IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

TIRESE JOHNSON, et. al., Plaintiffs, v. PREFERRED PROFESSIONAL INSURANCE COMPANY, et. al., Defendants.	:	C.A. No: N13C-01-119 RBY
MASON E. TURNER JONES, JR., and PRICKETT, JONES & ELLIOTT, P.A., Third-Party Plaintiffs, v. KENNETH M. ROSEMAN; KENNETH ROSEMAN, P.A.; DANIEL MCCARTHY; MINTZER SAROWITZ ZERIS LEDVA & MEYERS, LLP; and PHYLLIS JAMES, M.D., Third-Party Defendants.	:	

Submitted: January 16, 2015
Decided: January 28, 2015

Upon Consideration of Defendants Mason E. Turner, Jr. and Prickett, Jones & Elliott, P.A.'s Motion for Entry of Final Judgment
DENIED

ORDER

Francis J. Murphy, Esquire, Murphy & Landon, Wilmington, Delaware for Plaintiffs.

William J. Cattie, III, Esquire, Rawle & Henderson, LLC, Wilmington, Delaware for Defendant Preferred Professional Insurance Company.

John A. Elzufon, Esquire, Elzufon Austin Tarlov & Mondell, P.A., Wilmington, Delaware for Defendant Michelle Montague.

Colm F. Connolly, Esquire, Morgan Lewis & Bockius, LLP, Wilmington, Delaware for Defendants/Third-Party Plaintiffs Mason E. Turner, Jr. and Prickett, Jones & Elliott, P.A.

Allison L. Texter, Esquire, Swartz Campbell, LLC, Wilmington, Delaware for Third-Party Defendants Kenneth M. Roseman and Kenneth Roseman, P.A.

Pro Hac Vice Jeffrey McCarron, Esquire, Swartz Campbell, LLC, Philadelphia, Pennsylvania for Third-Party Defendant Kenneth M. Roseman and Kenneth Roseman, P.A.

Kevin J. Connors, Esquire, Marshall Dennehey Warner Coleman & Goggin, Wilmington, Delaware for Third-Party Defendants Daniel McCarthy and Mintzer Sarowitz Zeris Ledva & Meyers, LLP.

Pro Hac Vice Eric A. Weiss, Esquire, Marshall Dennehey Warner Coleman & Goggin, Philadelphia, Delaware for Third-Party Defendants Daniel McCarthy and Mintzer Sarowitz Zeris Ledva & Meyers, LLP.

Leroy A. Tice, Esquire, Silverman, McDonald & Friedman, Wilmington, Delaware for Third-Party Defendant Phyllis James, M.D.

Young, J.

SUMMARY

In September of 2014, this Court dismissed Kenneth Roseman P.A. ("Roseman, P.A.") and Kenneth Roseman ("Roseman"), two of the Third-Party Defendants in this multi-party, multi-claim litigation. Third-Party Plaintiffs, and original Defendants, Mason E. Turner, Jr. ("Turner"), and Prickett, Jones & Elliott, P.A. ("PJE," and together with Turner, "Defendants") move for entry of final judgment of the order dismissing said Third-Party Defendants, so that an immediate appeal can be filed with the Delaware Supreme Court.

Defendants have failed to establish the two criteria permitting entry of final judgment: (1) that Defendants face a substantial hardship or injustice in the delay of the appeal; and (2) that judicial administration will be furthered, or, alternatively, unburdened by such an Order. The purported prejudice claimed by Defendants is no greater than that faced by any party which sustains a ruling against it. By contrast, given the expansive and onerous nature of this suit, an immediate appeal to the Supreme Court will serve only to delay already prolonged proceedings with potentially unnecessary appellate review. Therefore, the Court **DENIES** this motion.

FACTS AND PROCEDURE

The factual circumstances giving rise to the present litigation are voluminous. Succinctly stated, Turner, a former partner at PJE, is alleged to have withheld damaging evidence in his defense of Michelle Montague ("Montague"), a Physician's Assistant and Defendant in a prior medical negligence suit. Tirese Johnson ("Plaintiff"), who was also the Plaintiff in the aforementioned suit, seeks

recourse for these litigation misdeeds. The suit currently before the Court is against Turner, Montague, and Preferred Professional Insurance Company ("PPIC"), the insurer involved in the original medical negligence suit.

