UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2333

SEPTEMBER TERM, 2014

JAMES DAVIS, *et al.*

v.

PATRICK JOHNSON

Eyler, Deborah S.,
Leahy,
Moylan, Charles E., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Eyler, Deborah S., J.

Filed: December 4, 2015

On May 1, 2013, in the Circuit Court for Prince George's County, Patrick Johnson, the appellee, filed a police brutality suit. In an amended complaint filed on July 3, 2013, he stated claims for assault, battery, and false imprisonment against Sergeant James Davis and Corporal Travis Rickert, the appellants, and against Corporal Julian Mitchell and Officer Darryl Jones (Counts I, II, and III); for violation of Article 24 of the Maryland Declaration of Rights, by use of excessive force or deprivation of liberty, against the four police officers and Prince George's County ("the County") (Count IV); for violation of Article 26 of the Maryland Declaration of Rights, by use of excessive force or deprivation of liberty, against the four police officers and the County (Count V); for violation of Article 26 of the Maryland Declaration of Rights, by unlawful search of his vehicle, against the four police officers and the County (Count VI); for intentional infliction of emotional distress against the four police officers only (Count VII); and for unlawful pattern and practice of violating the Maryland Declaration of Rights against the County only (Count VIII).

On May 31, 2013, the County moved to bifurcate the pattern and practice claim (Count VIII) for trial. It argued that it would be prejudiced if that claim were tried with the other claims. It asked the court to hold a trial on the claims made in Counts I through VII and, if the defendant officers were held liable on any of the constitutional tort counts, to then hold a trial on Count VIII. Johnson opposed the motion to bifurcate. By order entered on August 9, 2013, the circuit court granted the County's motion. The order states:

> [T]here shall be a separate second trial on Plaintiff's Count VIII for pattern and practice if there is a verdict returned in Plaintiff's favor on either his claim for violation of Article 24 by use of excessive force or deprivation of liberty, violation of Article 26 by use of excessive force or deprivation of liberty, or violation of Article 26 by unlawful entry and unlawful search.

The trial on Counts I through VII began on June 16, 2014. At the close of Johnson's case-in-chief, he voluntarily dismissed his claims against Mitchell and Jones. Immediately before the court instructed the jury, he voluntarily dismissed his claim for intentional infliction of emotional distress (Count VII) against Davis and Rickert.

On June 19, 2014, the jury returned a verdict against Davis and Rickert on Counts I through III, and against Davis, Rickert, and the County on Counts IV through VI. It awarded Johnson $160,000 in compensatory damages against Davis, Rickert, and the County, and $10,000 in punitive damages against Davis and Rickert. On July 3, 2014, the circuit court entered judgment on the verdict.

On July 18, 2014, Davis and Rickert filed notices of appeal. In this Court, Johnson moved to dismiss the appeal as not permitted by law. *See* Rule 8-602(a)(1). He argued that because all claims against all parties had not been disposed of, as required by Rule 2-602(a), there was no final judgment. In particular, he pointed out that the pattern and practice claim against the County (Count VIII) remained unresolved.

Davis and Rickert filed an opposition to Johnson's motion to dismiss the appeal. Recognizing that there was not a final judgment, they asked this Court to "enter a final judgment on its own initiative," under Rule 8-602(e)(1)(C). This Court did not do so, and

in an order entered on October 14, 2014, granted Johnson's motion to dismiss the appeal as not allowed by law.

Then, on October 28, 2014, in the circuit court, Davis and Rickert filed a "MOTION FOR ENTRY OF FINAL JUDGMENT," pursuant to Rule 2-602(b), asking the court to enter a final judgment as to them. As we shall discuss, that rule gives the circuit court discretion to certify a judgment as final "as to one or more but fewer than all of the claims or parties[.]" The motion stated that the verdict returned in the trial on Counts I through VI "did not dispose of all claims" and that "Defendants seek to appeal, but cannot pursue any appeal until a final judgment is entered on the verdict returned" in the trial on Counts I through VI. Davis and Rickert did not give any other reason in their motion to support their request that the court certify the judgments against them as final for purposes of appeal.

Johnson filed an opposition to the motion, pointing out that the bifurcation order directed that a trial on Count VIII be held after the trial on Counts I through VII, if the officers were held liable on any of the constitutional tort claims, and that certifying the judgments against Davis and Rickert as final only would allow piecemeal appeals that would result in unnecessary delay and duplicate proceedings.

