

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
JULY 17, 2008 Session

**CHRISTUS GARDENS, INC. v. BAKER, DONELSON, BEARMAN, ET AL.**

**Appeal from the Circuit Court for Davidson County  
No. 02C-1807 James L. Weatherford, Judge**

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**No. M2007-01104-COA-R3-CV - Filed August 15, 2008**

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This is an appeal from a legal malpractice lawsuit. Appellant sued law firm and lawyer for three instances of legal malpractice. On a motion for partial summary judgment, the trial court dismissed two of the three theories based upon the statute of limitations. *See* Tenn. Code Ann. § 28-3-104(a)(2). Appellant filed a motion asking the trial court to certify the Order dismissing the two theories as a final order, pursuant to Tenn. R. Civ. P. 54.02. The trial court granted the motion. Appellant appealed the Order dismissing its first two theories. We find that it was error for the trial judge to certify the Order granting partial summary judgment as a final order, under Tenn. R. Civ. P. 54.02. We vacate the judgment and remand the case for trial.

**Tenn. R. App. P. 3.; Judgment of the Circuit Court Vacated; and Remanded**

J. STEVEN STAFFORD, J., delivered the opinion of the court, in which ALAN E. HIGHERS, P.J., W.S., and HOLLY M. KIRBY, J., joined.

George H. Nolan, Nashville, TN, for Appellant

Robert J. Walker, Nashville, TN, for Appellees

Kathryn Hays Sasser, Nashville, TN, for Appellees

**OPINION**

**Facts and Procedural History**

This is an appeal from a legal malpractice lawsuit which arises out of a copyright infringement lawsuit filed against the plaintiff/appellant, Christus Gardens, Inc. (hereinafter, "Christus") by Ron Cotter (hereinafter, "Cotter"). Christus operates a tourist attraction and gift shop in Gatlinburg, Tennessee. The main attraction is a six-ton marble burial stone depicting the face of

Jesus Christ. Beginning in 1987, Christus' gift shop began selling book-end sized sculptures that resemble the burial stone, created by Cotter. Subsequently, Cotter received a Copyright Registration number for the sculpture, entitled "Miracle Face."

The lawsuit commenced after Cotter discovered that Christus was selling similar book-end sized sculptures created by other entities who had used Cotter's copyrighted sculpture to create a mold for their sculptures. In March of 1997, Cotter filed suit against Christus for copyright infringement in the United States District Court for the Eastern District of Tennessee. Christus retained the defendant/appellee, the law firm of Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C. (hereinafter, "Baker") to defend it in the Cotter lawsuit. Baker assigned the case to Stephen Anderson, a lawyer within the firm. The Cotter lawsuit was tried to a jury in April of 1999, and the jury found that Christus had willfully infringed on Mr. Cotter's copyright. The jury determined that, as a result of the infringement, Cotter was entitled to an award of damages in the amount of \$153,355.00, or, in the alternative, an award of statutory damages in the amount of \$100,000.00. On April 30, 1999, a Final Judgment was entered against Christus, awarding \$153,355.00 to Cotter.

Christus appealed to the United States Court of Appeals for the Sixth Circuit. On appeal, Christus argued that the \$153,355.00 award was excessive and that Cotter could not "reopen" his claim for statutory damages because he failed to make an election of statutory damages before the Final Judgment was entered. The Sixth Circuit remanded the case to the district court, and reversed the actual damages award for being excessive. The Sixth Circuit also held that Cotter could, on remand, elect statutory damages or have a new trial limited to the issue of actual damages. *See Cotter v. Christus Gardens, Inc.*, No. 99-5996, 2000 WL 1871698, at \*6 (6<sup>th</sup> Cir. Dec. 12, 2000).

On remand, the district court entered a Final Judgment against Christus in the amount of \$100,000.00. Christus filed a Motion for New Trial arguing that Cotter could only elect statutory damages after a new jury trial on both actual damages and statutory damages. The district court denied the Motion. Baker failed to file a timely Notice of Appeal with the Sixth Circuit Court of Appeals.

On June 24, 2002, Christus filed suit against the law firm, Baker, and Stephen Anderson, individually.<sup>1</sup> In its complaint, Christus alleged that (1) Baker failed to give appropriate advice regarding a prejudgment settlement in the Cotter suit, (2) Baker failed to inquire about the existence of insurance coverage applicable to the Cotter suit, and (3) Baker failed to file a timely notice of appeal after Cotter elected to receive statutory damages in the Cotter suit. Specifically, Christus alleges that Baker negligently stated, in writing, that Christus' exposure in the Cotter lawsuit was no more than a few thousand dollars, and that Baker negligently encouraged Christus not to accept a \$20,000.00 offer to settle the Cotter lawsuit. Additionally, Christus contends that Baker failed to investigate whether Christus had insurance coverage for copyright infringement, and that Baker negligently failed to perfect an appeal of the June 25, 2001 judgment entered against it.

