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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2012-2013

1100902

Dr. Stephen L. Wallace

v.

Belleview Properties Corporation et al.

Appeal from Jefferson Circuit Court,
Bessemer Division
(CV-05-1619)

WISE, Justice.

Dr. Stephen L. Wallace, the plaintiff/counterclaim-defendant below, appeals from a summary judgment of the

Jefferson Circuit Court in favor of Belleview Properties Corporation, IPF/Belleview Limited Partnership ("IPF"), HR/Belleview, L.P., and Infinity Property Management Corporation (hereinafter referred to collectively as "the defendants"). We dismiss the appeal.

Facts and Procedural History

In August 1991, Wallace leased office space in the Belleview Shopping Center in Fairfield, Alabama, to use for his dental practice. Around 1996, the defendants purchased the shopping center and renewed Wallace's lease. The lease was renewed a second time in 2003 for a term of five years.

On December 22, 2005, Wallace sued the defendants,[1] alleging fraud and suppression; negligence; wantonness; breach of contract; unjust enrichment; and negligent training, supervision, and retention. Wallace alleged that, during the term of the lease, he reported various maintenance problems to the defendants. He also alleged that, although the defendants assured him that the problems would be taken care of, they

[1]Wallace also named Kenneth Rosen, an officer or manager of one or more of the defendants, as a defendant. The trial court ultimately entered a summary judgment in favor of Rosen, and Wallace does not challenge that judgment in this appeal.

were not. Wallace asserted that, as a result of reported water leaks that were left unrepaired, the office was infested with toxic mold. Therefore, he asserted, in April 2005, he closed his practice to avoid exposing his employees and his patients to the toxic mold.

The defendants filed answers to the complaint and asserted affirmative defenses. Also, IPF filed a counterclaim alleging breach of contract, essentially seeking unpaid rent. Wallace answered the counterclaim, alleging that he was constructively evicted from the premises because of the mold infestation and asserting defenses to IPF's counterclaim.

On August 28, 2009, the defendants filed a motion for a summary judgment as to Wallace's claims against them. On September 11, 2009, IPF filed a motion for a summary judgment on its counterclaim against Wallace. On January 20, 2010, the trial court conducted a hearing on the motions for a summary judgment.

On January 27, 2010, the trial court entered an order granting the defendants' motion for a summary judgment as to Wallace's claims against them. The trial court certified the judgment as to all claims filed by Wallace as final pursuant

to Rule 54(b), Ala. R. Civ. P.[2] Finally, it stated that it was taking IPF's motion for a summary judgment as to its counterclaim under advisement.

On February 11, 2010, Wallace filed a motion asking the trial court to reconsider or vacate its January 27, 2010, order and to set the matter for a hearing. The defendants filed a motion in opposition to Wallace's motion. The trial court conducted a hearing on the motion on April 27, 2010. On December 15, 2010, the trial court conducted a hearing on IPF's motion for a summary judgment on its counterclaim against Wallace. On December 27, 2010, the trial court denied the motion for a summary judgment on the counterclaim, explaining as follows: "The Court is of the opinion that this case should be tried and heard because the Court notes that there is a serious question of constructive eviction and

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[2]Rule 54(b), Ala. R. Civ. P., provides, in relevant part:

> "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."

promissory estoppel as a defense of the plaintiff to said counterclaim." In that order, the trial court also stated: "Any other motions are hereby overruled and denied." On February 14, 2011, Wallace filed a request for clarification of the December 27, 2010, order.

During a hearing on March 21, 2011, counsel for IPF specifically asked that the counterclaim be dismissed. As a result, on March 21, 2011, the trial court entered a final order of dismissal in the case. Wallace filed a notice of appeal to this Court on May 2, 2011.

Discussion

In his notice of appeal and in the statement of jurisdiction in his brief to this Court, Wallace purports to appeal from the trial court's March 21, 2011, final order of dismissal. However, he categorizes his arguments as follows in his brief to this Court:

> 1. "The trial court's order granting partial summary judgment was in error because genuine issues of material fact exist."
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> 2. "The trial court's December 27, 2010, order denying relief under Rule 60 was an abuse of discretion."
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> 3. "The Trial Court's Rule 54(b) certification was ineffective or, in the alternative, the rule

> adopted in Allen v. Briggs, 60 So. 3d 899 (Ala. Civ. App. 2010), should be overturned or modified based on the facts of this case."

Also, in the summary of the argument portion of his brief to this Court, Wallace states: "This appeal is filed to challenge an erroneous grant of summary judgment, denial of a Rule 60 motion, and an improper and ineffective Rule 54(b) certification." Therefore, it is clear that Wallace is challenging the summary judgment the trial court entered in favor of the defendants on January 27, 2010, and the denial of his motion for reconsideration, rather than the trial court's March 21, 2011, final order of dismissal.

The defendants argue that this Court should dismiss this appeal as untimely. Specifically, they contend that the notice of appeal was filed more than 42 days after the trial court certified the summary judgment on Wallace's claims against them as final pursuant to Rule 54(b). The defendants also assert that, if Wallace's motion to reconsider was filed pursuant to Rule 59, it was denied by operation of law after 90 days, and the notice of appeal was not filed within 42 days after that denial. Finally, they allege that, if Wallace's motion to reconsider was filed pursuant to Rule 60(b), it was

denied on December 27, 2010, and the notice of appeal was not filed within 42 days after that date. We agree with the defendants that Wallace's appeal is untimely.

With regard to when an appeal should be taken, Rule 4(a)(1), Ala. R. App. P., provides:

> "Except as otherwise provided herein, in all cases in which an appeal is permitted by law as of right to the supreme court or to a court of appeals, the notice of appeal required by Rule 3[, Ala. R. App. P.,] shall be filed with the clerk of the trial court within 42 days (6 weeks) of the date of the entry of the judgment or order appealed from ...."

With regard to tolling the time for filing a notice of appeal, Rule 4(a)(3), Ala. R. App. P., provides:

> "The filing of a post-judgment motion pursuant to Rules 50, 52, 55 or 59 of the Alabama Rules of Civil Procedure ([Ala. R. Civ. P.]) shall suspend the running of the time for filing a notice of appeal. In cases where post-judgment motions are filed, the full time fixed for filing a notice of appeal shall be computed from the date of the entry in the civil docket of an order granting or denying such motion. If such post-judgment motion is deemed denied under the provisions of Rule 59.1 of the Alabama Rules of Civil Procedure, then the time for filing a notice of appeal shall be computed from the date of denial of such motion by operation of law, as provided for in Rule 59.1."

With regard to postjudgment motions in civil cases, Rule 59, Ala. R. Civ. P., provides, in relevant part:

> "(e) Motion to Alter, Amend, or Vacate a Judgment. A motion to alter, amend, or vacate the judgment shall be filed not later than thirty (30) days after entry of the judgment."

Finally, Rule 59.1, Ala. R. Civ. P., provides:

> "No postjudgment motion filed pursuant to Rules 50, 52, 55, or 59 shall remain pending in the trial court for more than ninety (90) days, unless with the express consent of all the parties, which consent shall appear of record, or unless extended by the appellate court to which an appeal of the judgment would lie, and such time may be further extended for good cause shown. A failure by the trial court to render an order disposing of any pending postjudgment motion within the time permitted hereunder, or any extension thereof, shall constitute a denial of such motion as of the date of the expiration of the period."

