Rel: September 30, 2021



# SUPREME COURT OF ALABAMA

## SPECIAL TERM, 2021

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## 1200433

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## Builder Systems, LLC

**v.**

## George "Jerry" Klamer and Lisa Klamer

## Appeal from Shelby Circuit Court
## (CV-17-900440)

BOLIN, Justice.

Builder Systems, LLC, appeals from an order, certified as final pursuant to Rule 54(b), Ala. R. Civ. P., entered in favor of George "Jerry" Klamer and his wife Lisa Klamer arising from a remediation and new-construction project performed by Builder Systems on the Klamers' house. Because we determine that the order was not appropriate for Rule 54(b) certification, we dismiss the appeal.

Facts and Procedural History

In May 2006, the Klamers purchased a house that contained toxic and defective drywall that had been manufactured in China. In 2011, the Klamers joined a class action against the manufacturers of the drywall that was being overseen by the United States District Court for the Eastern District of Louisiana. The class action settled in December 2012. As part of the class settlement, the Klamers had two options for remediation of the drywall: (1) they could use Moss & Associates,[1] or a Moss authorized contractor, to remediate the defective drywall or (2) they

[1]Moss & Associates appears to be the contractor chosen by the class-action-settlement administrators to be the lead contractor for the remediation program.

could choose self-remediation, in which case they would choose their own contractor to remediate the defective drywall according to protocol established in the settlement agreement, and the chosen contractor would be paid from the remediation settlement fund based on a work-scope model provided by Moss. The Klamers chose the self-remediation option.

On January 25, 2013, the Klamers entered into an "Agreement for Renovation of a Residential Dwelling" with Builder Systems both to remediate the defective drywall in the Klamers' house and to renovate portions of their house. Both the Klamers and Builder Systems acknowledged in the renovation agreement that the class-action defendants had agreed to fund up to $378,380.36 of the costs to complete the the drywall remediation. Builder Systems determined that the remediation costs would total $301,684 based on the Moss work-scope model. The Klamers, fearing that the remediation costs would exceed Builder Systems' proposed budget for the remediation project, suggested that $325,000 of the $378,380.36 be allocated for the remediation project, with the difference between the $325,000 and the $378,380.36 funded from the class-action settlement being used for upgrades to other items

that fell within the work scope of the renovation project, including such items as fixtures, materials, and the HVAC unit. The renovation agreement contained an arbitration provision.

After Builder Systems began the remediation and renovation project, disputes arose between the parties as to the work performed by Builder Systems. The Klamers contend that the work performed by Builder Systems was defective, fell well below industry standards, and violated various building-code provisions. The Klamers contend that, ultimately, Builder Systems failed or refused to perform the work required by the renovation agreement. The Klamers further contend that Builder Systems' defective and incomplete performance of the work plagued the house with various problems and issues that caused damage to other portions of the house. For example, the Klamers state that the house suffered extensive mold damage due to incomplete and defective HVAC-related work performed by Builder Systems. Additionally, the Klamers state that Builder Systems damaged other property in the house while doing the remediation and renovation work, that the plumbing work failed

to meet applicable code standards, and that electrical work violated code standards and created safety hazards.

Builder Systems states that, once it undertook the work on the remediation and renovation project, disputes arose between the parties as to what work was to be performed, whether the requested work was within the Moss work-scope model, and payment for the work performed that was outside the Moss work-scope model. Builder Systems states that by "September 2013 and into 2014," it had completed over $400,000 worth of remediation and renovation work on the house. On May 21, 2014, the disputes arising from the remediation and renovation project were submitted to arbitration pursuant to the arbitration provision contained in the renovation agreement.

During the course of the remediation and renovation project, Inline Electric Supply Co., Inc. ("Inline"), entered into a subcontract with Builder Systems to provide certain materials and services for the remediation and renovation project on the house. On July 28, 2014, Inline sued Builder Systems and its owner Chuck Kitchen, both individually and as guarantor for Builder Systems, as well as the Klamers, alleging that Builder

Systems had failed and/or refused to pay for materials and services that Inline had provided for the remediation and renovation project pursuant to the contract entered into between Inline and Builder Systems. Inline claimed a lien against the Klamers' property in the amount of $14,965.72.[2] On October 6, 2014, the Klamers answered Inline's complaint and filed a cross-claim against Builder Systems, asserting a breach of the renovation agreement for Builder Systems' alleged failure to perform the remediation and renovation services. On January 22, 2015, after Builder Systems and Kitchen had failed to answer Inline's complaint, Inline moved the trial court in that action for a default judgment pursuant to Rule 55(b)(2), Ala. R. Civ. P. On March 3, 2015, the trial court in that action granted Inline's motion for a default judgment and entered a

