

REPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 523

September Term, 1995

Richard Shofer

v.

The Stuart Hack Company, et al.

Fischer,
Cathell,
Murphy,

JJ.

Opinion by Fischer, J.

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Filed: January 2, 1996

Richard Shofer appeals from three separate orders of the Circuit Court for Baltimore City. The three orders, entered by three different circuit court judges during three separate hearings over the course of four years, dismissed individual damage claims from Shofer's complaint against The Stuart Hack Company (Hack Co.) and Stuart Hack (Hack) personally. The circuit court, pursuant to Maryland Rule 2-602 (b), certified the three orders as final judgments so they could be directly appealed to this Court. In appealing the three orders, Shofer presents the following issues for our consideration, which have been reworded:

- I. Should the Court of Appeals decision in *Shofer v. Hack Co.*, 324 Md. 92 (1991) be modified on the issue of damages in light of developing case law subsequent thereto?
- II. Did the circuit court err in entering the three orders that limited Shofer's damages claims?
- III. Did the circuit court's orders constitute a violation of Shofer's right to due process pursuant to the United States Constitution and the Maryland Declaration of Rights?

We choose, however, to address the dispositive procedural question that neither party discussed in their briefs, but which we inquired about during oral argument:

- I. Did the circuit court err in certifying for appeal three interlocutory orders that were neither final judgments nor exceptions to the final judgment rule?

FACTS

This case is yet another stop on the never-ending litigational

odyssey otherwise known as *Shofer v. Hack Co.* Shofer is an automobile dealer who is the sole stockholder and president of Catalina Enterprises, Inc. (Catalina), which trades as Crown Motors. In 1971, Catalina adopted a pension plan that qualified under the Internal Revenue Code.

Hack is president of Hack Co., which coordinates and organizes pension plans for businesses. Hack Co. administered Catalina's pension plan. Hack provided professional assistance to Catalina, which included advice on tax issues.

A single event gave rise to Shofer's lawsuit. In 1984, Shofer asked Hack whether he could legally borrow money from the pension fund. Hack, in a letter, answered Shofer's question in the affirmative. Between 1984 and 1986 Shofer proceeded to borrow \$375,000 from his pension fund. Subsequently, Shofer's accountants informed him that he owed taxes on the money he borrowed from the pension fund. Shofer paid a total of \$120,428.19 in both federal and Maryland taxes and tax penalties.

After paying his taxes and tax penalties, Shofer sued Hack and Hack Co. in the circuit court. Shofer contended that Hack, as a pension consultant to Catalina, should have advised him about the potential tax consequences of borrowing money from the pension fund. After the circuit court dismissed Shofer's claim with prejudice, Shofer appealed to this Court. Before this Court heard the appeal, the Court of Appeals granted certiorari. The Court of Appeals held: (1) that the contract and tort claims based on

malpractice were not preempted by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1461 (1988); and (2) that the claim based on breach of duty was preempted by ERISA. The case was remanded to the circuit court for a trial on the remaining damages issues. *Shofer v. Hack*, 324 Md. 92 (1991).¹

This appeal involves three separate orders from three different circuit court judges resulting from a series of motions and answers filed by the parties following *Shofer I*.

Judge Thomas Ward's Order

After *Shofer I*, *Shofer* filed his Third Amended Complaint in the circuit court. *Hack* moved to dismiss certain damage claims from *Shofer's* complaint. Specifically, *Hack* sought to exclude the damage claims arising out of excise taxes, prohibited transactions, and possible disqualification of *Shofer's* pension. On February 17, 1991 Judge Ward, in accord with *Shofer I*, granted *Hack's* motion. Additionally, Judge Ward dismissed *Shofer's* claims for punitive damages and attorney's fees. In this appeal, *Shofer* challenges Judge Ward's rulings on the damages issues.

Judge Ellen Hollander's Order

Following Judge Ward's decision, and as discovery continued, *Shofer* filed a memorandum intended to supplement a previous answer to interrogatories. In the supplemental answer, *Shofer* revealed that he was seeking damages for additional taxes that might flow

¹ The Court of Appeals case will be referred to as *Shofer I*.

from a decision of the Internal Revenue Service that the loans constituted prohibited transactions, excise taxes on prohibited transactions, tax penalties arising out of his failure to follow proper procedures in borrowing from his pension, damages due to his inability to refinance his Virgin Islands property, lost salary, and lost business profits. Hack moved for summary judgment on the following grounds: (1) that Shofer's damage claims were unforeseeable, too speculative, or otherwise not recoverable; and (2) that on the whole, the Third Amended Complaint was preempted under *Mertins v. Hewitt Assoc.* ____ U.S. ____, 113 S. Ct. 2063 (1993). On July 11, 1994, Judge Hollander granted partial summary judgment for Hack and dismissed Shofer's damage claims. Judge Hollander did not grant summary judgment on the preemption issue. Shofer challenges the award of partial summary judgment in this appeal.