As the defendants note, Wallace clearly filed his notice of appeal more than 42 days after the trial court certified the summary judgment in their favor as final pursuant to Rule 54(b) on January 27, 2010. However, on February 11, 2010, Wallace filed a motion asking the trial court to reconsider or vacate its January 27, 2010, order. If that motion is considered a postjudgment motion to alter, amend, or vacate filed pursuant to Rule 59, it was denied by operation of law 90 days after it was filed, because the trial court did not rule on it within 90 days and the time for ruling on it was not extended. Wallace did not file his notice of appeal

within 42 days after the date the motion was denied by operation of law. Therefore, if the motion to reconsider was a postjudgment motion filed pursuant to Rule 59, Wallace's appeal is not timely.

Wallace argues that his postjudgment motion to reconsider was filed pursuant to Rule 60(b), rather than Rule 59, because, he says, he sought relief as the result of mistake, inadvertence, surprise, or excusable neglect. If the motion was filed pursuant to Rule 60(b) and not Rule 59.1, "it was not denied by operation of law pursuant to Rule 59.1 after 90 days had expired from the time it was filed." Conway v. Housing Auth. of Birmingham Dist., 676 So. 2d 344, 345 (Ala. Civ. App. 1996). See also Rhodes v. Rhodes, 38 So. 3d 54, 63 (Ala. Civ. App. 2009) ("[T]he 90-day period for ruling on postjudgment motions announced in Rule 59.1, Ala. R. Civ. P., applies only to motions filed under Rules 50, 52, 55, and 59, and not those filed under Rule 60(b)."). However, even if Wallace's motion to reconsider was a postjudgment motion filed pursuant to Rule 60, it was denied on December 27, 2010, and Wallace did not file his notice of appeal within 42 days after

that date.[3] Therefore, whether Wallace's motion to reconsider constituted a postjudgment motion pursuant to Rule 59 or pursuant to Rule 60, his notice of appeal was not timely filed.

In what is apparently an attempt to avoid a determination that his appeal is untimely, Wallace argues that, because the issues presented in his claims were intertwined with the issues in IPF's counterclaim, the trial court's Rule 54(b) certification in this case was improper; therefore, Wallace argues, the time for filing an appeal did not start to run until all the claims in the case were disposed of by the trial court's March 21, 2011, order dismissing IPF's counterclaim.

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[3]We recognize that Wallace filed a request for clarification of the December 27, 2010, order on February 14, 2011. However,

> "[a]fter a trial court has denied a postjudgment motion pursuant to Rule 60(b), that court does not have jurisdiction to entertain a successive postjudgment motion to 'reconsider' or otherwise review its order denying the Rule 60(b) motion, and such a successive postjudgment motion does not suspend the running of the time for filing a notice of appeal."

Ex parte Keith, 771 So. 2d 1018, 1022 (Ala. 1998). Therefore, even assuming that it was timely filed, Wallace's request for clarification did not suspend the running of the time for filing a notice of appeal from the December 27, 2010, order.

In Allen v. Briggs, 60 So. 3d 899, 903-05 (Ala. Civ. App. 2010), the Alabama Court of Civil Appeals addressed and rejected a similar contention, reasoning as follows:

> "Allen first attempts to challenge the summary judgment in favor of EBMC. However, the summary judgment in favor of EBMC was expressly made a final judgment pursuant to Rule 54(b), Ala. R. Civ. P., by the inclusion of some of the language contained in that rule in the summary-judgment order. See Sho-Me Motor Lodges, Inc. v. Jehle-Slauson Constr. Co., 466 So. 2d 83, 87 (Ala. 1985) (concluding that the statement '[t]he Court further finds there is no just reason for delay in the entry of said final judgment' was sufficient to make a judgment final pursuant to Rule 54(b)); see also Schneider Nat'l Carriers, Inc. v. Tinney, 776 So. 2d 753, 755 (Ala. 2000) (noting that 'if it is clear and obvious from the language used by the trial court in its order that the court intended to enter a final order pursuant to Rule 54(b), then we will treat the order as a final judgment' even though the order may not contain all the language indicating that it is, in fact, an order directing the entry of a final judgment). Although Allen argues on appeal that a Rule 54(b) certification was not proper in this case, we have held that he is precluded from raising that issue now, because, insofar as his appeal is from the summary-judgment order, his appeal comes too late, having been filed more than 42 days after the entry of the summary-judgment order on July 31, 2009. See Lary v. Gardener, 908 So. 2d 955, 957 n.1 (Ala. Civ. App. 2005) (citing Bagley v. Mazda Motor Corp., 864 So. 2d 301, 316-17 (Ala. 2003)); see also Ex parte King, 776 So. 2d 31, 38 (Ala. 2000) (Lyons, J., concurring specially) (indicating that, in Justice Lyons's opinion, the remedy for a party who believes that a Rule 54(b) certification is defective is to 'timely fil[e] a petition for a writ of mandamus directing the trial judge to set aside

the Rule 54(b) certification, possibly as an alternative remedy sought at the same time as an appeal is taken from the order purportedly made final by the Rule 54(b) certification').

"Despite our holding in Lary, the dissent argues that a party should be permitted to raise a challenge to a Rule 54(b) certification on appeal from a subsequently entered judgment. 60 So. 3d at 908. The dissent attempts to distinguish Lary on the basis that the plaintiff in Lary did not have a valid challenge to the Rule 54(b) certification. 60 So. 3d at 908. However, in Lary we did not discuss the merits of the certification issue; instead, we clearly indicated that the challenge to the Rule 54(b) certification would not be considered because the plaintiff's 'challenges are untimely because he did not file a notice of appeal with respect to [the Rule 54(b) certification of the summary] judgment within 42 days of its entry.' Lary, 908 So. 2d at 957 n.1.

"However, the dissent's approach is not without support. An appellate court may raise the impropriety of a Rule 54(b) certification ex mero motu when that judgment is presented in a timely appeal. Gregory v. Ferguson, 10 So. 3d 596, 597 (Ala. Civ. App. 2008). The right of an appellate court to consider ex mero motu the propriety of a Rule 54(b) certification stems from its power to determine its own jurisdiction, which jurisdiction flows, in part, from the timely appeal from a final, appealable judgment. See Dzwonkowski v. Sonitrol of Mobile, Inc., 892 So. 2d 354, 361 (Ala. 2004) (stating, in an opinion dismissing an appeal based on an improper use of a Rule 54(b) certification, that 'all parties have overlooked a fundamental flaw in these appellate proceedings -- the absence of an appealable judgment'); Gregory, 10 So. 3d at 597 ('However, this court may consider [the] issue [of the appropriateness of the Rule 54(b) certification] ex mero motu because the issue whether a judgment or

order is sufficiently final to support an appeal is jurisdictional.'). Thus, if a Rule 54(b) certification is determined to have been improperly entered, the judgment so certified is considered to be nonfinal and therefore unable to support an appeal. Dzwonkowski, 892 So. 2d at 361. If that is the case, and an improperly certified judgment is not a final judgment because of an improper certification, why should an appellate court be precluded from considering, on appeal from the judgment resolving the remaining claim or claims, the propriety of the certification and, if the certification was improper, the propriety of the underlying interlocutory judgment?