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<sup>1</sup>Although both Baker and Anderson have been sued in the instant case, both are represented by the same counsel. For ease of reference, in this opinion, both parties will be collectively referred to as "Baker."

Baker moved for summary judgment on two of the Christus legal malpractice theories, the handling of prejudgment settlement negotiations and the failure to inquire about the existence of insurance coverage. Baker asserted that these theories were barred by the one-year statute of limitation applicable to legal malpractice claims. On October 14, 2003, the trial court entered an Order Granting Partial Summary Judgment. The trial court dismissed Christus' first two theories of recovery, pursuant to Tenn. Code Ann. § 28-3-104(a)(2). That partial summary judgment is the subject of this appeal.

Following the dismissal of the first two theories, Baker filed a Motion for Final Judgment on the Issue of Causation, asking that the trial court bifurcate the issue of whether the failure to file a timely notice of appeal caused Christus to suffer any damages from the issues of negligence and damages. On November 10, 2003, the trial court granted Baker's motion. Shortly thereafter, Baker filed a Motion for Final Judgment on the Issue of Causation, asking the trial court to dismiss Christus' claim that Baker's failure to file a timely Notice of Appeal caused Christus to suffer any damages. The trial court denied Baker's motion on March 11, 2004, finding that, based on current case law, an appeal from the district court's denial of Christus' motion for a new trial would have been successful.

Baker then filed a Motion for Permission to Take an Interlocutory Appeal and For Stay. *See* Tenn. R. App. P. 9(a) & (f). Christus did not oppose Baker's motion, but argued that if interlocutory review was granted, that review must also encompass the trial court's ruling of partial summary judgment. The trial court granted Baker's request for interlocutory appeal, but denied Christus' request, stating that "because the request made by Plaintiff was untimely and because the Order was premised upon well-settled law, the Court is of the opinion that such an appeal is inappropriate and declines to grant Plaintiff permission to pursue same."

On appeal, this Court affirmed the trial court's finding that Baker's failure to file a timely notice of appeal was a cause of harm to Christus. *See Christus Gardens, Inc. v. Baker, Donelson, Bearman, Caldwell*, 205 S.W.3d 917, 929 (Tenn. Ct. App. 2006). On April 10, 2006, Christus filed a Motion for the Entry of Final Judgment. In the Motion, Christus asked the trial court to certify its Order Granting Partial Summary Judgment as a final order pursuant to Rule 54.02 of the Tennessee Rules of Civil Procedure. Baker opposed the Motion, contending that the "more than one claim for relief" requirement of Rule 54.02 was not satisfied. On May 2, 2007, the trial court entered an Order Granting Plaintiff's Motion for Entry of Final Judgment. In its Order, the trial court stated:

The Court hereby expressly determines that there is no just reason to further delay an appellate review of this Court's dismissal of the Plaintiff's first two claims. The Plaintiff should not be required to try this case based upon its third legal malpractice claim without first determining whether its first two claims were dismissed correctly.

The Court finds that proceeding with an appellate review of the partial summary judgment ruling will not prejudice the Defendants because the subject partial summary judgment ruling will likely require appellate review at some point, and it makes sense for that review to occur now, before the case is tried, rather than later.

On May 18, 2007, Christus filed a Notice of Appeal, appealing the trial court's Order Granting Partial Summary Judgment.

### **Issues on Appeal**

On appeal, Christus raises one (1) issue in its brief:

Did the trial court err when it summarily dismissed the Plaintiff Christus Garden's legal malpractice claims? Specifically, did the trial court err when it granted partial summary judgment to the Defendants by dismissing Christus Garden's claims based upon the Defendants' negligent handling of certain settlement negotiations and based upon the Defendants' negligent failure to inquire about the status of the Plaintiff's liability insurance coverage?

Additionally, Baker raises the issue of whether the trial court properly designated the order granting partial summary judgment as a final judgment under Rule 54.02 of the Tennessee Rules of Civil Procedure.

### **Standard of Review**

We review a trial court's decision to grant a motion for summary judgment *de novo*, with no presumption of correctness. *Warren v. Estate of Kirk*, 954 S.W.2d 722, 723 (Tenn. 1997).

### **Discussion**

Before we can address whether the trial court erred in dismissing Christus' first two theories, we must first determine whether this matter is properly before us for appellate review. Rule 13 of the Tennessee Rules of Appellate Procedure provides that our "review generally extends only to those issues presented for review. [We] shall also consider whether the trial and appellate court have jurisdiction over the subject matter, whether or not presented for review." *See* Tenn. R. App. P. 13(b). We "cannot exercise jurisdictional powers that have not been conferred directly to [us] expressly or by necessary implication." *Tennessee Envtl. Council v. Water Quality Control Bd.*, 250 S.W.3d 44, 55 (Tenn. Ct. App. 2007) (citations omitted).