[2]" 'Generally, when a person has provided labor or materials or has supplied services on a private construction project, the person is entitled under § 35-11-210, Ala. Code 1975, the mechanic's or materialman's lien statute, to file a lien against the private property and subsequently to foreclose on the property, if not paid for those services.' " Finish Line v. J.F. Pate & Assocs. Contractors, Inc., 90 So. 3d 749, 753 (Ala. Civ. App. 2012) (quoting Safeco Ins. Co. of America v. Graybar Elec. Co., 59 So. 3d 649, 655 (Ala. 2010)).

judgment against Builder Systems and Kitchen on Inline's claims in the amount of $22,372.89.

On April 1, 2015, following the arbitration proceedings between the Klamers and Builder Systems, the arbitrator entered an arbitration award, which provides, in relevant part:

> "The [Klamers] chose Option Two and engaged [Builder Systems] to remediate the drywall using the protocol from the settlement agreement. [Builder Systems] provided a budget based on the Moss work scope totaling $301,684.00. The [Klamers], fearing that the remedial costs would exceed the proposed budget from [Builder Systems], suggested that the remediation costs would be set at $325,000.00 and the difference between the orally agreed upon $325,000.00 and the written agreement amount of $378,380.36 would be used for additions and upgrades ....
>
> "Since the offer was made, accepted, consideration provided and there was mutual assent, the Parties, from the onset, acted on the oral agreement, which preceded the written agreement. The written agreement was used as a framework for the drywall remediation and for the distribution of funds with an understanding that when those funds were exhausted, the [Klamers] would pay any overages for the additional work. The misunderstanding of the opportunity for supplements would appear to be the core of the dispute as it relates to cost.
>
> "....
>
> "The action of the Parties as the project advanced shows that the written agreement was reduced to an instrument of

convenience to access the $378,380.36 provided by the settlement fund and all cost above this amount, regardless of the cause, was to be paid by the [Klamers].

"Testimony and documentation presented by the [Klamers] throughout the hearing was that [Builder Systems] exhibited a lack of workmanship relative to the tile work, painting and trim as well as a failure to maintain a standard of care relative to cabinets, granite tops, hardwood flooring, windows, doors and stored materials. The [Klamers'] solution, as presented by witnesses and estimates of the cost to cure, appears to be a near wholesale removal and replacement of components. [Builder Systems'] position is that the job is incomplete and is being judged before the final punch is performed. A site visit was conducted on September 23, 2014 and attended by Counsel for both Parties and this Arbitrator. The site visit revealed a job site that was out of sequence and incomplete. Items purported to be complete did not meet the industry standard for workmanship. The tile work in the Master Bath is one such item, there are others, as testimony revealed, that are beyond 'Punch' items. Mold was present in the lower portion of the house and the HVAC was not operational. Therefore, there is validity in both positions, but not at the extremes of those positions. The site certainly needs more attention to detail and there is a definite need for some order to the process with protective coverings in place for completed tasks, but the cost to cure as presented by the [Klamers] and [Builder Systems] would appear to be respectively excessive and understated.

"The Award regarding Claims:

"....

> "... [Builder Systems] will complete the project, or cause the project to be completed with an outside contractor, in its entirety including all protocol items listed in the Chinese Drywall Remediation Settlement as well as all additions, upgrades, damaged components and punch list items for all categories. Before this work commences, the [Klamers] will make [Builder Systems] whole by issuing a check for $24,107.07. Subsequently, [Builder Systems], or an outside contractor, is due to receive from the settlement fund the balance of $37,383.04 upon successful completion of the drywall remediation as determined by the settlement protocol. Furthermore, [Builder Systems], or the outside contractor, is due to receive from the [Klamers] the hard cost plus 10% Profit and 10% Overhead for all future valid, verifiable invoices above the combined total of $24,107.07 and $37,383.04 or $61,490.11. The [Klamers] will pay this amount upon the satisfactory completion of the entire project. It is understood that 'Punch Items' and the repair of damaged components will carry no additional cost to the [Klamers] including, but not limited to anything that has been installed or applied that does not meet Industry Standards. The elements of 'Satisfactory Completion' will be based on the approval of the governing inspection service and compliance to Industry Standards for high end residential construction. In the event of a disagreement regarding the latter, the Parties will agree on an independent Construction Professional to resolve the question of compliance to the 'Industry Standard,' the cost of which will be divided equally. If the eventual cost to complete is

less than $61,490.11, the surplus funds will be returned to [the Klamers].

"....