"Our research has revealed that only two federal appellate courts have considered this precise issue and that those two courts reached opposite conclusions. See In re Lindsay, 59 F.3d 942, 951 (9th Cir. 1995) (holding that '[a] Rule 54(b) certification, right or wrong, starts the time for appeal running'), and Page v. Preisser, 585 F.2d 336, 338 (8th Cir. 1978) (holding that 'when a district court erroneously certifies a claim as appropriate for immediate appeal under Rule 54(b), a party may raise that claim in a timely appeal from an adverse decision on the remaining claims in the lawsuit'). Although we comprehend the reasoning behind the rule announced in Page, which hinges on the idea that an erroneously certified judgment is, in fact, not a final judgment at all, Page, 585 F.2d at 338, we believe that the better course is to require that a party seeking to challenge the propriety of a Rule 54(b) certification do so in a timely appeal from the certified judgment. As explained in In re Lindsay, '[t]his avoids uncertainty for counsel about when to appeal.' In re Lindsay, 59 F.3d at 951.

"Alabama law is well settled -- '[a] judgment certified by a trial court pursuant to Rule 54(b) is a final appealable judgment[, and] the certification

triggers the running of the 42-day appeal period.' Lewis v. State, 463 So. 2d 154, 155 (Ala. 1985).[3] To allow a later appeal of a judgment certified as final pursuant to Rule 54(b) in those circumstances in which a party desires to argue that the certification was improper injects uncertainty regarding the time to appeal and the finality of judgments. If a judgment certified as final may be appealed at a later date, the prevailing party is left in limbo, uncertain whether the judgment in its favor is, in fact, final or whether it might, at the time the remaining claim or claims in the action are resolved, be rendered ineffective because the appellate court determines that the Rule 54(b) certification was improper. In addition, if a party waits to appeal the certified judgment because it believes that the certification was improperly granted, that party risks an appellate determination that the certification was, in fact, properly made, with the resulting foreclosure of the right to appeal regarding the certified judgment. See 15A Charles A. Wright et al. Federal Practice & Procedure § 3914.7 (2d ed. 1992) (explaining that, typically, if a party fails to appeal from a judgment certified as final pursuant to Rule 54(b), Fed. R. Civ. P., the right to review is lost and stating that 'a party who believes that a judgment was improperly entered would be better advised to take a protective appeal and urge that the appeal be dismissed'). We therefore reject the rule announced in Page and, consistent with Lary, embrace the holding in In re Lindsay. Thus, insofar as Allen's appeal relates to the summary judgment entered in favor of EBMC, the appeal is dismissed.

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"[3]Of course, the time for appeal would be suspended by a timely filed postjudgment motion directed to the certified judgment, see Rule 4(a)(3), Ala. R. App. P. ('The filing of a post-judgment motion pursuant to Rules 50, 52, 55 or

> 59 of the Alabama Rules of Civil Procedure ... filing a notice of appeal.'), and, therefore, in those circumstances, the time for appeal would expire upon the grant or denial of the postjudgment motion."

(Footnote omitted.)

Wallace argues that he should not be bound by Allen because that case was decided several months after the Rule 54(b) certification was entered in this case. However, his argument is not well taken because this Court and the Court of Civil Appeals had applied the same reasoning in previous cases. In Lewis v. State, 463 So. 2d 154, 155 (Ala. 1985), this Court stated: "A judgment certified by a trial court pursuant to Rule 54(b) is a final appealable judgment; the certification triggers the running of the 42-day appeal period."

In Bagley v. Mazda Motor Corp., 864 So. 2d 301 (Ala. 2003), this Court addressed a situation similar to Wallace's as follows:

> "The Bagleys' final argument is that the trial court erred in entering a summary judgment for Creekside regarding the fraud claim. Creekside argues that the Bagleys' appeal on this claim was untimely. We note that the trial court initially entered a summary judgment for Creekside on May 11, 1998, and specifically stated that it was certifying that judgment as final pursuant to Rule 54(b), Ala.

R. Civ. P. The court amended its summary-judgment order on May 21, 1998, to clarify that the May 11 judgment covered only the fraud claim. On July 14, 1998, the trial court entered an 'Amended Order Nunc Pro Tunc,' again entering a partial summary judgment for Creekside on the fraud claim, and again certifying the judgment as final. Rule 54(b) states, in pertinent part:

> "'When more than one claim for relief is presented in an action, ... 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.'

"Rule 4, Ala. R. App. P., provides, in relevant part, that, 'in all cases in which an appeal is permitted by law ... the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 42 days (6 weeks) of the date of the entry of the judgment or order appealed from....'

"In opposing Creekside's timeliness challenge, the Bagleys cite Brown v. Whitaker Contracting Corp., 681 So. 2d 226 (Ala. Civ. App. 1996). In Brown, the trial court entered a summary judgment for the defendant and certified it as final pursuant to Rule 54(b), Ala. R. Civ. P. The Court of Civil Appeals held that genuine issues of material fact existed as to the plaintiff's claim. The Court of Civil Appeals went on to state:

> "'The trial court, in its order, should list the factors which it considered in reaching its decision regarding whether to certify the judgment, pursuant to Rule 54(b), in order that the appellate court is better equipped to review the trial court's action....

> "'... Hereafter, if a trial court should fail to list the factors considered, then the case will be returned so that the trial court can list those factors.'

"681 So. 2d at 229. In Schneider National Carriers, Inc. v. Tinney, 776 So. 2d 753, 755 (Ala. 2000), this Court expressly overruled Brown, pointing out:

> "'We held in Sho-Me [Motor Lodges, Inc. v. Jehle-Slauson Construction Co., 466 So. 2d 83 (Ala. 1985),] that if it is clear and obvious from the language used by the trial court in its order that the court intended to enter a final order pursuant to Rule 54(b), then we will treat the order as a final judgment....'

"In Schneider, we further stated that '[n]othing in Rule 54(b) requires findings to buttress the conclusion "that there is no just reason for delay." All that is required is an "express determination."' 776 So. 2d at 755-56.

"The Bagleys argue that relying on Brown they 'took no action to appeal said Order as under the law at that time it could not be considered a final order since the Judgment merely stated that it was "a final Summary Judgment" and that there was no just reason for delay.' However, Brown provided that if the trial court failed to list the factors considered in certifying a judgment as final pursuant to Rule 54(b), the case would be remanded for the trial court to list the factors. The approach advocated in Brown was not reasonably subject to the construction that the court's order was not a final, appealable order because it lacked certain phraseology; in order for the case properly to be remanded, rather than the appeal's just being dismissed, the judgment would have to be one that would support an appeal. In Ex parte Pritchett, 812 So. 2d 1157 (Ala. 2000), this Court discussed the

> effect of Brown and noted that after the decision in Brown, 'the Court of Civil Appeals routinely remanded cases that did not meet the level of specificity required by Brown.' 812 So. 2d at 1158.
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> "In the present case, the 42-day period prescribed by Rule 4, Ala. R. App. P., for filing an appeal began to run on July 14, 1998, at the latest, the day the trial court entered its order nunc pro tunc, which, for the second time, expressly certified the partial summary judgment in favor of Creekside as to the fraud claim as final pursuant to Rule 54(b). Even if Creekside had not pointed out the untimeliness of the appeal of that ruling, '[i]t is the duty of this Court to take notice of the filing date of an appeal and, if finding the appeal to be untimely, to dismiss it ex mero motu. Stewart v. Younger, 375 So. 2d 428 (Ala. 1979).' Lewis v. State, 463 So. 2d 154, 155 (Ala. 1985). The Bagleys' notice of appeal, filed on April 29, 2002, almost four years after the partial summary judgment was last certified as final, is untimely as to that partial summary judgment and the Bagleys' appeal from that partial judgment is dismissed."