Tennessee Rule of Appellate Procedure 3(a) provides:

In civil actions every final judgment entered by a trial court from which an appeal lies to the Supreme Court or Court of Appeals is appealable as of right. Except as otherwise permitted in Rule 9 and in Rule 54.02 Tennessee Rules of Civil Procedure, if multiple parties or multiple claims for relief are involved in an action, any order that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties is not enforceable or appealable and is subject to revision at any time before entry of a final judgment adjudicating all the claims, rights, and liabilities of all parties.

Tennessee Rule of Civil Procedure 54.02 provides:

Multiple Claims for Relief. When more than one claim for relief is present in an action, whether as a claim, counterclaim, cross-claim, or third party claim, or when multiple parties are involved, the court, whether at law or in equity, 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. In the absence of such determination and direction, any order or other form of decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of the judgment adjudicating all the claims and the rights and liabilities of all the parties.

This rule is identical to Federal Rule of Civil Procedure 54(b). Therefore, the opinions of federal courts are persuasive authority in construing the finality provisions of the rule. *Bowman v. Henard*, 547 S.W.2d 527, 530 (Tenn. 1977). In the instant case, only two parties are involved, thus Rule 54.02 certification necessarily depends on the presence of multiple claims. *See Tucker v. Capitol Records, Inc.*, No. 2000-01765-COA-R3-CV, 2001 WL 1013085, at \*7 (Tenn. Ct. App. Sept. 6, 2001).

Baker argues that final judgment certification under Rule 54.02 of the Tennessee Rules of Civil Procedure was inappropriate because there is not “more than one claim for relief” at issue in this legal malpractice suit. Baker contends that Christus has only asserted one “claim for relief” against Baker, *i.e.* a claim for legal malpractice. Baker proposes that, while Christus has asserted various theories of legal malpractice, those multiple theories do not constitute more than one claim under Rule 54.

Christus argues that it was proper for the trial court's May 2, 2007 Order to be certified as a final judgment because each of Christus' claims are separate and distinct theories of recovery, which, if proven, would support a recovery against Baker.

The issue, then, is what constitutes a "claim" for purposes of Rule 54.02. In *Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. 737, 744 (1976) the United States Supreme Court found it unnecessary to precisely define "what constitutes a claim for relief under Rule 54(b) of the Federal Rules of Civil Procedure, stating that:

We need not here attempt any definitive resolution of the meaning of what constitutes a claim for relief within the meaning of the Rules. See 6 J. Moore, Federal Practice P P 54.24, 54.33 (2d ed. 1975). It is sufficient to recognize that a complaint asserting only one legal right, even if seeking multiple remedies for the alleged violation of that right, states a single claim for relief.

See *General Acquisition, Inc. v. GenCORP, Inc.*, 23 F.3d 1022, 1028 (6<sup>th</sup> Cir. 1994) (quoting *Liberty Mutual*, supra 424 U.S. at 742-743. The Sixth Circuit has defined the term 'claim', as used in the Federal Rules and in the Tennessee Rules, to denote "the aggregate of operative facts which give rise to a right enforceable in the courts" and has often been applied to cases involving Rule 54(b). *McIntyre v. First Nat'l Bank of Cincinnati*, 585 F.2d 190, 191 (6th Cir. 1978) (citing *Backus Plywood Corp. v. Commercial Decal, Inc.* 317 F.2d 339, 341 (2d Cir. 1963)); see also *Schwartz v. Eaton*, 264 F.2d 195, 196 (2d Cir. 1959) (providing that "[a]ll of the facts on which plaintiff relies constitute but a single transaction composed of a closely related series of occurrences. F.R. 54(b), which gives the district court the power to enter a final judgment covering only a part of the litigation before it, is applicable by its terms only to separate and distinct claims. It is \* \* \* thoroughly settled that such a claim is a set of facts giving rise to one or more legal rights, and that F.R. 54(b) cannot be used to appeal a part of a single claim or, as here, to test a single legal theory of recovery \* \* \*').

In this case the three 'causes of action' in the complaint present three different theories of legal malpractice against Baker for its alleged failure to properly defend Christus in the Cotter lawsuit. All three theories arise from an aggregate set of operative facts, namely, Baker's defense of Christus in the Cotter lawsuit. Accordingly, Christus' multiple incidents of legal malpractice are based upon a closely related series of occurrences. Thus, it was improper for the trial court to allow some of Christus' theories to be appealed, without disposing of all of them. See *General Acquisition*, supra, 23 F.3d at 1029.

We find that Christus has not stated multiple claims - it has offered alternative theories in pursuit of one recovery. See *General Acquisition*, supra, 23 F.3d at 1027-1029. The absence of

multiple claims or parties in this case renders the trial court without authority to certify the May 2, 2007 Order for immediate appeal under Rule 54.02 of the Tennessee Rules of Civil Procedure.

### **Conclusion**

The judgment of the trial court declaring its May 2, 2007 Order to be a final order under Tenn. R. Civ. P. 54.02 is vacated, and the case is remanded for trial. Because we conclude that this appeal was improvidently granted, we cannot address the merits of the dispute. Costs of the appeal are assessed to Christus Gardens, Inc., and its surety.

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J. STEVEN STAFFORD, J.