"... Inline claim and lawsuit for lighting $14,965.00 -- Granted [i.e., to be paid by Builder Systems]....

"....

"....

"[I]f the if the completion of the residence extends beyond 60 calendar days from the time work commences, [Builder Systems] will pay the [Klamers] a housing allowance of $150.00 per day.

"[I]f the completion of the residence extends beyond 60 calendar days from the time work commences, [Builder Systems] will pay the [Klamers] a storage allowance of $53.33 per day.

"[I]f the completion of the residence extends beyond 60 calendar days from the time work commences, [Builder Systems] will pay the [Klamers] a utility allowance of $15.83 per day.

"[I]f the completion of the residence extends beyond 60 calendar days from the time work commences, [Builder Systems] will pay the [Klamers] a yard care allowance of $5.00 per day."

The arbitrator also awarded to the Klamers $27,027 for mold remediation and for damage to some blinds that were improperly stored by Builder Systems.

The Klamers state that, after the arbitration award had been entered, they attempted to work with Builder Systems to identify what needed to be repaired or completed in the house. On May 7, 2015, the Klamers provided to Builder Systems a list of items they claimed needed to be corrected in the house. According to the Klamers, Builder Systems was supposed to evaluate that list of items and respond with its agreement or disagreement with respect to the items on the list. Builder Systems visited the house on May 27, 2015, but failed to respond with its agreement or disagreement regarding the items on the list.

On June 9, 2015, counsel for the Klamers informed Builder Systems that, because of Builders Systems' inaction and unresponsiveness to its request regarding the list, the Klamers took the position that Builder Systems did not intend to perform the work provided for in the arbitration award. The Klamers explained in the letter the urgency of commencing

the work, particularly with respect to the HVAC system and the electrical work. The Klamers further stated:

> "The Award outlines a payment of $24,107.07 due from the Klamers to Builder Systems. The Award also makes Builder Systems liable for payment to InLine Electrical. In-Line obtained a default judgment against Builder Systems and Chuck Kitchen for $22,372.89 that we are told has not been paid. In-Line claims a lien against the Klamers property in the amount of $14,965.12. The Klamers believe that if they pay Builder Systems the $24,107.07, Builder Systems will not satisfy and remove the In-Line lien and will not perform the work required by the Award, which the Klamers believe exceeds $150,000 to $200,000.
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> "Because of Builder Systems' inaction and the unpaid lien, the Klamers demand written assurance of performance by Builder Systems and Chuck Kitchen and reasonable assurance and evidence of its financial ability to perform."

Builder Systems stated that the primary issue between the parties after the entry of the arbitration award was the Klamers' refusal to make payment of the $24,107.07 awarded to it during arbitration. Builder Systems contended that the payment of the $24,107.07 was a prerequisite to it performing any additional work on the remediation and renovation project. Builder Systems refused to begin work until the payment was made.

On July 9, 2015, the Klamers sought a modification of the arbitration award to address the requirement that they pay $24,107.07 to Builder Systems. On August 5, 2015, the arbitrator entered the following disposition regarding the Klamers' application to modify the arbitration award:

> "Pursuant R-48 'Modification of Award' in the Rules Amended and Effective October 1, 2009 being the rules which governed this Arbitration, the Award cannot be modified as requested by Item 17 in [the Klamers'] Request for Enforcement and/or Modification. Instead, the Award is clear as to the duties imposed on both parties and in the fact that certain funds shall be paid before work commences, furthermore, a mechanism is in place to assure quality finishes as well as code compliance. I will be willing to clarify the points in paragraph 1(b) under the Award regarding the Claims. To that end:
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> > "1. [Builder Systems] will be paid $24,107.07 before work resumes. This amount must be paid in order to make [Builder Systems] whole. It is a condition of the Award that this precedes any work being performed by [Builder Systems].
> >
> > "2. Any tasks or components that are not brought to satisfactory completion or would be considered code non-compliant that have been installed and charged in previous invoices must be corrected by [Builder Systems] to code or industry standards without additional charge to the [Klamers], '...The elements of "Satisfactory Completion" will be based on the approval of the governing inspection

> service and compliance to Industry Standards for high end residential construction. In the event of a disagreement regarding the latter, the Parties will agree on an independent Construction Professional to resolve the question of compliance to the "Industry Standard," the cost of which will be divided equally.'
>
> "3. Any Chinese Drywall remediation work that is part of the original scope but has not yet been performed will be paid from the remaining settlement funds totaling $37,838.04. Therefore, the total amount due from the [Klamers] to [Builder Systems] relative to Paragraph 1(b) is $61,945.11. Of that, $24,107.07 is due prior to work resuming, if the eventual cost to complete is less than $61,945.11, the surplus funds will be returned to [the Klamers].[3]
>
> "4. Any work requested by the [Klamers] of [Builder Systems] that is not part of the original scope, inclusive of additions and upgrades, will carry a charge as determined by [Builder Systems] and accepted by the [Klamers] prior to the work being performed.
>
> "5. In summary, [Builder Systems] will receive $24,107.07 before resuming work, and another