The medical negligence suit stemmed from incidents occurring in July of 2006, when Plaintiff was four-years old. Plaintiff's mother, LeToni Wilson ("Wilson"), brought him to be examined by Montague under the supervision of Phyllis James, M.D. ("Dr. James") at New Castle Family Care ("NCFC"). Plaintiff was examined by Montague and Dr. James for jaundice, and both professionals made notes of their time with Plaintiff. Following the examination, neither Montague nor Dr. James ordered medical tests. When Plaintiff's condition worsened, Wilson contacted Montague, who did not order tests or further treatment. Plaintiff was taken to Christiana Hospital and diagnosed with kernicterus, a condition that results in brain damage from jaundice.

Dr. James examined Plaintiff while he was at Christiana Hospital, determining that he had suffered permanent brain damage as a result of jaundice. Although it is disputed whether these revisions were "alterations" or "additions," both Dr. James and Montague made changes to their original diagnostic notes, following developments in Plaintiff's health. These changes are purported to have been made in order to conceal the mis-diagnosis. Plaintiff instituted a medical negligence suit initially against Dr. James, and later added Montague as a Defendant. The result of that lawsuit was a verdict against Dr. James in the

amount of $6,250,000.[1] Montague had been dismissed from the lawsuit prior to that verdict. Montague was represented in that lawsuit by Turner and PJE.

Turner's litigation conduct in the medical negligence suit is the center of the present lawsuit. Plaintiff alleges that Turner, although being given copies of both the original and revised diagnostic notes, never produced the potentially damaging evidence to the opposing party. By this suit Plaintiff seeks, pursuant to Superior Court Civil Rule 60(b), to vacate the judgment in the medical negligence suit.[2] In addition, Plaintiff seeks damages resulting from the improper litigation conduct of Montague, Turner, and PPIC.

On March 24, 2014, Defendants filed a Third-Party Complaint against Mintzer, Sarowitz, Zeris, Levda & Meyers, LLP ("MSZLM"), Roseman, P.A., Roseman, and Dr. James. Roseman, P.A. and Roseman, were counsel to Plaintiff in the original medical negligence suit. MSZLM represented Dr. James. Defendants' Complaint alleges that Roseman, P.A. and Roseman committed professional negligence in representing Plaintiff, and thus, potentially owe Defendants contribution for the harm alleged in Plaintiff's Complaint. Defendants further allege that MSZLM committed professional negligence in representing Dr.

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[1] Following the medical negligence suit, Dr. James instituted a lawsuit ("the Bad Faith Case") against his counsel Mintzer, Sarowtiz, Zeris Ledva & Meyers, LLP and Preferred Professional Insurance Company. This case was eventually settled.

[2] Following the entry of judgment in favor of Montague, Plaintiff's attorney discovered evidence of the undisclosed medical notes, and sought to vacate the judgment. The trial court denied that motion, and on appeal the Supreme Court affirmed that ruling.

James, which was a contributing cause in the purported harm to Plaintiff. The same contribution theory is applied to Dr. James. On September 25, 2014, this Court granted Roseman, P.A.'s and Roseman's Motion to Dismiss. Defendants seek entry of final judgment of this Order.

STANDARD OF REVIEW

Pursuant to Superior Court Civil Rule 54(b), the Court may, at its discretion, enter final judgment upon one or more claims, in a multi-claim litigation, where it determines that "there is no just reason for delay."[3] Stated succinctly, such a finding requires that "(1) the action involves multiple claims or parties; (2) at least one claim or the rights and liabilities of at least one party has been finally decided; and (3) that there is no just reason for delaying an appeal."[4] In reviewing motions for entry of final judgment, the Court must weigh the "judicial administrative interests," against the possibility of "some danger of hardship or injustice which would be alleviated by immediate appeal."[5] Importantly, the Court must keep in mind "that excessive resort to [Rule 54(b)] will increase the already sizeable burden of appellate dockets..."[6] Therefore, the discretionary entry of final judgment is to be done "sparingly."[7]

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[3] *Curtiss-Wright Corp. v. Gen. Elec. Co.,* 446 U.S. 1, 8 (1980).

[4] *In re Tri-Star Pictures, Inc. Litig.*, 1989 WL 112740, at *1 (Del. Ch. Sept. 26, 1989).

[5] *Id.* (internal quotations omitted).