Judge Andre M. Davis' Order

Following Judge Hollander's order, Shofer filed new damage claims for loss of sheltered earnings and losses attributable to tax penalties and interest. Hack filed a motion to dismiss the new damage claims. Judge Davis granted Hack's motion to dismiss the damage claim for loss of sheltered earnings, but denied the motion on the tax penalties and interest. Shofer challenges the dismissal of the damage claim for loss of sheltered earnings in this appeal.

At a pretrial conference in the circuit court, Shofer announced that he planned to appeal the three previous orders

regardless of the result of the upcoming non-jury trial. Pursuant to Rule 2-602 (b), Judge Davis certified the three orders as final judgments so Shofer could directly appeal to this Court before the start of the trial on the merits. Subsequently, Shofer filed a timely appeal before this Court.

STANDARD OF REVIEW

It is this Court's duty to examine a circuit court's certification decision under Maryland Rule 2-602. *See Planning Bd. v. Mortimer*, 310 Md. 639, 648 (1987). If the certification was improper, the appeal will be dismissed. Certification under Rule 2-602 is a question of law. Accordingly, this Court will afford no deference to the trial judge's decision. *See Davis v. Davis*, 280 Md. 119, 124-126, *cert. denied*, 434 U.S. 939 (1977).

omplaint as a whole. Judge Ward's Order struck out certain damages sought by Shofer, but did not exclude Shofer from pursuing his cause of action for different types of damages. Judge Hollander's Order also struck out certain specific damages requested by Shofer, but ruled the complaint, as a whole, was still viable. Judge Davis' Order struck the damages claim for loss of sheltered earnings, but kept intact the damage claim for losses attributable to tax penalties and interest.

Not only did the certification of the three orders not dispose of an entire claim, it did not comply with Rule 2-602's requirement that there exist "no just cause for delay" with respect to hearing

an appeal. This Court examines four factors to determine whether "no just cause for delay" exists:

- a. Whether delay of an appeal would work some harsh impact, including economic impact, on the litigant;
- b. Whether there is a danger that the same issues will be considered in subsequent appeals;
- c. Whether disposition of the remaining claims might moot the need for an immediate appeal; and
- d. Whether entertaining an immediate appeal would require the appellate court to determine questions that are still before the trial court.

John A. Lynch, Jr. & Richard W. Bourne, *Modern Maryland Civil Procedure* § 11.2, at 808 (1993, 1994 Supp.) (citing *Canterbury Rid. Condo. v. Chesapeake Investors, Inc.*, 66 Md. App. 635, 651-654 (1986)).

In this case, Shofer's case does not meet the "no just cause for delay" burden. Our not hearing the appeal will have no additional "harsh impact" on Shofer. The disposition of the claims may render moot the need to address the damages issues on appeal. Finally, not only are these issues before the circuit court, there is a chance these very issues will be considered in a subsequent appeal following the circuit court's eventual decision.

Shofer's threat to appeal the three orders "no matter what the result of the upcoming non-jury trial" has no effect on this Court's decision not to accept jurisdiction of the appeal. Appellate jurisdiction is established by "constitutional provisions, statutory provisions, and rules; jurisdiction cannot be

conferred by consent of the parties," *Pearlstein*, 79 Md. App. at 48. This Court does not have jurisdiction to hear a case because one party wishes to appeal an interlocutory order adverse to its position. The role of this Court is not to furnish the Maryland Circuit Courts, or litigants before them, with advisory opinions. Our duty upon appellate review is to answer legal questions derived from a final judgment of a lower court.

This case illustrates the practical problem that can occur when trial judges remove, prior to trial, damage requests from claimants' causes of action. Where appropriate, trial judges can avoid this problem by presenting damage claims to the fact finder. After a decision on liability and damages, upon proper motion, the trial court can modify an award that is believed to be inconsistent with Maryland law. On appeal, if this Court disagrees with the trial judge's decision, then we can reinstate all or part of an award. This approach avoids the disjunctive yo-yo effect of multiple trials and multiple appeals, and might have alleviated some of the problems associated with this case.

This is not to say the trial judges should routinely submit all damage claims, regardless of their validity, to the fact finder. When appropriate, trial judges should strike invalid claims that might tend to confuse the fact finder (in the event the fact finder is a jury) or for which substantial evidence might need to be introduced that otherwise would be irrelevant or prejudicial. In those cases, however, where a reasonable possibility exists that

the claims have validity, a verdict should be obtained.

The circuit court's certification and Shofer's appeal in the case *sub judice* were counter productive to reaching a conclusion in the long, torturous trip of *Shofer v. Hack Co.* We have no choice but to remand this case for a trial on the remaining damage items.