[3]We note that the figures used in this paragraph do not match the figures used in the arbitration award. In the arbitration award, the amount of the remaining settlement funds was listed as $37,383.04, not $37,838.04, and the total due from the Klamers was listed as $61,490.11, not $61,945.11.

> $37,838.04 upon completion of the settlement scope. All items presented at the hearing will be addressed to satisfactory completion. All required components will be inspected or re-inspected by the local authorities for code compliance, and any dispute between the parties regardless of the component, cosmetic issue, code issue or major system (Plumbing, HVAC or Electrical ) will be settled by an agreed upon construction professional (Architect, Engineer, High End House Builder).

"In all other respects the Award dated April 1, 2015, is reaffirmed and remains in full force and effect."

In the meantime, the Klamers had, on June 4, 2015, moved the trial court in Inline's action to enforce the arbitration award as it related to Builder Systems' payment of Inline. On August 17, 2015, the trial court in that action entered an order enforcing the terms of the arbitration award against Builder Systems as it related to Builder Systems' obligation to satisfy the award of $14,965 to the Klamers in order to remove the Inline lien on the Klamers' property.[4]

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[4]On January 11, 2016, the trial court in Inline's action entered an order disposing of all remaining claims and cross-claims, stating that the "arbitration award on April [1], 2015, represented a full settlement of all claims and counterclaims submitted to that arbitration. All claims not expressly granted therein are denied." On February 23, 2016, a certificate of judgment releasing Inline's lien on the Klamer property was issued and

On August 25, 2015, the Klamers paid Builder Systems $24,107.07, as specified by the arbitration award. After the $24,107.07 was paid to Builder Systems, the Klamers contend, Builder Systems performed some minor corrective work on the house, which they say was as faulty and defective as the original work. On October 13, 2015, the Klamers issued a notice of nonconformance of work to Builder Systems, outlining the work the Klamers contended failed to conform to the project requirements and failed to meet industry standards for high-end residential construction. The Klamers issued additional notices of nonconformance of work to Builder Systems on October 23, 2015, and November 17, 2015.

On November 24, 2015, the Klamers filed a notice to the arbitrator and a request for inspection and award, alleging that Builder Systems was in breach of the arbitration award and requesting an inspection of the house by the arbitrator and an award compensating them for Builder Systems' alleged damage to the house. The Klamers asserted the following:

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recorded in the Shelby Probate Court.

> "Builder Systems' work does not meet 'Industry Standards for high end residential construction'; the work was not completed within 60 days; Builder Systems refuses to engage a Construction Consultant to resolve disputes about work quality;[5] and Builder Systems has illustrated no intention of completing the work to the required standard. [The Klamers] request an inspection by the Arbitrator, a determination of damages due to Builder Systems' failure to comply with the Award and an assessment of liquidated damages. In the alternative, the Klamers request that the Arbitrator inspect the house and rule on whether the work being performed satisfies the conditions in the Award and issue a ruling for damages."

On December 16, 2015, the arbitrator entered the following order denying the Klamers' request for inspection and award:

> "Regarding Counsel for the [Klamers] and his request that the Arbitrator inspect the ongoing work at the [Klamers'] house, I will decline the request on the basis of the AAA [American Arbitration Association] Rules that read in part:
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> > " '... The AAA's role in the arbitration process generally ends at the time that the award is transmitted to the parties. If a party to an arbitration wishes to challenge an award for any reason, they need to make an application to a court except in the rare case where the parties'

[5]The record indicates that the Klamers had suggested on a number of occasions that the parties engage a professional construction consultant, as required by the arbitration award, to resolve any disputes that might arise once work on the house resumed.

> agreement provides for some type of appellate proceeding within the arbitration....'
>
> "I am not aware that this rare exception is provided in this case."

The Klamers allege that on January 8, 2016, as a last ditch effort to implore Builder Systems to complete the remediation and renovation project, they, along with their counsel, met representatives of Builder Systems and its counsel at the house to identify the work that needed to be performed. The Klamers contend that Builder Systems promised to complete the work. However, after the meeting, Builder Systems never performed any further work on the house.

