QUAN-EN YANG,	*	IN THE
On His Own Behalf and on Behalf Of All Others Similarly Situated,	*	CIRCUIT COURT
	*	FOR
Plaintiffs,	*	MONTGOMERY COUNTY, MD
v.	*	Case No. 403885V
G & C GULF, INC. d/b/a G&G TOWING, *et al.*,	*	TRACK VI
	*	Hon. Ronald Rubin
Defendants.		Specially Assigned
	*	

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RESPONSE TO DEFENDANT GLENN W. CADE, JR.'S MOTION FOR ENTRY OF FINAL JUDGMENT PURSUANT TO MARYLAND RULE 2-602(b)

Plaintiff Quan-En Yang ("Dr. Yang") hereby responds to the Motion for entry of Final Judgment Pursuant to Maryland Rule 2-602(b) filed by Defendant, Glenn W. Cade, Jr. ("Mr. Cade"). For the reasons set forth more fully herein, the Order at issue cannot be certified under Rule 2-602(b), and the motion, therefore, must be denied.

BACKGROUND

On January 4, 2016 Mr. Cade filed a Consent Motion to Sever and for Separate Trial pursuant to Maryland Rule 2-503, which the Court granted: "ORDERED, that the said CONSENT MOTION TO SEVER AND FOR SEPARATE TRIAL be and the same is hereby GRANTED."

On March 31, 2016, Mr. Cade filed a motion for summary judgment only on Mr. Cade's liability for the individual claims of Dr. Yang.

On May 3, 2016, the Court granted Mr. Cade's motion (the "Summary Judgment Order"): "ORDERED, that judgment be and the same is hereby granted in favor of Defendant Glenn W.

Cade, Jr., and against Plaintiff Quan-En Yang on all Counts of the second amended complaint." During the course of the hearing on May 3rd, counsel for Mr. Cade acknowledged that there was no final judgment (Tr. p. 35, lines 3-5), but alerted the Court that he likely would file a motion to certify the summary judgment as a final judgment. (Tr. p. 30, lines 19-20).

On June 7, 2016, Mr. Cade filed the contemplated motion for entry of a final judgment. The motion, made pursuant to Maryland Rule 2-602(b), relies entirely on *dicta* in a Court of Appeals decision, *Smith v. Lead Industries Assoc., Inc.*, 386 Md. 12 (2005). After tacitly acknowledging the limitations in which a circuit court may certify an order as a final judgment, Mr. Cade argues that the Court can do so in this case because the summary judgment order pertains to "a severed claim against a severed defendant."

ARGUMENT

The present motion must be denied on three grounds: (1) Rule 2-602(b) is inapplicable in the present circumstance because Dr. Yang (the aggrieved party) is not seeking an immediate appeal from the summary judgment order; (2) the Court did not sever Dr. Yang's claims against Mr. Cade into a separate action; the Court only severed them for separate trial under Rule 2-503; and (3) there is just reason to delay entry of final judgment until all issues by and against all parties are resolved.[1]

A. The Purpose of Rule 2-602(b) is to Avoid Piecemeal Appeals and Facilitate Early Appeals Only in Rare Cases; Neither of Which Would be Advanced by Granting the Present Motion

The present motion is offered pursuant to Maryland Rule 2-602. The Rule, which is modeled after Rule 54(b) of the Federal Rules of Civil Procedure, is intended to facilitate ***when***

[1] Although Dr. Yang opposes Mr. Cade's Motion, he is not entirely unsympathetic towards Mr. Cade's request. Of course Mr. Cade would want a final end to his participation in this lawsuit. Nonetheless, Dr. Yang does not believe that such a request can be granted under the Rules.

appellate jurisdiction arises in the Maryland appellate courts, and more specifically to prevent piecemeal appeals and avoid the confusion, delay and expense caused by having two or more appeals in the same case. *Picking v. State Fin. Corp.*, 257 Md. 554, 557 (1970); *Parish v. Maryland & Va. Milk Producers Ass'n*, 250 Md. 24, 98 (1968). Section (a) of the Rule defines the attributes of orders or other forms of decisions that constitute final judgments. Any order or decision that does not dispose of all claims and all parties is not a final judgment, and can be revised at any time before entry of a judgment that adjudicates all claims by and against all parties. Md. Rule 2-602(a).[2] Section (b) establishes a limited exception within the discretion of a circuit court to direct that an order in a multi-party/multi-claim case be a final judgment, and states in pertinent part:

> (b) If the court 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:
>
> (1) as to one or more but fewer than all of the claims or parties;

It is clear from the interaction of the two sections of the Rule that the limited exception in section (b) pertains to accelerating the attachment of appellate jurisdiction to allow an early appeal, and should be exercised only in rare instances to avoid injustice. *See* P. Niemeyer, L. Schuett, J. Smithey, *Maryland Rules Commentary 4th Ed.*, Rule 2-602 at 641 (Matthew Bender & Co. 2014)("Only in limited circumstances, and only then when the court, in its discretion, determines that the policy of piecemeal appeal outweighs factors that favor waiting for an appeal of the entire case, does the rule permit a trial court to enter a judgment as to part of a case by making the determination in accordance with this rule."). This was made abundantly clear in *Doe v. Sovereign Grace Ministries, Inc.*,

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[2] As discussed more fully *infra* in Section B, Maryland appellate courts (with specific limited exceptions) have jurisdiction to hear appeals only from final judgments. *Addison v. Lochearn Nursing Home, Inc.*, 411 Md. 251, 261 (2009).

