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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2018-2019

2170988

Russell Williams

v.

Heather Rene Fann and Progressive Direct Insurance Company

2170989

Heather Rene Fann

v.

Russell Williams

Appeals from Jefferson Circuit Court
(CV-17-902114)

DONALDSON, Judge.

Our supreme court has consistently stated that certifications of judgments as final under Rule 54(b), Ala. R. Civ. P., are disfavored and should rarely be entered by trial courts. See Schlarb v. Lee, 955 So. 2d 418, 419 (Ala. 2006)("This Court looks with some disfavor upon certifications under Rule 54(b)."); and Baker v. Bennett, 644 So. 2d 901, 903 (Ala. 1994)(citing Branch v. SouthTrust Bank of Dothan, N.A., 514 So. 2d 1373 (Ala. 1987))("Certifications under Rule 54(b) should be entered only in exceptional cases and should not be entered routinely."). Furthermore, our supreme court has explained that a Rule 54(b) certification is not proper when certified claims present issues that are "intertwined" with claims that remain pending in the trial court or when "[r]epeated appellate review of the same underlying facts" is probable. Smith v. Slack Alost Dev. Servs. of Alabama, LLC, 32 So. 3d 556, 562 (Ala. 2009).

Russell Williams appeals from an order of the Jefferson Circuit Court ("the trial court") that, among other things, entered a partial summary judgment as to Williams's claim of wantonness against Heather Rene Fann. Fann cross-appeals that

same order insofar as it denied her motion seeking to strike certain evidence submitted by Williams and granted Williams's motion seeking to strike certain evidence submitted by Fann and Progressive Direct Insurance Company ("Progressive"). The trial court's order was certified as final under Rule 54(b). Because the order was interlocutory and not subject to certification as final under Rule 54(b), we dismiss these appeals as having been taken from a nonfinal judgment. See Moore v. Strickland, 54 So. 3d 906, 908 (Ala. Civ. App. 2010)(quoting Sexton v. Sexton, 42 So. 3d 1280, 1282 (Ala. Civ. App. 2010))("'Generally, an appeal will lie only from a final judgment, and if there is not a final judgment then this court is without jurisdiction to hear the appeal.'").

In May 2017, Williams filed a complaint in the trial court asserting claims of negligence and wantonness against Fann stemming from an automobile and bicycle collision. Additionally, Williams asserted a claim of negligence per se against Fann and a claim seeking underinsured-motorist benefits against Progressive.

On March 27, 2018, Fann and Progressive filed a joint motion for a partial summary judgment with supporting

documentation regarding Williams's claim of wantonness. On April 30, 2018, Williams filed a response in opposition to the motion for a partial summary judgment with supporting documentation. On May 3, 2018, Williams, on one side, and Fann and Progressive, on the other side, filed motions seeking to strike certain evidence the other side had submitted in support of, or in opposition to, the partial-summary-judgment motion.

On May 7, 2018, the trial court entered the following order:

> "[Williams's] Motion to Strike Investigating Officer Evidence in Support of [Fann and Progressive's] Motion for Partial Summary Judgment is GRANTED.
>
> "[Fann and Progressive's] Motion to Strike Evidence Submitted by [Williams] in Opposition to [their] Motion for Partial Summary Judgment is Denied.
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> "The Joint Motion for Partial Summary Judgment filed by the Defendants, Heather Fann and Progressive [Direct] Insurance Company, is GRANTED. [Williams's] wantonness claim is dismissed as a matter of law as there are no genuine issues of material fact in dispute.
>
> "Pursuant to Rule 54(b), [Ala. R. Civ. P.,] this Order is hereby made final as there is no just reason for delay."

Williams filed a notice of appeal to the supreme court on May 31, 2018. Fann filed a cross-appeal on June 18, 2018. On August 2, 2018, the supreme court transferred the appeals to this court pursuant to § 12-2-7(6), Ala. Code 1975. The appeals were submitted to this court on October 26, 2018.

The May 7, 2018, order did not dispose of all pending claims and, therefore, would support the appeals only if it was appropriately certified as final under Rule 54(b). See Carlisle v. Carlisle, 768 So. 2d 976, 977 (Ala. Civ. App. 2000)(citing Rule 54(b), Ala. R. Civ. P.; and Ex parte Harris, 506 So. 2d 1003, 1004 (Ala. Civ. App. 1987))("An order is generally not final unless it disposes of all claims or the rights and liabilities of all parties."). After reviewing the record, this court questioned the appropriateness of the Rule 54(b) certification. Whether a judgment was properly certified as final pursuant to Rule 54(b) and whether that judgment is sufficiently final to support an appeal are jurisdictional questions that this court may notice ex mero motu. Firestone v. Weaver, 245 So. 3d 590, 595-96 (Ala. 2017). This court asked the parties to submit letter briefs addressing whether

the May 7, 2018, order was appropriately certified as final under Rule 54(b).