On January 14, 2016, counsel for the Klamers wrote counsel for Builder Systems and reiterated that Builder Systems must comply with the arbitration award and complete the remediation and renovation project on the house. The Klamers demanded written assurance that Builder Systems would return to the house and complete the work. Builder Systems never responded to that communication. On January 26, 2016, counsel for the Klamers wrote counsel for Builder Systems, pointing out that the Klamers had received no response to the January

14, 2016, letter and that no further work had been performed at the house. The Klamers notified Builder Systems that they were going to move forward to mitigate their damages by hiring another contractor to complete the work and that they would hold Builder Systems responsible for all damages and costs. Builder Systems did not respond to that letter. The Klamers hired a replacement contractor to complete the work on the house and to repair the allegedly substandard work that had been performed by Builder Systems. The Klamers state that they paid the replacement contractor $127,990.78 to complete the work on the house.

On May 16, 2017, the Klamers sued Builder Systems; Kitchen; Jason Haupt, who the Klamers alleged had an equity interest in Builder Systems; and Employers Mutual Casualty Co., Builder Systems' general-liability insurance provider, in the Shelby Circuit Court, alleging that Builder Systems had breached the arbitration award. The Klamers also asserted a claim against Employers Mutual pursuant to § 27-23-2, Ala. Code 1975, alleging that they were entitled to receive insurance proceeds from the general-liability policy issued to Builder Systems by Employers Mutual to satisfy the arbitration award entered against Builder Systems.

The Klamers sought to enforce the arbitration award and sought an award of money damages in the amount of $198,498.90.

On July 24, 2017, Builder Systems and Kitchen answered the Klamers' complaint, and Builder Systems filed a counterclaim against the Klamers, asserting claims of unjust enrichment and quantum meruit and alleging that, following the payment of the $24,107.07 by the Klamers to Builder Systems, Builder Systems completed work on the Klamers house at a cost of $20,000 to Builder Systems. Builder Systems sought the $20,000 cost of the services provided, plus 10% overhead and 10% profit. On August 23, 2017, the Klamers answered the counterclaim, generally denying the allegations and asserting certain affirmative defenses.

On November 20, 2017, Builder Systems, Kitchens, and Haupt ("the Builder Systems defendants") moved the trial court to dismiss the complaint pursuant to Rule 12(b)(1) and (6), Ala. R. Civ. P., arguing that it was barred by the doctrine of res judicata, because, they said, many issues raised in the complaint were previously litigated in the arbitration proceeding; that the Klamers had not satisfied the contractual prerequisites to bringing the action; and that the arbitration award had

specifically vested the sole authority to resolve the disputes raised in the complaint in an independent construction professional, thus divesting the trial court of subject-matter jurisdiction. On January 1, 2018, the Klamers filed a response in opposition to the motion to dismiss, arguing that the trial court had jurisdiction over the matter, that the issue of breach of the arbitration award had never been litigated, and that all prerequisites to bringing the action had been satisfied or had been waived by Builder Systems.

On May 9, 2018, Employers Mutual moved the trial court to dismiss, in part, the claim against it, arguing that the Klamers could assert a direct action against it, pursuant to § 27-23-2, only after they had obtained a judgment against Builder Systems.[6] On May 21, 2018, the Klamers filed a response in opposition to Employers Mutual's motion to dismiss, arguing that they had obtained a judgment against Builder Systems in the arbitration proceeding and could therefore maintain the

[6]Employers Mutual conceded that the $27,027 awarded by the arbitrator to the Klamers had been reduced to a judgment and acknowledged that the Klamers could pursue their claim against it for that amount.

present action against Employers Mutual to recover the money they had expended to complete the work on the house and to repair damage allegedly caused by Builder Systems.

On February 26, 2019, the Builder Systems defendants filed a cross-claim against Employers Mutual, asserting claims of breach of contract and bad-faith refusal to pay an insurance claim, alleging that the claims asserted against them by the Klamers fell within the general-liability coverage provided to Builder Systems by Employers Mutual and that Employers Mutual had refused to provide them a defense and indemnification. On March 28, 2019, Employers Mutual answered the cross-claim.

On July 23, 2019, Employers Mutual filed a cross-claim against the Builder Systems defendants asserting claims of a breach of contract and unjust enrichment and alleging that it had paid $27,027 to Builder Systems to satisfy the arbitration award for the mold remediation and damaged blinds and that the money had been used by Builder Systems for some other purpose.

On July 31, 2019, the trial court entered an order setting the case for a trial on October 15 and 16, 2019. Following a bench trial, the trial court, on November 15, 2019, entered an order against Builder Systems, finding that Builder Systems had failed to perform its obligations under the arbitration award and awarding the Klamers $172,561.64, which included, in part, liquidated damages. The judgment did not address Builder Systems' counterclaims alleging unjust enrichment and quantum meruit.