[6] *Id.*

[7] *Id.*

DISCUSSION

Recognizing, no doubt, the infrequent grant of Rule 54(b) motions, Defendants posit their situation as a dire one. Defendants bolster their claim by citation to the Delaware Supreme Court's holding in *Ikeda v. Molock*,[8] which they suggest is controlling in the case at bar. The impetus behind Defendants' current motion is this Court's September 25, 2014 Order, dismissing Third-Party Defendants Roseman, P.A., and Roseman from the suit. Defendants argue for entry of final judgment of this Order, as without it, they claim that they will suffer great injustice and hardship. Specifically, Defendants contend that they will be prejudiced by not having the jury apportion a degree of fault to the recently dismissed Third-Party Defendants. The *Ikeda* case is presented as support for the position that lacking the ability to apportion fault is a hardship deserving the entry of final judgment.[9]

Defendants additionally put forward that not only do they face a grave inequity in having to proceed in this Court without a potential joint tortfeasor, but further, that the issues on appeal will be discrete enough to meet the necessities of judicial economy. Defendants argue that, if this issue is presented on appeal, the voluminous facts comprising this case will not need to be reviewed by the Supreme Court. Only three arguments are said to be involved in the desired appeal and can, Defendants

[8] 603 A.2d 785 (Del. 1991).

[9] 603 A.2d at 785 ("[c]learly, the filing of a cross-claim is a pre-requisite to the apportionment of liability based on the relative degrees of fault between joint tort-feasors").

assert, be considered without resort to the greater essence of this lawsuit.[10]

Both Plaintiff and former Third-Party Defendants Roseman, P.A. and Roseman oppose Defendants' motion. The Court addresses these oppositions together as they overlap in substance. The core of both arguments is that judicial economy will not be served by granting Defendants' motion. Defendants' contribution claim against the dismissed Third-Party Defendants is said to be both a contingent claim, and intertwined with the facts underlying Plaintiff's claim against Defendants. Indeed, the apposing parties point out that the need for the contribution claim rests largely upon the outcome of Plaintiff's claim against Defendants. Plaintiff Roseman, P.A., and Roseman dispute the notion that Defendants' appeal will be focused on discrete issues. Instead, it is asserted that the bulk of the case, with all its intricacies, will be placed before the Supreme Court, if it were to consider Defendants' appeal. This is argued to be against the sparing discretion courts are to apply in entering final judgment.

Roseman, P.A. and Roseman further question whether Defendants will suffer the requisite hardship and injustice, called for by the Rule 54(b) analysis, absent the entry of final judgment. Citing *In re Tri-Star, Inc. Litig.*, the former Third-Party Defendants remark that the inability to apportion fault is plainly

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[10] Defendants' Motion for Entry of Final Judgment, at p. 4, n.1 ("First, the Court erred in holding that a contribution claim cannot be sustained if 'the legal relationship between plaintiffs and all defendants against whom contribution is asserted is not the same'"; "Second, the Court erred in basing its decision on its finding that 'the Third Party Complaint incorporates by reference the allegations of the First Amended Complaint'"; "Third, the Court erred in creating an exception for lawyers from the scope of DUCATA").

lacking from the examples provided by the *Tri-Star* Court, as constituting the inequity calling for immediate appeal.[11] In the presence of the judicial administration considerations, the alleged prejudice to Defendants is argued to be insufficient.

The Court must consider two elements[12] in deciding whether to enter final judgment: (1) the hardship or injustice suffered by the moving party in the absence of the final judgment; and (2) the interests of judicial administration and judicial economy.[13] In essence, this determination concerns whether there is "just reason" for delay.[14] Courts have further stressed that entry of final judgment is to be done

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[11] 1989 WL 112740 at * 2 n. 2 ("*Bank of Lincolnwood v. Federal Leasing, Inc.*, 622 F.2d 944, 951 (7th Cir. 1980) (delay in entry of final judgment would prevent execution on that judgment); *United Bank of Pueblo v. Hartford Acc. & Indem. Co.,* 529 F.2d 490, 492-493 (10th Cir. 1976)(delay pending defendant's third-party claim would deprive plaintiff of difference between statutory pre-judgment interest rate and the prime rate); *T.S.I. 27, Inc. v. Berman Enter., Inc.,* 115 F.R.D. 252, 256 (S.D.N.Y. 1987) (granting Rule 54(b) motion because delay in payment of judgment would jeopardize ability of plaintiff corporation to survive); *Prudential Ins. Co. v. Curt Bullock Builders, Inc.*, 626 F.Supp. 159, 169 (N.D. Ill. 1985) (granting Rule 54(b) motion because defendant's precarious financial condition might jeopardize plaintiff's ability to collect if judgment were not entered); *Republic Nat'l Bank of New York v. Sabet*, 512 F. Supp. 416, 430 (S.D.N.Y. 1980) (granting Rule 54(b) motion where delay deprived plaintiff of difference between market rate of interest and rate set in note on which it sued), *aff'd without op.*, 681 F.2d 802 (2d Cir.), cert. denied, 456 U.S. 976, 102 S.Ct. 2241 (1982)").