Rule 54(b) permits a trial court to "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." As our supreme court has explained, however, Rule 54(b) certification is disfavored and should be rarely entered. "'Rule 54(b) certifications should be granted only in exceptional cases and "should not be entered routinely or as a courtesy or accommodation to counsel."'" Branch v. SouthTrust Bank of Dothan, N.A., 514 So. 2d at 1374 (quoting Foster v. Greer & Sons, Inc., 446 So. 2d 605, 610 (Ala. 1984), quoting in turn Page v. Preisser, 585 F.2d 336, 339 (8th Cir. 1978)). "'"'Appellate review in a piecemeal fashion is not favored.'"'" Dzwonkowski v. Sonitrol of Mobile, Inc., 892 So. 2d 354, 363 (Ala. 2004)(quoting Goldome Credit Corp. v. Player, 869 So. 2d 1146, 1148 (Ala. Civ. App. 2003), quoting in turn 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)(overruled on other grounds by Schneider Nat'l Carriers, Inc. v. Tinney, 776 So. 2d 753 (Ala. 2000))). See also Goldome Credit Corp. v. Player, 869 So. 2d 1146, 1148 (Ala. Civ. App. 2003)(quoting Brown v. Whitaker Contracting Corp., 681 So. 2d 226, 229 (Ala. Civ. App. 1996) (overruled on other grounds by Schneider Nat'l Carriers, Inc. v. Tinney, 776 So. 2d 753 (Ala. 2000))) ("[A] trial court should certify a nonfinal order as final pursuant to Rule 54(b) only 'where the failure to do so might have a harsh effect.'").

Moreover, a Rule 54(b) certification should not be made when remaining claims are "intertwined" with a claim disposed of in the interlocutory order. Slack Alost, 32 So. 3d at 562. Our supreme court has further explained that

> "'"[i]t is uneconomical for an appellate court to review facts on an appeal following a Rule 54(b) certification that it is likely to be required to consider again when another appeal is brought after the [trial] court renders its decision on the remaining claims or as to the remaining parties."'"

Id. at 562-63 (quoting Centennial Assocs., Ltd. v. Guthrie, 20 So. 3d 1277, 1281 (Ala. 2009), quoting in turn 10 Charles Alan Wright et al., Federal Practice and Procedure § 2659 (1998)).

Williams asserted, among other claims, claims of negligence and wantonness. Although a negligence claim and a wantonness claim are separate claims, both claims share common elements that must be proven. Our supreme court has explained:

> "To establish negligence, the plaintiff must prove: (1) a duty to a foreseeable plaintiff; (2) a breach of that duty; (3) proximate causation; and (4) damage or injury. Albert v. Hsu, 602 So. 2d 895, 897 (Ala. 1992). To establish wantonness, the plaintiff must prove that the defendant, with reckless indifference to the consequences, consciously and intentionally did some wrongful act or omitted some known duty. To be actionable, that act or omission must proximately cause the injury of which the plaintiff complains. Smith v. Davis, 599 So. 2d 586 (Ala. 1992).
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> "Proximate cause is an essential element of both negligence claims and wantonness claims. See Albert, supra; Smith, supra. Proximate cause is an act or omission that in a natural and continuous sequence, unbroken by any new independent causes, produces the injury and without which the injury would not have occurred. Thetford v. City of Clanton, 605 So. 2d 835, 840 (Ala. 1992). An injury may proximately result from concurring causes; however, it is still necessary that the plaintiff prove that the defendant's negligence caused the injury. Buchanan v. Merger Enterprises, Inc., 463 So. 2d 121 (Ala. 1984); Lawson v. General Telephone Co. of Alabama, 289 Ala. 283, 290, 267 So. 2d 132, 138 (1972)."

Martin v. Arnold, 643 So. 2d 564, 567 (Ala. 1994)(emphasis added).

As this court explained in Kirby v. Jack's Family Restaurants, LP, 240 So. 3d 607 (Ala. Civ. App. 2017):

> "Rule 54(b) certification is not proper when the unadjudicated claims 'are so closely intertwined [with those adjudicated in a judgment that has been certified as final so] that separate adjudication would pose an unreasonable risk of inconsistent results.' Branch v. SouthTrust Bank of Dothan, N.A., 514 So. 2d 1373, 1374 (Ala. 1987). Furthermore, Rule 54(b) certification is improper 'when at least some of the issues presented in the claims still pending in the trial court [are] the same as the issues presented in the claims addressed in the judgment on appeal and "'[r]epeated appellate review of the same underlying facts would be a probability in [the] case.'"' Lund[v. Owens], 170 So. 3d [691,] 696 [(Ala. Civ. App. 2014)](quoting Patterson v. Jai Maatadee, Inc., 131 So. 3d 607, 611 (Ala. 2013), quoting in turn Smith v. Slack Alost Dev. Servs. of Alabama, LLC, 32 So. 3d 556, 562 (Ala. 2009))."