On December 12, 2019, Builder Systems moved the trial court to reconsider its order, arguing that the trial court had failed to apply credit for $37,838.08 it alleged it was owed under the arbitration award, see note 3, supra, and that its motion to dismiss was due to be granted. On December 12, 2019, the Klamers filed a response in opposition to Builder Systems' motion.

On December 13, 2019, Builder Systems moved the trial court for a summary judgment as to the breach-of-contract claim asserted in its cross-claim against Employers Mutual, arguing that the Klamers had presented undisputed evidence demonstrating that Builder Systems had damaged

existing components of the Klamers' house in the course of its remediation and renovation activities and that such damage fell within the coverage of the general-liability policy issued by Employers Mutual.

On January 3, 2020, Builder Systems moved the trial court for leave to amend its cross-claim asserted against Employers Mutual to seek additional damages against Employers Mutual based on the damage Builder Systems had allegedly suffered as a result of collection efforts that had been instituted by the Klamers.[7] On February 19, 2020, the trial court entered an order granting Builder Systems' motion for leave to amend its cross-claim.

On April 15, 2020, Employers Mutual filed its response in opposition to Builder Systems' motion for a summary judgment on the breach-of-contract claim asserted by Builder Systems in its cross-claim and also

[7]The Klamers had initiated collection proceedings against Builder Systems to collect on the order entered by the trial court on November 15, 2019. Builder Systems opposed those efforts, and the trial court ultimately entered an order granting Builder Systems' motion to halt those collection proceedings.

moved the trial court for a summary judgment in its favor as to Builder Systems' cross-claims.

Also on April 15, 2020, Employers Mutual moved the trial court for a summary judgment as to the claims asserted against it by the Klamers. Employers Mutual argued that the $27,027 awarded to the Klamers for mold remediation and damaged blinds was not covered by its general-liability policy with Builders Systems. Therefore, Employers Mutual argued, the Klamers could not collect the $27,027 from Employers Mutual. Employers Mutual further argued that a direct action to obtain specific performance against Builder Systems by requiring Employers Mutual to pay the costs for hiring a second contractor to complete the work on the house and to cure Builder Systems' defective work is prohibited by § 27-23-2. Finally, Employers Mutual argued that the damages sought by the Klamers and awarded by the trial court were not covered by Builder Systems' insurance policy with Employers Mutual.

On July 31, 2020, the Klamers filed a response in opposition to Employers Mutual's motion for a summary judgment and also moved the trial court for a partial summary judgment as to the claims asserted by

them against Employers Mutual. The Klamers argued that Employers Mutual was legally obligated under its general-liability policy issued to Builder Systems to pay for the damage to their house caused by the covered occurrence attributable to Builder Systems' actions.

On August 12, 2020, the trial court entered an amended order, reducing the amount originally awarded the Klamers to $134,723.50 as requested by Builder Systems in its motion to reconsider.[8] The amended order did not address Builder Systems' counterclaims alleging unjust enrichment and quantum meruit.

On November 10, 2020, the Klamers moved the trial court to certify the August 12, 2020, amended order as final pursuant to Rule 54(b), Ala. R. Civ. P. The Klamers contended that the amended order addressed their claim to enforce the arbitration award against Builder Systems and that Employers Mutual had not been a party to the arbitration proceedings and

[8]In its motion to reconsider, Builder Systems requested that the trial court reduce the award to the Klamers by $37,838.04; the trial court actually reduced the award by $37,838.14.

the arbitration award. The Klamers further stated that the amended order resolved all issues and claims between them and Builder Systems. On February 11, 2021, the trial court entered a second amended order, granting the Klamers' motion, finding that there was no just reason for delay, and certifying that order as final pursuant to Rule 54(b). The trial court stated:

> "This constitutes enforcement of the Award only. It does not adjudicate claims in this action that are outside of [the Klamers'] claim for enforcement of the Award against Builder Systems, LLC.
>
> "Upon [the Klamers'] Motion for Entry of Final Judgment, the court clarifies in this Second Amended Order that it determines that there is no just reason for delay and directs the entry of a final judgment in favor of [the Klamers] against Defendant Builder Systems, LLC as set forth herein pursuant to Ala. R. Civ. P. 54(b)."

The second amended order did not adjudicate Builder Systems' counter-claims alleging unjust enrichment and quantum meruit.

On February 12, 2021, Builder Systems moved the trial court for a ruling on its initial motion to dismiss filed on November 20, 2017. On February 25, 2021, the trial court entered an order denying Builder Systems' motion to dismiss.