217 Md. App. 650, 665 (2014), *quoting, Canterbury Riding Condominium v. Chesapeake Investors, Inc.*, 66 Md. App. 635, 643-44 (1986)(emphasis added):

> The Rule [2-602(b)] is intended
>
> > To deal with the infrequent harsh case, ... to facilitate the entry of a judgment upon one or more claims or as to one or more parties, in a multiple-claim or multiple-party action, before the final adjudication of the entire case. ***It makes available, where appropriate, an immediate appeal. It seeks to avoid the possible injustice that might result from a delay in entering judgment until the final resolution of all claims.***
>
> *Id.* at 641, 505 A.2d 858. *See also Diener Enters., Inc. v. Miller*, 266 Md. 551, 556, 295 A.2d 470 (1972)(Rule 2-602(b) is to be reserved for "the very infrequent harsh case."); *Silberback v. ACandS, Inc.*, 402 Md. 673, 679, 928 A.2d 855 (2008)(same).

Under the circumstances of the present case, there is no basis for invoking the limited exception of Rule 2-602(b). Mr. Cade, the party seeking final judgment pursuant to Rule 2-602(b), is the prevailing party. He won his summary judgment motion, and therefore, cannot appeal the Court's decision. *See e.g., Paolino v. McCormick & Co.*, 314 Md. 575, 579 (1989)("[A]n appeal or cross appeal is impermissible from a judgment wholly in a party's favor."); *Offut v. Mont. County Bd. of Educ.*, 285 Md. 557, 564 n. 4 (1979)("It is established as a general principle that only a party aggrieved by a court's judgment may take an appeal and that one may not appeal or cross-appeal from a judgment wholly in his favor."). Dr. Yang, who is the only party aggrieved by the summary judgment order, is neither seeking certification under Rule 2-602(b), nor interested in appealing the Court's decision at this time. The very limited exception to the final judgment rule embodied in Rule 2-602(b) is not applicable under the present circumstances.

B. *Smith v. Lead Industries Assoc., Inc.* Does Not Support Mr. Cade's Motion

Mr. Cade argues that entry of a final judgment is appropriate here because: (1) Dr. Yang's individual claim against Mr. Cade is "a severed claim against a severed defendant;" and (2) *dicta* in *Smith v. Lead Industries Assoc., Inc.*, 386 Md. 12 (2005) provides for certification as final in that circumstance. Neither argument is correct.

In *Smith*, the Court of Appeals determined that an order of the circuit court could not have been certified under Rule 2-602(b) because to do so would have split a single claim. *Smith*, 386 Md. at 24. In *dicta*, the Court noted that perhaps the result would have been different if the circuit court had "severed [one party] entirely . . . ." *Id.* It is on this sliver of *dicta* that Mr. Cade relies, asserting that Dr. Yang's claim against Mr. Cade was severed entirely by the Court. Mr. Cade is incorrect.

In January, when Mr. Cade filed the Consent Motion to Sever and for Separate Trial, he did so pursuant to "Maryland Rule 2-503" which states in pertinent part:

> (b) In furtherance of convenience or to avoid prejudice, the court, on motion or on its own initiative, may order a separate trial of any claim, counterclaim, cross-claim, or third-party claim, or of any separate issue, or of any number of claims, counterclaims, cross-claims, third-party claims, or issues.

In his motion, Mr. Cade specifically quotes this section of the Rule and argues in support of the motion based on the criteria set forth in the Rule (*i.e.*, convenience and to avoid prejudice). The Court's Order states "that the said CONSENT MOTION TO SEVER AND FOR SEPARATE TRIAL be and the same is hereby GRANTED."

