

**MONTANA EIGHTH JUDICIAL DISTRICT COURT,
CASCADE COUNTY**

THOMAS KONESKY,**Plaintiff & Counter-Defendant,****vs.****KEVIN KELLER; KAREN L. REIFF;
CHURCH, HARRIS, JOHNSON &
WILLIAMS, P.C., and JOHN DOES
A-Z;****Defendants & Counter-Plaintiff.****Cause No. BDV-19-0568**

**ORDER GRANTING PLAINTIFF'S
MOTION FOR RULE 54(b)
CERTIFICATION**

KEVIN KELLER,**Third-Party Plaintiff,****vs.****DONITA KONESKY,****Third-Party Defendant.**

Before the Court is Plaintiff Thomas Konesky's Rule 54(b) motion for certification as final and entry of judgment on this Court's October 14, 2020, Order granting the Church Harris Defendants' motion for summary judgment (Doc. 50). The Church Harris Defendants did not object to Plaintiff's motion; Defendant Kevin

Keller did object. For the following reasons, the Court finds there is “no just reason for delay,” and accordingly grants the motion. Mont. R. Civ. P., Rule 54(b).

Rule 54(b) of the Montana Rules of Civil Procedure provides that, “any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties” Such orders are not appealable. Mont. R. App. P., Rule 6(5)(a). However, Rule 54(b) also provides that, “[w]hen an action presents more than one claim for relief—whether as a claim, counterclaim, crossclaim, or third-party claim—or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay.”

“Rule 54(b) attempts to strike a balance between the undesirability of piecemeal appeals and the need to make review available at a time when it best serves the needs of the parties.” *Roy v. Neibauer*, 188 Mont. 81, 85, 610 P.2d 1185, 1188 (Mont. 1980). But “54(b) orders should not be entered routinely or as a courtesy or accommodation to counsel.” *Id.* This Court exercises its discretion to grant certification “only ‘in the infrequent harsh case’ as an instrument for the improved administration of justice and the more satisfactory disposition of litigation in the light of the public policy indicated by [the Rule].” *Id.*

The following factors bear upon this Court’s decision to grant Rule 54(b)

certification:

(1) The relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the district court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence or absence of a claim or counterclaim which could result in a set-off against the judgment sought to be made final; (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, triviality of competing claims, expense, and the like.

Id. The burden is on Mr. Konesky as the party seeking certification to convince this Court that the case is the “‘infrequent harsh case’ meriting a favorable exercise of discretion.” *Id.* He has done so.

This is the “infrequent harsh case” meriting Rule 54(b) certification because the adjudicated and unadjudicated claims are easily severed, and failure to certify would delay this litigation unnecessarily. Mr. Konesky’s First Amended Complaint alleged one count of professional negligence against the Church Harris Defendants (Count I) and three counts against Defendant Kevin Keller, breach of contract, breach of the implied covenant of good faith and fair dealing, and violation of the Residential Landlord Tenant Act (Counts II–IV, respectively). (Doc. 2.) This Court set the matter for trial on March 23, 2021. (Doc. 18.) Prior to trial, Mr. Konesky moved for summary judgment on liability against Defendant Kevin Keller on Counts II–IV. (Doc. 21.) The Church Harris Defendants joined the motion, and Keller opposed it. (Docs. 25, 26.) On July 30, 2020, this Court granted Mr. Konesky’s

motion as to Counts II and III, and denied it as to Count IV. (Doc. 33.) Then, the Church Harris Defendants moved for summary judgment on Count I. (Doc. 35.) This Court granted that motion on October 14, 2020, holding that as a matter of law Church Harris did not owe Mr. Konesky the duty he claims they breached. (Doc. 50.) That ruling effectively ended the litigation between Mr. Konesky and the Church Harris Defendants. Shortly thereafter, Defendant Kevin Keller filed a motion to amend his answer and add a party. (Doc. 51.) Mr. Keller sought leave to initiate counterclaims against Mr. Konesky for breach of contract, negligence, and negligence (*res ipsa loquitor*). Mr. Keller also sought leave to add Mr. Konesky's wife, Donita Konesky, as a party to this suit. This Court granted Mr. Keller's motion on November 24, 2020, vacated the March 23, 2021 trial date, and re-set the trial for December 6, 2022. (Docs. 58, 60.) As it stands, the matters left to be litigated at trial are Mr. Konesky's damages for Counts II and III and liability and damages for Count IV of the First Amended Complaint, and Mr. Keller's counterclaims against both Thomas and Donita Konesky.

Due to the procedural posture of this case, there is no possibility that the need for review of the summary judgment order in favor of the Church Harris Defendants would be mooted by future proceedings in this Court, or that the Montana Supreme Court would be obliged to consider the same issue twice. There is also no claim or counterclaim which could result in a set-off against the judgment Mr. Konesky seeks

to be made final because the judgment was in favor of the Defendants, not the Plaintiff. It is possible to effectively sever the claims between Mr. Keller and the Koneskys from Mr. Konesky's single claim against the Church Harris Defendants and allow the latter to be taken up on appeal while the former continue to develop below.

Allowing an immediate appeal of this Court's summary judgment order in favor of the Church Harris Defendants will materially advance the ultimate determination of the case and avoid wasteful and protracted litigation. Certifying the summary judgment order in favor of the Church Harris Defendants at this juncture would enable Mr. Konesky to seek review of that order and the Montana Supreme Court to issue its opinion on the matter in time for a possible remand prior to the December 6, 2022, trial date without causing a second postponement of the trial. By granting Mr. Konesky's motion for Rule 54(b) certification, this Court will allow the Supreme Court to review an order that conclusively ended litigation against one set of Defendants, while permitting discovery to proceed between the remaining parties. On the other hand, failure to certify that order as final for purposes of appeal would delay this case even further than it has already been delayed, and it would save no judicial resources in the process. Failure to certify would likely result in a piecemeal trial in 2022, clouded by the certainty of a post-trial appeal and the potential of a retrial of all issues—including issues already tried—if Mr. Konesky

prevails in the Montana Supreme Court.

This is the “infrequent harsh case,” Mont. R. Civ. P., Rule 54(b), in which a favorable exercise of this Court’s discretion would allow the parties to use a two-year delay in their trial date to seek review of an order effectively dismissing one set of Defendants, and make any necessary adjustments to their trial preparation and strategy necessitated by the Supreme Court’s ruling, without having to seek a further continuance of the trial date or a potential retrial on all issues. Having balanced the competing factors present in the case, the Court has determined it is in the interest of sound judicial administration and public policy to certify the judgment as final. *Roy*, 188 Mont. at 87, 610 P.2d at 1189.

Accordingly, “there is no just reason for delay,” Mont. R. Civ. P., Rule 54(b), and it is HEREBY ORDERED that Plaintiff Konesky’s motion for Rule 54(b) certification is GRANTED. This Court’s October 14, 2020, Order granting the Church Harris Defendants’ motion for summary judgment (Doc. 50) is certified as final for purposes of appeal. Mont. R. App. P., Rule 6(6). The Clerk is directed to enter such judgment immediately.

DATED this 8th day of January, 2021.

ELIZABETH A. BEST

Hon. Elizabeth Best
District Court Judge

CC: ✓ Samir F. Aarab & Caitlin Boland Aarab, *Attorneys for Plaintiff Konesky*
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