Bagley, 864 So. 2d at 315-17.

Also, in Lary v. Gardener, 908 So. 2d 955 (Ala. Civ. App. 2005), Lary sued Gardener, alleging negligence in connection with a motor-vehicle collision that damaged his vehicle. He also sued Farm Bureau, Gardener's automobile-liability insurance carrier, alleging that it had acted in bad faith by failing to investigate the collision and to pay benefits under Gardener's policy. Farm Bureau filed a motion to dismiss Lary's claims against it. On June 30, 2003, the trial court

entered a judgment in Farm Bureau's favor and directed the entry of a final judgment as to all claims against Farm Bureau pursuant to Rule 54(b), Ala. R. Civ. P. On April 12, 2004, the trial court entered a summary judgment in favor of Gardener, and Lary filed a notice of appeal on May 20, 2004.

On appeal, Lary attempted to challenge the judgment in favor of Farm Bureau and the Rule 54(b) certification with regard to those claims. The Court of Civil Appeals rejected those claims as untimely, holding:

> "Although Lary has asserted in his briefs to this court that that judgment, and the direction of the entry of a final judgment pursuant to Rule 54(b), were erroneous, his challenges are untimely because he did not file a notice of appeal with respect to that judgment within 42 days of its entry. See Bagley v. Mazda Motor Corp., 864 So. 2d 301, 315-17 (Ala. 2003) (holding that an appeal taken after the entry of a judgment disposing of all remaining claims and parties was ineffective to secure appellate review of a judgment entered pursuant to Rule 54(b) several years beforehand, despite the contention that the Rule 54(b) certification had been improper)."

Lary, 908 So. 2d at 957 n.1.

Both Bagley and Lary involved arguments that Rule 54(b) certifications were improper and invalid. Also, in both cases, the courts found that the Rule 54(b) certification could not be challenged at the conclusion of other proceedings

in the case because the appeals were untimely filed. Although the decision in Allen was the first time the Court of Civil Appeals referenced In re Lindsay, 59 F.3d 942 (9th Cir. 1995), it was not the first time that court had refused to hear an untimely appeal from a Rule 54(b) certification. Rather, that court's decision in Allen was supported by its previous decision in Lary and by this Court's decisions in Lewis and Bagley. Therefore, we reject Wallace's argument that he should not be bound by the holding in Allen.

In the alternative, Wallace argues that the rule adopted in Allen should be overturned or modified based on the facts of this case. Wallace also argues that the Allen opinion makes it clear that there is support for his argument that an appellate court should be able to review the propriety of a Rule 54(b) certification on an appeal from a judgment resolving the remaining claims in the case, and he urges us to follow Page v. Preisser, 585 F.2d 336 (8th Cir. 1978), rather than In re Lindsay. Although there may be some support for a different finding, in its opinion in Allen the Court of Civil Appeals clearly and concisely explained its reasons for "reject[ing] the rule announced in Page and, consistent with

Lary, embrac[ing] the holding in In re Lindsay." 60 So. 3d at 905. We agree with the Court of Civil Appeals' analysis of the policy considerations in Allen and with the conclusion that court reached in Allen.

> "The filing of a timely notice of appeal is a jurisdictional act. Lewis v. State, 463 So. 2d 154, 155 (Ala. 1985). 'A judgment certified by a trial court pursuant to Rule 54(b) is a final appealable judgment; the certification triggers the running of the 42-day appeal period.' 463 So. 2d at 155."

Painter v. McWane Cast Iron Pipe Co., 987 So. 2d 522, 529 (Ala. 2007).

> "An appeal shall be dismissed if the notice of appeal was not timely filed to invoke the jurisdiction of the appellate court."

Rule 2(a)(1), Ala. R. App. P. When the trial court enters a Rule 54(b) certification, there is a facially valid order from which the time for filing a notice of appeal starts to run.[4]

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[4]We note, as did the Court of Civil Appeals in Allen, 60 So. 3d at 904 n.3:

> "Of course, the time for appeal would be suspended by a timely filed postjudgment motion directed to the certified judgment, see Rule 4(a)(3), Ala. R. App. P. ('The filing of a post-judgment motion pursuant to Rules 50, 52, 55 or 59 of the Alabama Rules of Civil Procedure ... shall suspend the running of the time for filing a notice of appeal.'), and, therefore, in those circumstances, the time for appeal would expire upon the grant or

As the United States Court of Appeals for the Ninth Circuit noted in In re Lindsay: "A Rule 54(b) determination, right or wrong, starts the time for appeal running. This avoids uncertainty for counsel about when to appeal." 59 F.3d at 951. Any other interpretation would eviscerate Rule 54(b) and render it meaningless. Therefore, we reject Wallace's alternative argument.

Conclusion

For the reasons set forth herein, Wallace did not timely file his notice of appeal. Accordingly, we dismiss this appeal for lack of jurisdiction. See Rule 2(a), Ala. R. App. P. ("An appeal shall be dismissed if the notice of appeal was not timely filed to invoke the jurisdiction of the appellate court.").

APPEAL DISMISSED.

Malone, C.J., and Stuart, Parker, and Main, JJ., concur.

Murdock, J., concurs specially.

Woodall, Bolin, and Shaw, JJ., dissent.

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denial of the postjudgment motion."

MURDOCK, Justice (concurring specially).

I agree with the main opinion. I write separately first to offer in Part A below a rationale for the main opinion and for the authorities upon which it relies. Part B of this writing consists of additional authority and reasons in support of our holding today. Finally, in Part C, I comment upon the necessarily synonymous nature of finality for purposes of execution and finality for purposes of appeal.

A.

A court's authority to make a decision and the correctness of that decision are two different things. The authority to make a decision is not dependent upon the making of a correct decision. A court with authority to decide may err, but, unless the error is recognized and addressed pursuant to applicable procedures, including any temporal restrictions that are part of those procedures, the court's decision will stand.

Under our Rules of Appellate Procedure, the trial court is specifically given the authority to make an "express[] determination" as to whether there is any "just reason for delay" in making final an order that adjudicates at least one of, but less than all, the claims in an action. Rule 54(b),

Ala. R. Civ. P. The trial court may make a "correct" decision or an "erroneous" decision but, unless determined to be erroneous and reversed in accordance with established appellate procedures, the decision it makes will stand. This is the nature of the authority to decide.

In most cases, the grant of authority to a trial court to decide if there is "no just reason for delay" translates to a grant of authority to decide whether the claim being adjudicated is "so closely intertwined" with a claim that will remain pending "'that separate adjudication would pose an unreasonable risk of inconsistent results.'" See, e.g., Highlands of Lay, LLC v. Murphree, [Ms. 1110674, August 10, 2012] ___ So. 3d ___, ___ (Ala. 2012) (quoting Lighting Fair, Inc. v. Rosenberg, 63 So. 3d 1256, 1263 (Ala. 2010)), and the cases cited therein. This is a decision that requires the trial court to carefully assess the factual, as well as legal, issues involved in the respective claims and likewise assess the risk of inconsistent results if those claims are adjudicated separately. Id. Although it is a decision susceptible to judicial review for error, it is still a decision committed in the first place to the authority of the trial court.