On December 10, 2014, the circuit court entered an order granting Davis and Rickert's Rule 2-602(b) motion.[1] Its order stated that "the Court finds that there is no just

[1] There was no hearing held on the Rule 2-602(b) motion.

reason for delay" and "that final judgment is entered as to Defendants James Davis and Travis Rickert." The court did not give any reason for granting the motion and entering a final judgment against Davis and Rickert for purposes of appeal. On December 17, 2014, the circuit court entered an order staying the trial on the pattern and practice claim (Count VIII) against the County, pending appeal.

On January 9, 2015, Davis and Rickert filed notices of appeal to this Court.[2]

DISCUSSION

With some exceptions not relevant here, the right to take an appeal to this Court is governed by Maryland Code (1973, 2013 Repl. Vol.), section 12-301 of the Courts and Judicial Proceedings Article ("CJP"), which states that an appeal only may be taken from a "final judgment." *See American Bank Holdings, Inc. v. Kavanagh*, 436 Md. 457, 462-63 (2013). An order or other form of decision that does not adjudicate the rights and liabilities of all the parties to the action on all the claims asserted is not a final judgment. Md. Rule 2-602(a)(1). "It is a 'long-standing bedrock rule of appellate jurisdiction, practice, and procedure that, unless otherwise provided by law, the right to seek appellate review . . . ordinarily must await the entry of a final judgment that disposes of *all claims against all parties*.'" *USA Cartage Leasing, LLC v. Baer*, 202 Md. App. 138, 168 (2011)

[2] The notice of appeal states: "Defendants note an appeal to the judgment entered on December 10, 2014 (see attachment)." The attachment is the circuit court's December 10, 2014 certification order as to Davis and Rickert. Thus, notwithstanding the use of the word "Defendants," which would seem to include the County, an appeal was not noted by the County, as there was no certification of final judgment as to it. (The County did not file any brief in this appeal.)

(emphasis in original) (quoting *Silbersack v. ACANDS & S, Inc.*, 402 Md. 673, 678 (2008)).

Rule 2-602(b) is an exception to the final judgment rule. It reads, in pertinent part:

> If the [circuit] court expressly determines in a written order that there is no just reason for delay, it may direct in the order the entry of a final judgment . . . as to one or more but fewer than all of the claims or parties[.]

Circuit court judges are vested with discretion to decide whether a final judgment should be entered under this Rule because "they sit at the best vantage point from which to determine whether a particular claim warrants an exception to the general rule requiring the entry of a final judgment[.]" *Miller Metal Fabrication Inc., v. Wall*, 415 Md. 210, 221 (2010). The discretion to certify a final judgment under Rule 2-602(b) is to be exercised sparingly, however, and only in the "'very infrequent harsh case.'" *Silbersack*, 402 Md. at 679 (quoting *Diener Enters., Inc. v. Miller*, 266 Md. 551, 556 (1972)). The "appellate courts retain the authority to review a trial court's exercise of its certification power[.]" *Miller Metal*, 415 Md. at 222.

When granting a motion to certify a final judgment under Rule 2-602(b), the circuit court is not required to "set forth the basis for [its] determination of 'no just reason for delay[.]'" *Id.* at 226. Because the purpose of the final judgment rule is to prevent piecemeal appeals, and that is best accomplished when the court that certifies a final judgment under Rule 2-602(b) explains its reason for doing so, both this Court and the Court of Appeals have strongly encouraged circuit court judges to explain the reasoning that supports a finding of "no just reason for delay." *See Smith v. Lead Industries Ass'n,*

Inc., 386 Md. 12, 25 (2005) (holding the Court will not hesitate "to countermand the entry of judgment under Rule 2-602(b) and dismiss an appeal upon a finding that the trial court had not articulated a sufficient reason why there was no just reason for delay, sufficient to allow an immediate appeal"); *Canterbury Riding Condominium v. Chesapeake Inv., Inc.*, 66 Md. App. 635, 651 (1986) ("Although we stop short of adding any rigid requirement or 'precise rubric' when a trial judge certifies a case as final under Rule 2-602, we nonetheless find it more difficult to affirm the exercise of discretion where no reasons for that exercise are given."). In *Miller Metal*, the Court of Appeals held that a circuit court's failure to explain its reasoning affects the standard of review the appellate courts apply when deciding whether the certification was proper. If the circuit court declares that there is no just reason for delay, "but fails to articulate . . . the findings or reasoning in support thereof, the deference normally accorded such a certification is nullified." *Miller Metal*. 415 Md. at 227 (citations and internal quotations omitted). In that circumstance, the Rule 2-602(b) order "only will be a valid exercise of the trial court's discretion if the record clearly demonstrates 'the existence of any hardship or unfairness' sufficient to 'justify discretionary departure from the usual rule establishing the time for appeal.'" *Id.* at 228 (quoting *Diener*, 266 Md. at 555).