[12] None of the parties dispute that the present litigation involves multi-claims or that the court's Order dismissing third party defendants was final as to those defendants.

[13] *Sequa Corp. v. Aetna Cas. & Sur. Co.,* 1992 WL 207251, at *1-2 (Del. Super. Ct. Aug. 7, 1992).

[14] *Curtiss-Wright Corp.,* 446 U.S. at 8.

cautiously and frugally.[15] As such, the potential prejudice to movant must be severe.[16] The Court addresses each consideration in turn.

To begin, the Court is not of the opinion, despite Defendants' assertion otherwise, that *Ikeda* governs the analysis of Defendants' hardship. Defendants cite *Ikeda* for the proposition that a "cross-claim is a prerequisite to the apportionment of liability based upon the relative degrees of fault between joint-tortfeasors."[17] The Court understands this argument, by analogy, to imply that impleader is likewise a prerequisite to the apportionment of fault. Even accepting this proposition, however, the Court does not find that *Ikeda* requires the entry of final judgment in this situation.

It is significant that *Ikeda* had nothing to do with Rule 54(b). Indeed, the Supreme Court's review of the lower court's decision involved the determination of whether the trial court had abused its discretion in not allowing the Defendant to file a cross-claim.[18] The Supreme Court reasoned that as the apportionment of fault was central to the Defendant's argument, determining that the trial court should have provided Defendant with the opportunity to file the cross-claim.[19] The

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[15] *Tri-Star*, 1989 WL 112740 at *1.

[16] *Sequa Corp.*, 1992 WL 207251 at *2 (requiring hardship to comprise "exceptional circumstances" and be "compelling enough" to enter final judgment).

[17] 603 A.2d at 785.

[18] *Id.*

[19] *Id.*, at 787.

Ikeda situation is inapposite to the one Defendants face in this case. Unlike the *Ikeda* trial court, this Court *did* allow the Defendants to file a Third-Party Complaint against Roseman, P.A. and Roseman. The ultimate adjudication of the propriety of that Third-Party Complaint not in Defendants favor does not, under *Ikeda*, or any other Delaware authority for that matter, mean Defendants should have the right of immediate appeal to the Supreme Court. As this Court reads *Ikeda*, Defendants had only to be afforded their day in Court – which they irrefutably were.

The next part of this Court's analysis requires looking at the purported injustice to be suffered by Defendants, as opposed to the interests of judicial administration. Lacking the support of *Ikeda*, Defendants' portrayal of their hardship is unpersuasive. Although Defendants, from their perspective, may be at a disadvantage going forward in the apportionment of fault, this is a result of developments in this litigation. This Court dismissed Roseman, P.A. and Roseman based upon consideration of the legal argumentation presented by the parties to this dispute – including Defendants. That the Third-Party Defendants are no longer in the litigation to be apportioned fault, is because of an adjudication of the contribution claim. As Plaintiff points out, the sole fact that a Motion to Dismiss was granted as to one claim in the litigation does not, *ipso facto*, call for immediate appeal.[20]

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[20] *See e.g., Caldwell-Baker Co. v. Southern Illinois Railcar, Co.*, 209 F.R.D. 649, 650 (D. Kan. 2002) (Rule 54(b) appeal order granting motion to dismiss against all but one defendant in multi-defendant case was not appropriate).

A review of the situations examined by the *Tri-Star* Court, concerning when a hardship is severe enough to warrant entry of final judgment, also does not persuade the Court to grant Defendants' motion. The cases cited by the *Tri-Star* Court almost all have a glaring similarity: the party was faced with some impending, exigent situation, external to the litigation, which necessitated expedient review by a higher court.[21] This is simply not the case in the present matter. The alleged hardship faced by Defendants is within this litigation: who the jury will have before it at trial. There are no external forces which may have an impact on their claim. The Defendants will have ample opportunity, albeit at a later time, to appeal this Court's Order dismissing Roseman, P.A. and Roseman, upon the resolution of all the claims in this litigation. In fact, depending on the outcome of the suit, Defendants' contribution claim may not even be warranted.