If, then, a determination as to whether there is or is not a "just reason for delay" is one that is within the authority of the trial court, a decision by that court as to that issue is not "invalid and void" in the same way a decision is void when it is made in a circumstance in which the trial court has no authority to make it. The dissent is incorrect, therefore, to suggest that a trial court's determination as to whether there is any "just reason for delay" is "invalid" or "void." It may be incorrect and subject to reversal, but it is a decision that is within the power of the trial court to make, at least under the predicate circumstances described in Rule 54(b), i.e., where more than one claim is presented and the trial court has adjudicated the entirety of at least one of, but less than all, those claims.[5]

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[5]The predicate circumstances described in Rule 54(b) were not present in Page v. Preisser, 585 F.2d 336 (8th Cir. 1978), discussed in both the main opinion and the dissent. In Page, the appellate court was confronted with a situation where the trial court had attempted to certify as final not the adjudication of an entire claim, but a decision by the trial court as to the correctness of only one of several alternative "constitutional theories" proposed by the plaintiff in support of the only claim alleged in her complaint. As the Page court explained:

> "In her complaint in the District Court, Page sought to have certain Iowa regulations invalidated. She asserted alternative constitutional theories in

Professor Moore explains that it is a judgment "entered under the authority of Rule 54(b)" that "begins the running of time to appeal." 10 James William Moore Moore's Federal Practice § 54.26[1] (3d ed. 2012). Under such circumstances, according to Professor Moore, "[a]n aggrieved party must appeal a Rule 54(b) judgment within the time permitted by Appellate Rule 4(a) and may not seek review of the judgment after the remaining claims have been adjudicated." Id. Even more specifically, Professor Moore explains without equivocation as follows:

> "A Rule 54(b) judgment begins the running of the time to appeal regardless of the propriety of the entry of that judgment. In other words, whether or not the court abused its discretion in entering

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> support of her argument. Her complaint, however, arose out of a single transaction and asserted only a single claim. See Edney v. Fidelity & Guaranty Life Insurance Company, supra, 348 F.2d [136] at 138 [(8th Cir. 1968)]. As the Supreme Court has recently stated:
>
> > "'Rule 54(b) 'does not apply to a single claim action.'"

585 F.2d at 339 (quoting Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737, 743 (1976) (emphasis added)). This may point to a basis for distinguishing Page from the present case and the cases relied upon by the main opinion, see also note 9, infra, though it is not necessary to fully consider this possibility for purposes of this case.

> judgment is irrelevant to the parties' obligation to timely appeal."

Id. (emphasis added).

It is true that this Court and the Court of Civil Appeals repeatedly have acted ex mero motu when we or they have perceived error by the trial court in its decision that there was no "just reason for delay." See, e.g., Hammock v. Wal-Mart Stores, Inc., 8 So. 3d 939 (Ala. 2008); Watson v. Life Ins. Co. of Alabama, 74 So. 3d 470 (Ala. Civ. App. 2011). We have done so, however, because error by the trial court as to that decision would have meant that the underlying judgment presented on appeal could not in fact properly be considered final for purposes of its appealability. That is, we have found it necessary to address the "no just reason for delay" determination by the trial court, despite the absence of appropriate arguments in the briefs concerning it, because error in that determination would have implicated the jurisdiction of the appellate court to assess the merits of the underlying substantive judgment presented in the case. In those cases where we have reversed the trial court's "no just reason for delay" decision, we have never held that that decision -- although in error -- was beyond the authority or

the jurisdiction of the trial court. To the contrary, when we have found fault with that decision, we have done so on its merits and not on the ground that the decision was void. We have been able to review the "no just reason for delay" decision itself, on its merits, in each case because in each case that decision itself has been brought within the "bosom" of the appellate court in a timely manner. i.e., within the 42 day days from the entry of that decision itself.[6]

Our opinions to date and those of the Court of Civil Appeals, discussed in Part B below, therefore reflect the quintessentially and uniquely final nature of a Rule 54(b) decision, a decision that not only is intended as the final word of the trial court as to the claim it addresses but is in fact the act that imparts finality to an otherwise nonfinal adjudication of that claim. Ultimately, these opinions are entirely consistent with the fact that this is a determination

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[6]See generally Gollotte v. Peterbilt of Mobile, Inc., 582 So.2d 459, 463 (Ala. 1991) ("The entry of a final judgment made all rulings leading up to that judgment subject to appeal, and an appeal from that judgment allows the appellant to argue on appeal any alleged error at any point in the proceedings that led to that judgment."); Lewis v. State, 463 So. 2d 154, 155 (Ala. 1985) (recognizing that the 42-day period applicable to appeals from final judgments runs from the date of entry of the Rule 54(b) determination itself, not from the date of entry of the underlying judgment).

within the authority of the trial court, and moreover is one that contemplates no further action on the part of the trial court and that, therefore, is properly treated as a final judgment in and of itself.[7] It is for this reason that the

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[7]"A final judgment has been defined by the courts as one that 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" Moore's Federal Practice § 202.02 (3d ed. 2012) (quoting Catlin v. United States, 324 U.S. 463, 467 (1978)). See, e.g., Keith v. Truck Stops Corp., 909 F.2d 743, 746 (3d Cir. 1990) ("An order substantively changing a judgment constitutes a new judgment with its own time for appeal at least where the change is the subject matter to be reviewed."). See generally 15B Charles Alan Wright et al., Federal Practice and Procedure § 3916 (2d ed. 1992), quoting with approval from In re Farmers' Loan & Trust Co., 129 U.S. 206, 213 (1889), to explain as follows:

> "'[T]he doctrine that, after a decree which disposes of a principal subject of litigation and settles the rights of the parties in regard to that matter, there may subsequently arise important matters requiring the judicial action of the court in relation to the same property, and some of the same rights litigated in the main suit, making necessary substantive and important orders and decrees in which the most material rights of the parties may be passed upon by the court, and which, when they partake of the nature of final decisions of those rights, may be appealed from, is well established by the decisions of this court.'"

(The treatise also notes "the simple point that once the original trial proceedings have been completed, final judgment appeal should be available upon conclusion of most post-judgment proceedings" and that "[t]he finality requirement is met by orders entered after final judgment, too late or too collateral to be reviewed effectively on appeal from the final judgment, upon complete disposition of the

determination that there is no just reason for delay and that the underlying judgment should be final must be appealed, if at all, within the 42-day period for appealing final judgments prescribed by our rules.

B.

The well respected treatise, Federal Practice and Procedure, explains as follows:

> "The various purposes that may prompt entry of judgment under Rule 54(b) all suggest that the right to review should be lost if appeal is not taken within the ordinary appeal time rules as measured from the entry of judgment. Only this rule can achieve repose for a defendant, support prompt execution, and effectuate a purpose to conduct further proceedings with the knowledge that some matters are finally resolved or instead must be dealt with anew in light of the views of the court of appeals. And so it has been held that the right to review is lost."

15A Charles Alan Wright et al., Federal Practice and Procedure § 3914.7 (2d ed. 1992) (emphasis added; footnote omitted). The same treatise further states:

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post-judgment proceeding.") Compare State v. Chandler, 460 So. 2d 1302, 1305 (Ala. Civ. App. 1984) (explaining that an order denying collection of a prior judgment was itself a final, appealable judgment because it contemplated no further action by the trial court: "The denial of the motion to enforce the supersedeas bonds effectively terminated the State's efforts to collect its judgment from the sureties on the bond. It was a final judgment." (emphasis added)).

