

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

ALEXUS BENNETT,	:	
A MINOR, BY AND THROUGH HER	:	
GUARDIAN AD LITEM	:	
JONATHAN IRVINE, et al.,	:	
Plaintiffs,	:	CIVIL ACTION
	:	
v.	:	
	:	
CITY OF PHILADELPHIA, et al.,	:	No. 03-5685
Defendants.	:	

MEMORANDUM AND ORDER

Schiller, J.

January 26, 2004

Plaintiffs in this § 1983 action are three minor children who seek an injunction and damages from the City of Philadelphia and its Department of Human Services (“DHS”) as a result of injuries Plaintiffs sustained at the hands of a third party after their mother absconded with them from a DHS-supervised residence and DHS closed their case files.¹ Presently before the Court is Defendants’ motion for reconsideration of the Court’s Memorandum and Order dated December 18, 2003, which granted in part and denied in part Defendants’ motion to dismiss. In the alternative, Defendants seek certification of the relevant issues for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). For the reasons set out below, the Court denies Defendants’ motion and does not certify these issues for appeal.

The Third Circuit has held that “only extraordinary circumstances . . . warrant a court's reconsideration of an issue decided earlier in the course of litigation. They include situations in

¹ The facts of this action are set forth fully in this Court’s Memorandum and Order of December 18, 2003. *See Bennett v. City of Philadelphia*, Civ. No. 03-5685, 2003 WL 23096884, 2003 U.S. Dist. LEXIS 23897 (E.D. Pa. Dec. 18, 2003).

which: (1) new evidence is available; (2) a supervening new law has been announced; or (3) the earlier decision was clearly erroneous and would create manifest injustice.” *Pub. Interest Research Group v. Magnesium Elektron*, 123 F.3d 111, 116-17 (3d Cir. 1997) (internal quotations omitted). In their motion for reconsideration, Defendants argue that this Court’s December 18 Memorandum and Order misinterpreted *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189 (1989), by holding that Plaintiffs’ allegation that DHS failed to locate them before closing their case files was a potential basis for liability under the state-created danger doctrine of § 1983. Defendants argue that *DeShaney* permits § 1983 liability to be found only in situations in which the state’s action leaves the eventual victim worse off than if the state had not acted at all. *See id.* at 201. Accordingly, Defendants argue, DHS’s failure to locate the children cannot give rise to liability, for that failure was no different than simply leaving the children in the custody of their mother from the beginning.

Although Defendants’ interpretation of *DeShaney* is correct, their reading of the December 18 Order is inaccurate. That Order did not hold that DHS’s failure to prevent the children from leaving the shelter or its failure to locate them afterwards was a potential basis for § 1983 liability. Instead, the Court held that DHS’s affirmative act of closing the children’s case files, thereby foreclosing the possibility of future rescue, might constitute a state action that left the children worse off than if DHS had simply allowed the status quo—i.e., active case files—to continue. Thus, for the purposes of Defendants’ motion to dismiss, Plaintiffs’ complaint satisfies *DeShaney*’s requirement to plead facts sufficient to make out a case that Plaintiffs would have been better off if Defendants had taken no action whatsoever. Accordingly, the December 18 Order does not constitute “a clear error of law” that would warrant reconsideration under the law of this circuit. *See*

Max's Seafood Cafe ex rel. Lou-Ann, Inc. v. Quinteros, 176 F.3d 669, 677 (3d Cir. 1999).

Alternatively, certification for interlocutory appeal is appropriate where the district court is “of the opinion that [the case] involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal . . . may materially advance the ultimate termination of the litigation.” 28 U.S.C. § 1292(b). This Court has previously noted that the instant action involves novel questions of law. *See Bennett v. City of Philadelphia*, Civ. No. 03-5685, 2003 WL 23096884, at *8, 2003 U.S. Dist. LEXIS 23897, at *27 (E.D. Pa. Dec. 18, 2003). Thus, the first clause of § 1292(b) is satisfied. The Court stresses, however, that no liability has been found in this case, nor is the factual record sufficiently developed for any court, trial or appellate, to make a determination of liability at this time. In light of this factual sparsity, the Court finds that certification pursuant to 28 U.S.C. § 1292(b) would not “materially advance the ultimate termination of the litigation” because an interlocutory appeal would not necessarily resolve the question of liability. Defendants’ request for such certification is accordingly denied.

For the foregoing reasons, Defendants’ motion for reconsideration and request for a certificate of appealability are denied. An appropriate order follows.

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ORDER

AND NOW, this 26th day of **January, 2004**, upon consideration of Defendants' Motion for Reconsideration of the Court's Order of December 18, 2003, or in the Alternative, for Certification Pursuant to 28 U.S.C. § 1292(b) (Document No. 10) and Plaintiffs' response thereto, it is hereby **ORDERED** that:

1. Defendants' Motion for Reconsideration is **DENIED**.
2. Defendants' Motion for Certification is **DENIED**.

BY THE COURT:

Berle M. Schiller, J.