Usually, hardship or unfairness that will support a court's exercise of discretion to certify a final judgment under Rule 2-602(b) is found "when delaying an appeal will have a significant adverse economic impact on the party requesting certification." *Miller*

Metal, 415 Md. at 229. The *Miller Metal* Court made clear that a circuit court does not properly exercise its discretion to certify an otherwise non-final judgment as final when

> [t]he appellate court may be faced with having the same issues presented to it multiple times; the parties may be forced to assemble records, file briefs and records extracts, and prepare and appear for oral argument on multiple occasions; resolution of the claims remaining in the trial court may be delayed while the partial appeal proceeds, to the detriment of one or more parties and the orderly operation of the trial court; and partial rulings by the appellate court may do more to confuse than clarify the unresolved issues.

Id. (citing *Smith*, 386 Md. at 24–25).

Furthermore, as the *Miller Metal* Court explained, "when the pending claim, or claims, and the claim subject to appeal 'arise from a nexus of fact and law so intertwined that if we decide the one now, we may nonetheless face many of the same questions in determining the other later'" certification is not appropriate. 415 Md. at 229 (quoting *Bldg. Indus. Ass'n v. Babbitt*, 161 F.3d 740, 745 (D.C. Cir. 1998)). Also, when a circuit court has dismissed some but not all claims, the court's "preference for 'early review by the appellate court . . . [to] eliminate the necessity for a second trial in the event' of a reversal of those claims is not a proper basis upon which to rest a finding of 'no just reason for delay.'" *Miller Metal*, 415 Md. at 229 (quoting *Ebrahimi v. Huntsville Bd. of Educ.*, 114 F.3d 162, 168 (11th Cir. 1997)) (alteration in original).

In the case at bar, Johnson does not argue on appeal that the circuit court abused its discretion in certifying the judgments against Davis and Rickert as final, pursuant to Rule 2-602(b). Nevertheless, the Court of Appeals made plain in *Miller Metal* that the

issue not only is proper for us to raise on our own, it is an issue we need to raise and decide in order to assess whether to exercise appellate jurisdiction.

Miller Metal was a product liability action brought by two plaintiffs against two defendants, on a number of legal theories. The circuit court granted summary judgment in favor of one of the defendants on the various claims against it. It then entered a Rule 2-602(b) order certifying the judgment against that defendant as final. That defendant noted an appeal to this Court. In this Court, none of the parties challenged the propriety of the circuit court's Rule 2-602(b) order, and we did not raise the issue ourselves. We filed an unreported opinion reversing the summary judgment ruling in part and affirming it in part, on the substantive issues raised on appeal.

The Court of Appeals granted a petition for writ of *certiorari* on certain of the substantive issues decided by this Court, but did not reach any of them. Instead, it raised the question whether the circuit court had abused its discretion in certifying the summary judgment ruling in favor of one defendant as final under Rule 2-602(b), and ruled that it had. More specifically, for our purposes, the Court of Appeals held that this Court should not have exercised appellate jurisdiction, because the circuit court had abused its discretion in entering a final judgment under Rule 2-602(b). The Court explained:

> The propriety of the Circuit Court's Rule 2-602(b) certification was not among the questions upon which we granted certiorari. We nevertheless do not hesitate to consider the propriety of that certification because, though the precise Rule 2-602(b) issue presented by this case does not implicate the lack of appellate jurisdiction, it implicates the appellate court's exercise of its jurisdiction. We explain *infra* why the Court of Special Appeals should not have exercised appellate jurisdiction in this instance.

Miller Metal, 415 Md. at 220 n. 9. The Court went on to assess whether the circuit court had abused its discretion in certifying the summary judgment ruling in favor of one defendant as final, and in its mandate directed this Court to vacate the circuit court's Rule 2-602(b) order. Thus, it is clear that, in an appeal predicated on a judgment that is final only because it has been certified as such under Rule 2-602(b), it is incumbent upon this Court to decide whether the final judgment properly was certified and only to exercise appellate jurisdiction if it was.

As noted, in the case at bar, the circuit court gave no reason for its finding that there was "no just reason for delay," on which it entered a final judgment against Davis and Rickert. We owe no deference to the court in that finding; and the court's exercise of discretion to certify the judgments against Davis and Rickert as final only will be upheld if the record clearly demonstrates the existence of hardship or unfairness justifying a departure from the final judgment rule.

There is absolutely nothing in the record that demonstrates at all, let alone clearly, that Davis and Rickert will suffer any hardship or unfairness by waiting to pursue their appellate challenges to the judgments against them on Counts I through VI until after judgments are entered on Count VIII – at which time there in fact will be a final judgment. Indeed, there was no showing made of any anticipated "significant adverse economic impact."