> "[Rule 54] does not require that a judgment be entered when the court disposes of one or more claims or terminates the action as to one or more parties. Rather, it gives the court discretion to enter a final judgment in these circumstances and it provides much-needed certainty in determining when a final and appealable judgment has been entered. ...
>
> "The requirement in Rule 54(b) that the court make an express determination that there is no just reason for delaying the review of a judgment on fewer than all of the claims or involving fewer than all of the parties in an action eliminates any doubt whether an immediate appeal may be sought. Conversely, it makes clear when an appeal must be sought or the right to appeal will be lost, since the time for appeal begins to run from the entry of an order that meets the requirements of the rule."

10 Charles Alan Wright et al., Federal Practice and Procedure § 2654 (3d ed. 1998) (emphasis added).

In Jacquot v. Rozum, 790 N.W.2d 498 (S.D. 2010), the South Dakota Supreme Court reviewed the same two federal appellate decisions noted in the main opinion: Page v. Preisser, 585 F.2d 336 (8th Cir. 1978), and In re Lindsay, 59 F.3d 942 (9th Cir. 1995), which reach opposite results. As the main opinion notes, in Lindsay the federal court of appeals held that "'[a] Rule 54(b) determination, right or wrong, starts the time for appeal running.'" ___ So. 3d at ___ (quoting Lindsay, 59 F.3d at 951).

The South Dakota Supreme Court, after discussing both Page and Lindsay, concluded that the better course is to require a party seeking to challenge a Rule 54(b) order to do so by a timely appeal after the entry of that partial judgment. In so doing it specifically relied upon Lindsay and one other case, the decision of our own Court of Civil Appeals in Allen v. Briggs, 60 So.3d 899 (Ala. Civ. App. 2010), quoting much of the passage from Allen that appears in the main opinion. See ___ So. 3d at ___. I find both Allen and the decision of the South Dakota Supreme Court to be well reasoned.

The dissenting opinion suggests that our "caselaw" is at odds with today's decision. It suggests that we should adhere to "long-standing practice found in our caselaw" and not "abandon our current practice." ___ So. 3d at ___. I find no reported Alabama "caselaw" at odds with our decision today, nor do I find any Alabama cases that heretofore have endorsed some "long-standing" or "current" practice different than that articulated by the main opinion today.

To the contrary, four Alabama precedents discussed in the main opinion indicate a "current" practice that is exactly

what is articulated in the main opinion. Two of these decisions were rendered by this Court and articulate a clear rule fully in accord with the holding in the main opinion. See the discussion in the main opinion of Lewis v. State, 463 So. 2d 154, 155 (Ala. 1985) ("A judgment certified by a trial court pursuant to Rule 54(b) is a final appealable judgment; the certification triggers the running of the 42-day appeal period."), and Bagley v. Mazda Motor Corp., 864 So. 2d 301, 317 (Ala. 2003) ("The Bagleys' notice of appeal, filed ... almost four years after the partial summary judgment was last certified as final, is untimely as to that partial summary judgment and the Bagleys' appeal from that partial judgment is dismissed."). ___ So. 3d at ___.

Moreover, two other Alabama appellate court opinions have expressly addressed challenges to the propriety of the Rule 54(b) certification itself and have held that the appellate court can address that issue only in the context of an appeal brought within 42 days of the certification. See Allen v. Briggs, 60 So. 3d at 903 ("Although Allen argues on appeal that a Rule 54(b) certification was not proper in this case, we have held that he is precluded from raising that

issue now, because, insofar as his appeal is from the summary-judgment order, his appeal comes too late, having been filed more than 42 days after the entry of the summary-judgment order on July 31, 2009." (emphasis added)); Lary v. Gardener, 908 So. 2d 955, 957 n.1 (Ala. Civ. App. 2005) ("Although Lary has asserted in his briefs to this court that [the certified] judgment, and the direction of the entry of a final judgment pursuant to Rule 54(b), were erroneous, his challenges are untimely because he did not file a notice of appeal with respect to that judgment within 42 days of its entry." (emphasis added)).[8]

The dissent also states:

> "[U]ncertainty as to the finality of a certified judgment still exists despite the rule expressed in the main opinion. Although a party must now immediately challenge an improper Rule 54(b) certification by appeal, nothing prevents the trial court from later recognizing that the claims

[8]Consistent with my own research, there is no mention in any of these four cases, including Allen, decided in 2010, of any precedents of this Court or of the Court of Civil Appeals ever approving of a "practice" of appellate-court review of the propriety of a Rule 54(b) certification as part of an appeal (a) that challenges subsequently entered judgments and (b) that is filed more than 42 days after the certification order. Furthermore, the only issue as to the overruling of prior precedent that exists in the present case is presented by Dr. Stephen L. Wallace, the plaintiff below, who finds it necessary to ask us to overrule Allen.

> disposed in the prior judgment are intertwined with remaining claims in the case and vacating that improvident certification."

___ So. 3d at ___. I believe that both the conclusion stated at the outset of this passage and the predicate for this conclusion stated in the last sentence misread the main opinion. As to the predicate notion that "nothing prevents the trial court from later recognizing that the claims disposed ... are intertwined with remaining claims," the whole point of our holding today is that the appeal must be taken from a judgment certified as final in the same way as an appeal must be taken from any other final judgment. When an appeal is not taken, that judgment becomes "final" and "res judicata" in the same sense as does any final judgment from which no appeal is taken. Having entered a final judgment finding that the adjudicated claim is not intertwined with remaining claims and that the adjudication of the claim is appropriate for certification, and no appeal having been taken from that judgment, the trial court is in fact prevented from later changing its mind and trying to undo what it has already made final. Such is the nature of a "final judgment."

Likewise, therefore, I disagree with the conclusion stated at the outset of the above-quoted passage, i.e., that

uncertainty as to the finality of a certified judgment "still exists." The straightforward requirement that a party take an immediate appeal from a judgment certified as final under the circumstances presented in this case creates certainty, not uncertainty.

In an attempt to support its position as quoted above, the dissent further asserts in a footnote that "[t]he main opinion addresses the issue in this case in terms of a waiver" and that, "[i]f the main opinion purports to hold that an improperly certified judgment, left unchallenged, is actually final, then the trial court would lose jurisdiction over the judgment after 30 days." ___ So. 3d at ___ n. 11. The dissent adds that this approach would "foreclose" an "avenue" that should be available to the losing party.

Again, I believe the dissent misreads the main opinion. The main opinion does indeed hold that a judgment as to the entirety of one of several claims in an action that is certified as "final" under Rule 54(b) is "actually final." That in fact is the very point of the main opinion, just as it is the point of the authorities upon which the main opinion relies. Of course, this also can be expressed as a "waiver." When someone forgoes their right to appeal any final judgment,

they can be said to have "waived" their right to appeal. Again, the straightforward requirement that a party must take an immediate appeal from a judgment certified as final under the circumstances presented in this case creates certainty; it forecloses no "avenue" not foreclosed following any final, unappealed judgment.

C.