On March 12, 2021, Builder Systems moved the trial court to alter, amend, or vacate its second amended order. On March 25, 2021, Builder Systems appealed the trial court's second amended order awarding the Klamers $134,723.50. On April 19, 2021, the trial court entered an order denying Builder Systems' motion to alter, amend, or vacate the second amended order. [9]

Discussion

[9]A notice of appeal will be held in abeyance until a postjudgment motion is ruled upon by the trial court or denied by operation of law. Rule 4(a)(5), Ala. R. App. P. Further, although Builder Systems specifically identified the second amended order awarding the Klamers $134,723.50 as the order being challenged on appeal, it has raised and argued issues on appeal relating to the denial of its motion to dismiss. Rule 3(c), Ala. R. App. P., provides, in part, that a notice of appeal "shall designate the judgment, order, or part thereof appealed from." Rule 2(a)(2)(D), Ala. R. App. P., provides that "[a]n appeal may be dismissed ...when a party fails to comply substantially with these rules." Although Builder Systems identified the second amended order awarding the Klamers $134,723.50 as the order being challenged on appeal, it did include in a statement of issues attached to the notice of appeal issues relating to the denial of the motion to dismiss. We find that Builder Systems has substantially complied with Rule 3(c), Ala. R. App. P.

Builder Systems raises a number of issues on appeal, including the propriety of the trial court's certification of the second amended order as final pursuant to Rule 54(b). We find that issue dispositive of this appeal.

This Court has stated the following with regard to Rule 54(b) certification:

> " ' "Rule 54(b) certifications 'should be made only in exceptional cases.' " ' Posey v. Mollohan, 991 So. 2d 253, 258-59 (Ala. Civ. App. 2008) (quoting Wallace v. Tee Jays Mfg. Co., 689 So. 2d 210, 212 (Ala. Civ. App. 1997)).
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> " 'Rule 54(b) provides, in part:
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> > " ' "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."
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> " 'This Court recently explained the appropriate standard for reviewing Rule 54(b) certifications, stating:
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> > " ' " 'If a trial court certifies a judgment as final pursuant to Rule 54(b), an

> appeal will generally lie from that judgment.' Baugus v. City of Florence, 968 So. 2d 529, 531 (Ala. 2007).
>
> > " ' "Although the order made the basis of the Rule 54(b) certification disposes of the entire claim against [the defendant in this case], thus satisfying the requirements of Rule 54(b) dealing with eligibility for consideration as a final judgment, there remains the additional requirement that there be no just reason for delay. A trial court's conclusion to that effect is subject to review by this Court to determine whether the trial court exceeded its discretion in so concluding."

" 'Centennial Assocs. v. Guthrie, 20 So. 3d 1277, 1279 (Ala. 2009). Reviewing the circuit court's finding in Schlarb v. Lee, 955 So. 2d 418, 419-20 (Ala. 2006), that there was no just reason for delay, this Court [has] explained that certifications under Rule 54(b) are disfavored[.]

" '....

" 'In considering whether a trial court has exceeded its discretion in determining that there is no just reason for delay in entering a judgment, this Court has considered whether "the issues in the claim being certified and a claim that will remain pending in the trial court ' "are so closely intertwined that separate adjudication would pose an unreasonable risk of inconsistent results." ' "

Schlarb, 955 So. 2d at 419-20 (quoting Clarke-Mobile Counties Gas Dist. v. Prior Energy Corp., 834 So. 2d 88, 95 (Ala. 2002), quoting in turn Branch v. SouthTrust Bank of Dothan, N.A., 514 So. 2d 1373, 1374 (Ala. 1987), and concluding that conversion and fraud claims were too intertwined with a pending breach-of-contract claim for Rule 54(b) certification when the propositions on which the appellant relied to support the claims were identical). See also Centennial Assocs., 20 So. 3d at 1281 (concluding that claims against an attorney certified as final under Rule 54(b) were too closely intertwined with pending claims against other defendants when the pending claims required "resolution of the same issue" as issue pending on appeal); and Howard v. Allstate Ins. Co., 9 So. 3d 1213, 1215 (Ala. 2008) (concluding that the judgments on the claims against certain of the defendants had been improperly certified as final under Rule 54(b) because the pending claims against the remaining defendants depended upon the resolution of common issues).