240 So. 3d at 610-11.

In order to prevail on his pending negligence claim, Williams would be required to prove, among other elements, proximate causation and a resulting injury. Likewise, in order to establish wanton conduct, Williams would be required to prove proximate causation and a resulting injury. Because the negligence and wantonness claims require proof of some of the same essential elements, those claims are closely intertwined and there is a risk of inconsistent results if they are adjudicated separately. See Kirby, 240 So. 3d at 610-11. Furthermore, Williams would be required to rely on the same set of underlying facts to prove both his claim asserting

negligence and his claim asserting wantonness. "[T]here is more than a probability that accepting the trial court's Rule 54(b) certifications would require this Court to review the same facts again should it be presented with a future appeal (or appeals) after the pending claims are adjudicated...." Equity Tr. Co. v. Breland, 229 So. 3d 1091, 1100 (Ala. 2017). Accordingly, the May 7, 2018, order, insofar as it entered a partial summary judgment as to Williams's wantonness claim, was improperly certified as final under Rule 54(b), and, as a result, this court lacks jurisdiction to consider that ruling. See id.

As mentioned above, Fann has filed a cross-appeal challenging the trial court's May 7, 2018, order insofar as it denied her motion seeking to strike certain evidence and granted Williams's motion seeking to strike certain evidence. Williams asserts that Fann is precluded from appealing that portion of the order related to the trial court's evidentiary rulings. In support of his assertion, Williams argues that, because the trial court granted Fann and Progressive's motion for a partial summary judgment, Fann has not been prejudiced or aggrieved and that, as a result, she lacks standing to appeal. Although we agree that Fann's cross-appeal must be

dismissed, we reach that conclusion based on other reasoning.

This court has explained that a trial court's order ruling on evidentiary matters is an interlocutory order and is not a final decision on the merits of a pending claim that is subject to Rule 54(b) certification.

> "'Rule 54(b) certification has no purpose other than to make final a given adjudication which would otherwise be nonfinal by reason of, but only by reason of, the continued presence in the same suit of other undisposed ... claims or parties. Only a fully adjudicated whole claim against a party may be certified under Rule 54(b). See Liberty Mutual Ins. Co. v. Wetzel, 424 U.S. 737, 96 S.Ct. 1202, 1206, 47 L.Ed.2d 435 (1976).... If a purported Rule 54(b) certification of a ruling respecting a claim is not authorized by that rule, the certification is wholly ineffective....'
>
> "James v. Alabama Coalition for Equity, Inc., 713 So. 2d 937, 942 (Ala. 1997) (quoting Sidag Aktiengesellschaft v. Smoked Foods Products Co., 813 F.2d 81, 84 (5th Cir. 1987) (emphasis in original)).
>
> "The issues raised by the parties have not been adjudicated. Because the trial court erred in attempting to certify its evidentiary ruling as final pursuant to Rule 54(b), that certification order is due to be set aside. Fullilove v. Home Finance Co., 678 So. 2d 151 (Ala. Civ. App. 1996); Precision American Corp. v. Leasing Serv. Corp., 505 So. 2d 380 (Ala. 1987)."

Williams v. Fogarty, 727 So. 2d 831, 832-33 (Ala. Civ. App. 1999).

It is understandable that the parties may wish to have an appellate court review the May 7, 2018, order before the conclusion of the underlying action, but the jurisdiction of an appellate court cannot be conferred by agreement. "'[A] trial court cannot confer appellate jurisdiction upon [an appellate court] through directing entry of judgment under Rule 54(b) if the judgment is not otherwise "final."' Robinson v. Computer Servicenters, Inc., 360 So. 2d 299, 302 (Ala. 1978)." Dzwonkowski, 892 So. 2d at 362.

The portions of the May 7, 2018, order granting and denying the parties' respective motions to strike certain evidentiary submissions is not a final judgment capable of supporting an appeal, and, furthermore, the purported certification of that order as final pursuant to Rule 54(b) was ineffective. See Fogarty, 727 So. 2d at 833. Because the parties have appealed from a nonfinal order, we must dismiss the appeals. See Moore v. Strickland, 54 So. 3d at 908.

2170988 -- APPEAL DISMISSED.

2170989 -- CROSS-APPEAL DISMISSED.

Thompson, P.J., and Pittman, J., concur.

Thomas and Moore, JJ., concur in the result, without writings.