Finally, it is important to acknowledge the synonymous nature of the finality of a Rule 54(b) judgment for purposes of execution and for purposes of appeal. The purposes and effects of a Rule 54(b) certification necessarily mean that an order certified as final under Rule 54(b) is final for all the same purposes as any other judgment and, accordingly, must be viewed as being "as final" as any other final judgment. 10 Charles Alan Wright et al., Federal Practice and Procedure § 2654 (3d ed. 1998), for example, states that "Rule 54(b) also is important because of the collateral effects of a determination under the rule." (Emphasis added.) The referenced "collateral effects" of a Rule 54(b) judgment are the same as those of any other judgment. As further explained in Federal Practice and Procedure:

> "Because Rule 54(b) provides a means of rendering a final judgment on part of a multiple-claim or multiple-party action, it has an effect on various other rules or procedures connected with the rendition of judgment. For example, as was stated earlier, once there has been a Rule 54(b) certification and a final judgment has been entered, the time for appeal begins to run. Similarly, preclusion principles are based on a final judgment so that since a Rule 54(b) order is viewed as final, it has binding effect. On the other hand, if no certificate issues, the court's decision or order remains interlocutory and the above effects will not take place.
>
> "Other matters that should be noted in relation to the entry of a judgment under Rule 54(b) are that it enables a lien to be imposed on the judgment debtor's property and a writ of execution to be issued to begin the process of collecting any damage[s] award. Section 1962 of Title 28 provides that every district-court judgment shall be a lien on the property in the state in which the court is sitting, in accordance with the law of that state; state law commonly requires a judgment to be final in order to create a lien.
>
> "Another effect of a Rule 54(b) order is on the accrual of interest on a judgment, since interest begins to accumulate only on a judgment that has become final."

10 Federal Practice and Procedure § 2661. Professor Moore likewise explains that a judgment certified as final under Rule 54(b) is a final judgment "for all purposes," specifically emphasizing its finality for purposes of the "running of time to appeal," as well as for purposes of "res judicata," the accrual of interest and "execution." See

Moore's Federal Practice § 54.26[1]-[4]. See also Redding & Co. v. Russwine Constr. Corp., 417 F.2d 721, 728 (D.C. Cir. 1969) ("[T]he role Rule 54(b) plays with reference to the finality of a judgment for purposes of appeal has implications as regards its finality for purposes of execution as well." (footnote omitted)).

The latter authorities, including the opinion of the United States Court of Appeals for the District of Columbia in Redding, point to the absolute unworkability -- "chaos" would be the right word in many cases -- of a scenario where a judgment as to a claim is certified as final and execution ensues (so that a money judgment is collected or a judgment deed to land is delivered), only to have the losing party decide years later that he or she should not so readily have acquiesced in the certified judgment and therefore choose to appeal an already executed judgment along with the judgment entered on the remainder of the claims in the case.[9] A judgment is either final or it is not. The law does not have

[9]This problem could not ensue from the certification of an order of the nature certified in Page. Where a court has merely expressed its view as to one of several elements of a claim or, as in Page, one of several alternative arguments made in support of a claim, there is no "order" or "judgment" in place capable of being relied upon or executed.

two types of finality, one brand of finality for purposes of being able to execute upon a judgment and another brand of finality for purposes of appealability. Finality for purposes of appeal and for purposes of execution are the same. "Enforcement of a judgment by execution ... presupposes a judgment which determines with finality the rights and liabilities of the parties." 30 Am. Jur. 2d Executions, Etc. § 57 (2005). See also, e.g., 2 Federal Procedure, Lawyer Edition § 3:133 ("Since an execution ordinarily issues only upon a final judgment, finality for purposes of execution and finality for purposes of appeal should be the same.").

A ruling by this Court that a defendant (or a plaintiff) can be told years after the entry of a judgment, certified as final by an authorized trial court order that was not appealed at the time by the opposing party, that that judgment was in fact not final and that a defendant who thought he could move on with his life may be forced back into the litigation (or that a plaintiff and the plaintiff's lawyer may be required years later to disgorge themselves of a monetary recovery, contingency fees, and expense reimbursements from a collected judgment, or to surrender land upon which construction may have since occurred) no doubt would be a source of real

consternation among the bench and the bar. Insofar as Rule 54(b) is concerned, such a ruling would take the "final" out of the word "final."

SHAW, Justice (dissenting).

I respectfully dissent. Except as otherwise provided by law, appeals lie only from final judgments. Gilbert v. Nicholson, 845 So. 2d 785, 790 (Ala. 2002) ("It is well settled that '[a]n appeal will not lie from an order or judgment which is not final.'" (quoting Robinson v. Computer Servicenters, Inc., 360 So. 2d 299, 302 (Ala. 1978))). This principle is not aspirational; it is statutory. See Ala. Code 1975, § 12-22-2 ("From any final judgment of the circuit court or probate court, an appeal lies to the appropriate appellate court as a matter of right ...."); John Crane-Houdaille, Inc. v. Lucas, 534 So. 2d 1070, 1073 (Ala. 1988) ("[Section 12-22-2] embodies our time-honored rule that a final judgment is an essential precondition for appealing to this Court.").

Except as otherwise provided by law, this Court does not have jurisdiction over a nonfinal judgment. Crutcher v. Williams, 12 So. 3d 631, 636 (Ala. 2008) ("'"The question whether an order appealed from is final is jurisdictional...."'" (quoting Hinson v. Hinson, 745 So. 2d 280, 281 (Ala. Civ. App. 1999), quoting in turn Powell v. Powell, 718 So. 2d 80, 82 (Ala. Civ. App. 1998))). This is because a nonfinal judgment is interlocutory and is subject to

change by a trial court, which retains jurisdiction over the remainder of the case. Miller v. Santiago, 642 So. 2d 446, 447 (Ala. 1994) ("However, because no final judgment had been entered in this case, all orders up to that point were interlocutory, and, therefore, subject to change."). Further, such a nonfinal, interlocutory judgment "does '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.'" Hallman v. Marion Corp., 411 So. 2d 130, 132 (Ala. 1982) (quoting Rule 54(b), Ala. R. Civ. P.).

A proper certification under Rule 54(b), Ala. R. Civ. P., will deem an otherwise nonfinal judgment as "final" for purposes of appellate jurisdiction. Sparks v. City of Florence, 936 So. 2d 508, 512 (Ala. 2006) ("Rule 54(b), Ala. R. Civ. P., confers appellate jurisdiction over an otherwise nonfinal order ...."). An improper Rule 54(b) certification, however, does not render a nonfinal judgment appealable, does not confer jurisdiction on this Court, and will not support an appeal. Dzwonkowski v. Sonitrol of Mobile, Inc., 892 So. 2d 354, 362 (Ala. 2004) ("'[T]he trial court cannot confer

appellate jurisdiction upon this [C]ourt through directing entry of judgment under Rule 54(b) if the judgment is not otherwise "final."'" (quoting Computer Servicenters, Inc., 360 So. 2d at 302)); Harlan Home Builders, Inc. v. Hayslip, 58 So. 3d 102, 108 n.3 (Ala. 2010)("[T]he summary judgment entered by the trial court was not a final judgment that was properly appealable to this Court at the time it was entered or at the time it was purportedly certified as final by the trial court; therefore, this Court acquired no jurisdiction over the purported appeal of that judgment."). Thus, if a Rule 54(b) certification is invalid and void, the judgment is nonfinal, and this Court will ex mero motu note our lack of appellate jurisdiction and dismiss the appeal. Dzwonkowski, 892 So. 2d at 362 ("'"When it is determined that an order appealed from is not a final judgment, it is the duty of the Court to dismiss the appeal ex mero motu."'" (quoting Tatum v. Freeman, 858 So. 2d 979, 980 (Ala. Civ. App. 2003), quoting in turn Powell v. Republic Nat'l Life Ins. Co., 293 Ala. 101, 102, 300 So. 2d 359, 360 (1974))). We do not address, ex mero motu, a mere mistake; we do, however, address, ex mero motu, the fact that a judgment is not final and that the Court lacks appellate jurisdiction.