The potential for Defendants' contribution claim to evaporate, depending upon the result of this litigation, also impacts upon this Court's determination not to "increase the already sizable burden of appellate dockets."[22] Although

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[21] *See e.g., United Bank of Pueblo,* 529 F.2d at 492-493 (motion granted because plaintiff's recover was contingent of the difference between statutory pre-judgment interest rate and the prime rate - both fluctuating, *external* factors over which neither plaintiff, nor the court had control); *T.S.I. 27, Inc.,* 115 F.R.D. at 256 (granting Rule 54(b) motion because delay in payment of judgment would jeopardize ability of plaintiff corporation to survive - again an *external* circumstance); *Republic Nat'l Bank*, 512 F. Supp. at 430 (granting Rule 54(b) motion where delay deprived plaintiff of difference between market rate of interest and rate set in note on which it sued).

[22] *Tri-Star*, 1989 WL 112740 at *1; *see also Interstate Power Co. v. Kansas City Power*, 992 F.2d 804 (8th Cir. 1993) (reversing lower court's entry of final judgment of contribution claim where outcome of main action could moot the judgment entered).

Defendants assert that their appeal will focus on only three discrete and independent issues, the Court finds it incredulous that the Supreme Court will not be forced to "pour over the facts and issues of this entire case..."[23] Prior to the present action, the facts and circumstances surrounding Plaintiff, and his relationship to the various actors in this saga, spawned not one, but two lawsuits. For the Supreme Court even to begin to consider the merits of Defendants' contribution claim, which is against Third-Party Defendants who were *also* involved in the two previous suits, it will have to familiarize itself not only with a flood of ponderous facts, but further, the relationships among all the players.

Not any less important is the fact that Defendants' dismissed claims were contributory in nature. Former Third-Party Defendants Roseman, P.A. and Roseman persuasively point to case law which has held that the entry of final judgment on contributory claims is inappropriate where principal claims remain unresolved.[24] Although this case law is largely extra-jurisdictional, and deals with the Federal Rule 54(b), the Court finds it instructive, following the lead of the Delaware Supreme Court,[25] to review Federal courts' interpretations of comparable Federal Rules of Civil Procedure. These courts' reasonings were

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[23] *Republic Env't Sys., Inc. v. RESI Acquistion (Del) Corp.*, 1999 WL 464521, at *7 (Del. Super. Ct. May 28, 1999).

[24] *Factory Mut. Ins. Co. v. Bobst Group USA, Inc.,* 392 F.3d 922, 924 (7th Cir. 2004); *Corrosioneering, Inc. v. Thyssen Envt'l Sys., Inc.,* 807 F.2d 1279, 1284 (6th Cir. 1986) ("by its nature indemnity is collateral to and dependent upon a finding of liability").

[25] *See e.g., Hoffman v. Cohen*, 538 A.2d 1096, 1097-98 (Del. 1988).

largely motivated by the conclusion that "it makes little sense for an appellate court to address contribution when the subject may be made academic by the outcome of the trial."[26] Defendants argue that, by not granting their motion, this Court runs the risk of having the Supreme Court face the burdensome facts of this entire case. The Court finds the opposite to be true. The Court may, in fact, be preserving the strained judicial resources of the Supreme Court by denying Defendants' motion. Defendants' dismissed claim, by its very contingent nature, may not ultimately require resolution. It would be a great waste of the appellate court's time to delve into this issue, only to have the matter mooted.

The Court finds ample just reason to delay Defendants' appeal. As an initial matter, the purported hardship to be suffered is no greater or lesser than any other litigant's who has had a court rule against him. When compared to the interests of judicial economy, any alleged prejudice to Defendants is dwarfed by the potential strain on the Supreme Court in having to hear the appeal. The Defendants neatly couch their appeal into three concrete questions, but realistically, given the how this suit and the two before it have developed, it is highly unlikely that the Supreme Court would face only those three issues. The Court notes the disjunction in Defendants' claim that judicial economy will be preserved by these three, independent questions, but their hardship is great given the centrality of these questions to their case.

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[26] *Factory Mut. Ins. Co.,* 392 F.3d at 924; *see also Sequa Corp.*, 1992 WL 207251 at *2 ("[t]he possibility that future developments could moot the need to review the issues that are the subject of a Rule 54(b) motion is one factor to be considered in evaluating judicial interests").

CONCLUSION

For the foregoing reasons, the Court **DENIES** Defendants' Motion for Entry of Final Judgment.

IT IS SO ORDERED.

/s/ Robert B. Young
J.

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