"Rule 2-503(b) permits severance of claims or issues within an action ***for separate trials, not the mutation of one action into two or more separate actions.***" *Blades v. Woods*, 338 Md. 475, 479 (1995)(emphasis added). In contrast, the complete severance of a claim and party is governed by Rule 2-213, and the considerations to be reviewed in connection with such a severance

into an entirely separate case are different than the considerations to be reviewed in connection with a 2-503(b) severance for trial purposes. *See Kennedy v. Lasting Paints, Inc.*, 404 Md. 427, 453-54 (2008)(reviewing differing considerations for severance under 2-213 and 2-503(b)). Indeed, the Court of Appeals, in *Smith* – the case on which Mr. Cade relies – determined that the effect of ordering separate trials under 2-503(b) "maintain[ed] the action as a unitary one." 386 Md. at 17. In fact, in *Smith*, the trial court highlighted the difference between a 2-213 severance into separate cases, and a 2-503(b) severance for trial purposes – the court ***denied*** a motion for severance into separate cases, and ***instead*** permitted separate trials under 2-503(b). *See id.*

In short, Dr. Yang's claim against Mr. Cade was not completely severed into a separate case, and *Smith* does not support certification of the Summary Judgment Order as a final judgment under Rule 2-602(b).

C. There is Just Reason to Delay Entry of Final Judgment

Even if it were appropriate to apply Rule 2-602(b) in this circumstance, and the Summary Judgment Order could be certified as a final judgment, there is just reason to delay entry of final judgment until the conclusion of the case. In order to certify and order as a final judgment, the Court must make an express finding that there is "no just reason for delay." *Tyrone W. v. Danielle R*, 129 Md. App. 260, 271 (1999), *aff'd sub nom. Langston v. Riffe*, 359 Md. 396 (2000). Moreover, the Court must expressly articulate the reasons and factors underlying its decision. *Maryland-National Capital Park & Plan. Comm'n v. Smith*, 333 Md. 3, 6 (1993).

Mr. Cade has offered no basis to support the conclusion that there is no just reason for delaying final judgment until the end of the case. To the contrary, the Court alluded to significant reasons for delaying entry of final judgment during the hearing on May 3, 2016. At the hearing, the following exchange took place between the Court and counsel for Mr. Cade:

MR. EINHORN: Okay. That raises another issue.

> THE COURT: What's that?
>
> MR. EINHORN: And I would probably be filing a motion to certify this as a final judgment.
>
> * * *
>
> THE COURT: There are two cases by the Court of Special Appeals that might give me pause. And it always worries me in this context of the doctrine of bar and merger and how that would show up unexpectedly maybe. I'll have to look at it. But go ahead and file it.

(Tr. p. 30, line 17 - p. 31, line 16).[3]

Now that the motion has been filed, the Court was right to be hesitant to enter final judgment while the remaining claims and parties are pending. Currently pending is a Third Amended Complaint which added a defendant Class that includes nearly 600 Class members, some or all of whom may wish to assert cross-claims against Mr. Cade as well. It is unclear what effect if any, intended or unintended, a prior final judgment may have on such claims. *See e.g. Kreyhsig*, 225 Md. at 426 (parent's petition to change name of minor child dismissed as barred by *res judicata* based on final judgment in custody case where name change was not actually litigated).

There is risk of unintended and unexpected consequences from entering final judgment before all claims by and against all parties are resolved. That risk constitutes just cause to delay entry of final judgment until the end of the litigation. Conversely, there is little if anything to be gained from certifying the Summary Judgment Order as final. The primary benefit and reason for Rule 2-602(b), to make an order that is final in the traditional sense immediately appealable, is not in play. No appeal can nor will be taken at this time. Accordingly, the motion pursuant to Rule 2-

[3] It is unclear if these are the cases to which the Court referred, but two decisions in 2015 from the Court of Special Appeals involved the defense that a claim was barred by prior final judgment: *Kreyhsig v. Montes*, 225 Md. App. 418 (2015); *Davis v. Wicomico County Bureau of Support Enforcement*, 222 Md. App. 230 (2015).

602(b) must be denied. In short, this is not one of the infrequent harsh cases, justifying early entry of final judgment.

WHEREFORE, Dr. Yang requests that the Court deny the motion, and grant such further relief as justice demands.

Respectfully submitted,

Dated: June 24, 2016

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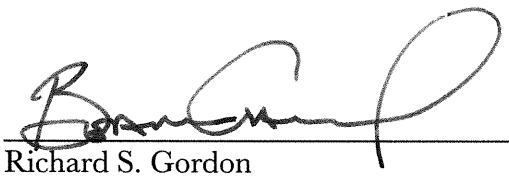
By: 
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CERTIFICATE OF SERVICE

I hereby certify, this 24TH day of June, 2016, that I served a copy of the foregoing Response to Defendant Glenn W. Cade, Jr.'s Motion for entry of Final Judgment Pursuant to Maryland Rule 2-602(b), by first-class mail, postage pre-paid, on:

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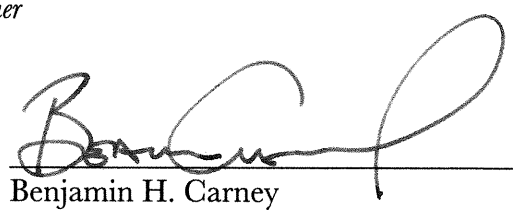

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