Further, an improper Rule 54(b) certification is set aside not because of a technical default, but because of the risk of an inconsistent result between the judgment certified as final and the subsequent final judgment on the remaining claims. Schlarb v. Lee, 955 So. 2d 418, 419-20 (Ala. 2006) ("[A] Rule 54(b) certification should not be entered if 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."'" (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))). Such inconsistent results may prejudice both parties to the litigation.

I believe that our caselaw is consistent with the decision in Page v. Preisser, 585 F.2d 336, 338 (8th Cir. 1978):

> "It is clear that a district court's decision to issue a Rule 54(b) certificate is not conclusive. Appellate courts have broad reviewing power in determining whether a district court has properly applied the rule and correctly certified an appeal. See Schwartz v. Compagnie General Transatlantique, 405 F.2d 270, 274 (2d Cir. 1968); RePass v. Vreeland, 357 F.2d 801, 804-805 (3d Cir. 1966); 10 C. Wright & A. Miller, Federal Practice and

> Procedure § 2655 at 35 (1973). In most cases, however, unlike the present action, the party challenging the certification takes a timely appeal from the court's order. Our research has failed to disclose any cases specifically deciding whether a party who neglects to take a timely appeal from a district court's Rule 54(b) certification may challenge the propriety of that certification after the period of time for taking an appeal has expired; and if the certification is held to have been erroneous, whether the party may, in his appeal from the court's final judgment of the remaining claims, seek review of the district court's adverse decision on the substantive claim underlying the Rule 54(b) certification.
>
> "We hold that such challenges may be made; and when a district court erroneously certifies a claim as appropriate for immediate appeal under Rule 54(b), a party may raise that claim in a timely appeal from an adverse decision on the remaining claims in the lawsuit. While, technically, the period for taking an appeal begins to run from the time the district court enters final judgment pursuant to the Rule 54(b) certification, if the certification is erroneous, there is, in fact, no proper final judgment from which a party must appeal. Thus, if an action involving a single claim is incorrectly categorized by the district court as one involving multiple claims, a party ought not be precluded from raising the propriety of the court's certification in a timely appeal from an adverse judgment on the other claims in the lawsuit."

(Emphasis added.) An erroneous Rule 54(b) certification does not confer appellate jurisdiction on this Court; appellate jurisdiction exists only when a judgment is final, and an erroneous Rule 54(b) certification does not create a final judgment.

The main opinion reverses this long-standing practice found in our caselaw. Here, the Court holds that the aggrieved party's failure to appeal immediately from a faulty Rule 54(b) certification and the resulting unappealable, nonfinal judgment waives any future challenge to the improper certification. Thus, what was an erroneous, mistaken, invalid certification that would not confer appellate jurisdiction over the underlying judgment has become unassailable by the parties.

I see no need to abandon our current practice. The main opinion notes that the jurisdictional nature of a defective Rule 54(b) certification can raise problematic issues of certainty when an immediate appeal is not taken.[10] Specifically, the Court of Civil Appeals stated in Allen v. Briggs, 60 So. 3d 899 (Ala. Civ. App. 2010), that there existed uncertainty regarding the time in which to appeal. I see no uncertainty. Under our current practice, although a party can wait until a final judgment is entered, at which time all the claims in an action are disposed of, and then challenge the Rule 54(b) certification, if the certification

[10]These uncertainties are hypothetical--they are not at play under the facts of the instant case.

is upheld, then a challenge to the merits of the judgment previously certified as final under Rule 54(b) is untimely. Thus, to ensure that an appellate court can hear a challenge to the certified judgment, a prudent party must appeal. The proper course of action is certain; failure to appeal is a known risk the aggrieved party may accept.

Allen also notes another purported uncertainty arising out of our current practice, namely the uncertainty as to the finality of the certified judgment. In other words, although the certified judgment would appear final by virtue of the certification itself, such certification can be challenged and vacated when a final judgment disposing of all the claims in the action is entered, thus exposing the previously certified judgment to appellate review. But it cannot be said that the parties are unaware of such "uncertainty"; reliance on a certified judgment before the entire case is finished is yet another known risk the parties may elect to take.

In any event, the uncertainty as to the finality of a certified judgment still exists despite the rule expressed in the main opinion. Although a party must now immediately challenge an improper Rule 54(b) certification by appeal, nothing prevents the trial court from later recognizing that

the claims disposed in the prior judgment are intertwined with remaining claims in the case and vacating that improvident certification.[11]

Although the main opinion undertakes to cure the uncertainties identified in Allen, none of those uncertainties actually affect the instant case. But the problematic issue that does exist is the danger of an inconsistent result, which clearly occurred in this case. The main opinion, in an attempt to address uncertainties not at play, has enshrined the inconsistent judgments.

Both the uncertainties identified in the main opinion and the risk of inconsistent results can be alleviated if our often stated invitation to caution is heeded:

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[11]The main opinion addresses the issue in this case in terms of a waiver by the aggrieved party of any right to challenge the certification; it does not appear to hold that an improperly certified judgment, left unchallenged, is actually final. If the main opinion purports to hold that an improperly certified judgment, left unchallenged, is actually final, then the trial court would lose jurisdiction over the judgment after 30 days. See George v. Sims, 888 So. 2d 1224, 1227 (Ala. 2004) ("Generally, a trial court has no jurisdiction to modify or amend a final order more than 30 days after the judgment has been entered, except to correct clerical errors."). Such a holding, I submit, would further complicate our Rule 54(b) jurisprudence by often foreclosing the only remaining avenue available to address the possibility of inconsistent results, as discussed in Schlarb, supra.

> "This Court looks with some disfavor upon certifications under Rule 54(b).
>
> > "'It bears repeating, here, that "'[c]ertifications under Rule 54(b) should be entered only in exceptional cases and should not be entered routinely.'" State v. Lawhorn, 830 So. 2d 720, 725 (Ala. 2002) (quoting Baker v. Bennett, 644 So. 2d 901, 903 (Ala. 1994)....). "'"Appellate review in a piecemeal fashion is not favored."'" Goldome Credit Corp. [v. Player, 869 So. 2d 1146, 1148 (Ala. Civ. App. 2003)] (quoting Harper Sales Co. v. Brown, Stagner, Richardson, Inc., 742 So. 2d 190, 192 (Ala. Civ. App. 1999), quoting in turn Brown v. Whitaker Contracting Corp., 681 So. 2d 226, 229 (Ala. Civ. App. 1996)) (emphasis added).'"

Schlarb, 955 So. 2d at 419 (quoting Dzwonkowski, 892 So. 2d at 363). It is the improper issuance of a Rule 54(b) certification that creates uncertainty and inconsistent results; no uncertainty exists if the prior judgment remains uncertified and the trial court refuses to issue a certification when a certification is improper.

I believe that the main opinion trades the easily recognized "uncertainties" created by an erroneous Rule 54(b) certification for an increased "unreasonable risk of inconsistent results." Schlarb, 955 So. 2d at 419-20. I would apply the well settled principles that a judgment improperly certified under Rule 54(b) is not a final judgment,

Dzwonkowski, supra; that nonfinal judgments are interlocutory and subject to modification and change by the trial court, Miller, supra; and that a nonfinal judgment is generally not subject to appellate jurisdiction. Sparks, supra.

Bolin, J., concurs.