"'... In MCI Constructors, LLC v. City of Greensboro, 610 F. 3d 849[, 855] (4th Cir. 2010), the United States Court of Appeals for the Fourth Circuit explained:

> "'"In determining whether there is no just reason for delay in the entry of judgment, factors the district court should consider, if applicable, include:
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> > "'"'(1) the relationship between the adjudicated

> and unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the district court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence or absence of a claim or counterclaim which could result in a set-off against the judgment sought to be made final; (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of circuit, frivolity of competing claims, expense, and the like.'
>
> " ' "Braswell [Shipyards, Inc. v. Beazer E., Inc.], 2 F. 3d [1331,] 1335-36 [(4th Cir.1993)] ... (quoting Allis-Chalmers Corp. v. Phila. Elec. Co., 521 F.2d 360, 364 (3d Cir. 1975) [overruled on other grounds by Curtiss-Wright Corp. v. Gen. Elec. Co., 446 U.S. 1 (1980)])." '

"Lighting Fair, Inc. v. Rosenberg, 63 So. 3d 1256, 1263-64 (Ala. 2010) (footnotes and emphasis omitted)."

Stephens v. Fines Recycling, Inc., 84 So. 3d 867, 875-76 (Ala. 2011). Appellate review in piecemeal fashion is not favored. Howard v. Allstate Ins. Co., 9 So. 3d 1213 (Ala. 2008).

After the trial court certified its second amended order on the Klamers' claim against Builder Systems as final pursuant to Rule 54(b), there was left pending in the trial court the Klamers' claim against Employers Mutual brought pursuant to § 27-23-2 to recover insurance proceeds from the general-liability policy to satisfy the arbitration award entered against Builder Systems; Builder Systems' counterclaims against the Klamers alleging unjust enrichment and quantum meruit; Builder Systems' cross-claim against Employers Mutual seeking a defense and indemnification for the Klamers' claim asserted against it; and Employers Mutual's cross-claim against Builder Systems alleging that it had paid $27,027 to Builder Systems to satisfy the arbitration award for the mold remediation and damaged blinds and that the money had been used by Builder Systems for some other purpose.

Builder Systems alleged in its counterclaim against the Klamers that, once the Klamers paid the $24,107.07 as required by the arbitration

award, it had completed some work on the house at a cost of $20,000 to it, in furtherance of its obligations under the arbitration award to complete the remediation and renovation project on the house to meet industry standards. The Klamers alleged in their complaint that Builder Systems had failed to perform the work on their house as required by the arbitration award and sought to enforce the arbitration award by recouping the costs incurred by them in hiring a replacement contractor to complete the work on the house and to repair the damage caused by Builder Systems. Builder Systems' unadjudicated counterclaims pending in the trial court and the Klamers' adjudicated claim pending on appeal are closely related, because they both arise directly from the parties' obligations under the arbitration award and seek to hold each other accountable for their performance or nonperformance under the arbitration award. Lighting Fair, Inc. v. Rosenberg, 63 So. 3d 1256, 1263-64 (Ala. 2010). The resolution of Builder Systems' counter-claims seeking payment for the $20,000 worth of work it performed on the Klamers' house necessarily requires resolution of issues that are common to issues resolved in the second amended order addressing the Klamers'

claim seeking to enforce the arbitration award. See Howard, 9 So. 3d at 1215 (concluding that the judgments on the claims against certain of the defendants had been improperly certified as final under Rule 54(b) because the pending claims against the remaining defendants depended upon the resolution of common issues).

We note also that there exists the distinct possibility that this Court would be required to consider the same issues between the parties arising from their respective obligations under the arbitration award should this Court be asked to review a subsequent judgment entered on Builder Systems' counterclaims. Rosenberg, 63 So. 3d at 1263-64. Finally, if Builder Systems is successful on its counterclaims seeking payment for the $20,000 worth of work it performed on the Klamers' house pursuant to its obligations under the arbitration award, that amount recovered by Builder Systems could be set off against the award obtained by the Klamers in the second amended order certified as final. Rosenberg, 63 So. 3d at 1263-64.

Because the issues presented by the Klamers' claim and Builder Systems' counterclaims are so closely intertwined, we conclude that the

trial court exceeded its discretion in certifying the second amended order entered in favor of the Klamers as final pursuant to Rule 54(b). Further, because a "nonfinal judgment will not support an appeal," Dzwonkowski v. Sonitrol of Mobile, Inc., 892 So. 2d 354, 363 (Ala. 2004), we must dismiss this appeal. Because we dismiss the appeal based on our determination that the issues presented by Builder Systems' counterclaims are closely intertwined with the issues presented by the Klamers' claim pending on appeal, we pretermit discussion of the remaining claims pending in the trial court.

APPEAL DISMISSED.

Parker, C.J., and Wise, Sellers, and Stewart, JJ., concur.