010), our supreme court also noted other factors identified by several United States Courts of Appeal to be considered in determining whether there is no just reason for delay in entering a judgment.

the location of the McNabbs' garage and the Tuckers' efforts to have the McNabbs' garage torn down caused the McNabbs to lose the use and enjoyment of their property, diminished the value of their property, and caused them to suffer mental and emotional distress. The evidence required to prove the McNabbs' allegations about actions taken by the Tuckers after the McNabbs purchased the property and the parties' competing requests for removal of nonconforming outbuildings would require essentially the same proof and poses a risk of inconsistent results. In their brief to this court, the Tuckers continue to argue that the McNabbs' garage is located too close to their property and that the garage should be torn down. The Tuckers do not argue that the award of damages is inadequate but, rather, argue only that the trial court erred in refusing their demand for injunctive relief.[4] We hold that the claims

[4]Having been awarded damages, the Tuckers appear to be the prevailing parties, and ordinarily a party cannot appeal from a favorable judgment. "Alabama caselaw is clear that a party who prevailed in the trial court can appeal only on the issue of adequacy of damages awarded." Ex parte Weyerhaeuser Co., 702 So. 2d 1227, 1228 (Ala. 1996). See also Ex parte Vincent, 770 So. 2d 92 (Ala. 1999) (a prevailing party may raise on appeal the issue of the adequacy of the damages awarded and the exclusion of evidence to support damages not awarded). The Tuckers do

addressed in the April 16, 2019, order that has been certified as final and the claims that remain pending in the trial court are so closely intertwined that separate adjudication of the Tuckers' claim for injunctive relief and the McNabbs' remaining claims would pose an unreasonable risk of inconsistent results. We therefore conclude that the trial court exceeded its discretion in certifying its order of April 16, 2019, as final for purposes of appeal. As this court stated in Robbins:

> "Judicial economy is not served by allowing parties to litigate one claim in the trial court, obtain appellate review with regard to only that claim, and then litigate their remaining claims based on the appellate court's decision on only a portion of the litigation. Such piecemeal review should occur in exceptional cases, see Dzwonkowski v. Sonitrol of Mobile, Inc., [892 So. 2d 354 (Ala. 2004),] and we cannot say that Coldwater has demonstrated that the facts or posture of this case warrant such piecemeal review by this court."

184 So. 3d at 1029.

## Conclusion

The Tuckers' appeal was timely filed. Nevertheless, the trial court exceeded its discretion when it certified its April 16, 2019, order as final

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not argue on appeal that the damages award was inadequate; instead, they argue that the trial court erred in awarding relief they did not request (damages) in lieu of relief they did request (injunctive relief). Because we conclude that the Tuckers have appealed from a nonfinal judgment, we need not address the propriety of their appellate argument.

pursuant to Rule 54(b); therefore, there is no final judgment to support the appeal. Without a final judgment, this court lacks jurisdiction to decide the issues presented, and therefore, we dismiss the appeal.

APPEAL DISMISSED.

Thompson, P.J., and Moore, Edwards, and Hanson, JJ., concur.