Moreover, there are many reasons why it was not proper to enable a piecemeal appeal by certifying the judgments against Davis and Rickert as final. The issues they

raise on appeal can be raised in an appeal taken from a final judgment (*i.e.*, from the judgment entered after the bifurcated trial on Count VIII). No hardship or prejudice will result from all the issues pertaining to the judgments on all the counts being presented to this Court at one time. If the trial on Count VIII results in a judgment in favor of the County, then the single appeal will address all the issues that Davis and Rickert have raised, without the prospect of another trial from which a second appeal will be taken. And if the trial on Count VIII results in a verdict against the County, the County can challenge that judgment and the judgments against it on Counts IV, V, and VI, at the same time Davis and Rickert challenge the judgments against them on all the counts on which verdicts were returned in the first trial. Indeed, confusion will abound if this piecemeal appeal—taken by Davis and Rickert, and not the County—is permitted to proceed. On Counts IV, V, and VI, the County was held liable on a theory of vicarious liability. Yet, the court certified a final judgment as to Davis and Rickert only. If this Court were to address the issues raised by Davis and Rickert in this appeal and were to reverse, the County still would have a judgment against it on Counts IV, V, and VI, regardless of the outcome of the second trial on the pattern and practice claim. Should the County later appeal, conceivably it could raise the same issues that Davis and Rickert are raising now.

The claims against Davis and Rickert that were tried and on which judgments were entered are intertwined, factually and legally, with the remaining unresolved pattern and practice claim against the County. Allowing a piecemeal appeal will not promote

judicial economy; on the contrary. *See Tharp v. Disabled Am. Veterans Dept. of Md., Inc.*, 121 Md. App. 548, 566 (1998) ("Rule 2-602 seeks economy from the perspective of the appellate court, not from the perspective of the trial court."). The piecemeal appellate resolution of separate claims within a single action that the Court of Appeals has made clear is not proper, even when convenient for the trial court, is what the circuit court's Rule 2-602(b) certification accomplished in this case.

For all of these reasons, we conclude that the circuit court abused its discretion by certifying final judgments against Davis and Rickert pursuant to Rule 2-602(b). Accordingly, we shall decline to exercise jurisdiction over this appeal, and shall dismiss it.[3]

[3] There is another finality problem with this case. As discussed, during the trial, the court allowed Johnson to voluntarily dismiss all his claims against Mitchell and Jones, and his intentional infliction of emotional distress claim (Count VII). There was no discussion on the record as to whether the dismissals were with or without prejudice. A "Daily Sheet" dated June 18, 2014, signed by the presiding judge, and entered on the docket on July 3, 2014, identifies the following "Docket Entries":

> Plaintiff's Motion (short) to Dismiss Defendant's [sic] Julian Mitchell, and Darryl Jones – Granted
>
> Plaintiff's Motion (short) to Withdraw Count 7 [intentional infliction of emotional distress] – Granted.

The "Daily Sheet" does not state whether the dismissals were with or without prejudice.

When a trial court renders an oral pronouncement granting a motion to dismiss a party or claim, the pronouncement must be "set forth on a separate document" that states "that the issues have been fully adjudicated and that the court has reached a final decision." *Hiob v. Progressive Am. Ins. Co.*, 440 Md. 466, 486 (2014). *See* Rule 2-601(a) (requiring that the court's rendition of judgment be made in a "separate

(Continued…)

APPEAL DISMISSED. CASE REMANDED TO THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY WITH INSTRUCTIONS TO VACATE THE RULE 2-602(b) CERTIFICATION ORDER AND FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY THE APPELLANTS.

(…continued)
document"). In *Hiob*, the plaintiff filed a "line" voluntarily dismissing one of the defendants from the case. A docket entry was made of the dismissal but was not signed by the presiding judge and was "ambiguous as to whether a judgment [was] entered because it [did] not specify whether the dismissal [was] with or without prejudice, leaving open the possibility that the claim . . . was not resolved definitively." *Id.* at 500.

In the case at bar, the circuit court granted Johnson's motions to voluntarily dismiss Mitchell and Jones and to voluntarily dismiss the intentional infliction of emotional distress claim. To the extent that the "Daily Sheet" satisfies the separate document requirement, it does not state that the claims were voluntarily dismissed with prejudice; and there only would be a final judgment on those claims if the dismissal were with prejudice. Assuming that Johnson's intention was to voluntarily dismiss the claims against Mitchell and Jones, and the intentional infliction of emotional distress claim, with prejudice, a separate document, signed by the presiding judge, must be entered that states that the dismissals are with prejudice.