

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

**MERRILL MEST et al.,
Plaintiffs**

v.

**CABOT CORPORATION et al.,
Defendants**

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**CIVIL ACTION
NO. 01-4943**

MEMORANDUM OPINION AND ORDER

RUFE, J.

May 10, 2004

By Memorandum Opinion and Order dated April 29, 2004 (the “Order”),¹ this Court granted in part Defendants Cabot Corporation and Cabot Performance Materials’ (collectively referred to as “Cabot”) Motion for Summary Judgment against Plaintiffs Wayne and Suzanne Hallowell² and Merrill and Betty Mest. In the Order, this Court held that the discovery rule did not toll the statute of limitations on Plaintiffs’ claims. Accordingly, the Court granted summary judgment in favor of Cabot on Plaintiffs’ claims based on Cabot’s activities prior to November 10, 1998. Plaintiffs now move for a certification of interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

Section 1292(b) sets forth the requirements the Court must consider when deciding whether to allow an appeal of an interlocutory order such as the Order:

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is a substantial ground for

¹ Mest v. Cabot Corp., No. Civ.A.01-4943, 2004 U.S. Dist. LEXIS 7497, 2004 WL 945131 (E.D. Pa. Apr. 29, 2004).

² In their Second Amended Complaint, the Hallowells added as plaintiffs their children, the Hallowell Farms Partnership, The Wayne Z. Hallowell Family Revocable Trust, and themselves in their capacities as Trustees of the Trust. Because these additional Plaintiffs’ claims are identical to the Hallowells, this opinion does not refer to these Plaintiffs specifically.

difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.³

Thus, this Court has the discretion to grant a section 1292(b) certificate if the Order “(1) involve[s] a controlling question of law, (2) offer[s] substantial ground for difference of opinion as to its correctness, and (3) if appealed immediately [would] materially advance the ultimate termination of the litigation.”⁴ One of the main purposes of this statute is to prevent wasteful litigation.⁵ With this principle in mind, the Court applies these factors to the Order.

Controlling Question of Law

“A controlling question of law must encompass at the very least every order which, if erroneous, would be reversible error on final appeal.”⁶ An order need not “be determinative of any plaintiff’s claim on the merits,” nor must “a reversal of the order terminate the litigation,” for a district court to find the existence of a controlling question of law.⁷ “The key consideration . . . is whether [the order] truly implicates the policies favoring interlocutory appeal,” one of which is “the

³ § 1292(b).

⁴ Katz v. Carte Blanche Corp., 496 F.2d 747, 754 (3d Cir. 1974); Courtney v. LaSalle Univ., Civ. A.Nos.92-3838, 92-4069, 1996 U.S. Dist. LEXIS 9075 (E.D. Pa. July 1, 1996) (“The statute sets forth three requirements for certification: a controlling question of law; substantial grounds for a difference of opinion; and material advancement of the ultimate termination of the litigation. The decision to certify an order is within the sound discretion of the district court.”) (certifying for appeal an order granting partial summary judgment on statute of limitations grounds).

⁵ For a discussion of the legislative history of § 1292(b), see Katz, 496 F.2d at 754-55 (“And on the practical level, saving of time of the district court and of expense to the litigants was deemed by the sponsors to be a highly relevant factor.”); see also Milbert v. Bison Labs., Inc., 260 F.2d 431, 433 (3d Cir. 1958) (“It is quite apparent from the legislative history . . . that Congress intended that section 1292(b) should be sparingly applied. It is to be used only in exceptional cases where an intermediate appeal may avoid protracted and expensive litigation and is not intended to open the floodgates to a vast number of appeals from interlocutory orders in ordinary litigation.”)

⁶ Katz, 496 F.2d at 755.

⁷ Id.

avoidance of possibly wasted trial time and litigation expense.”⁸

Whether the discovery rule tolls the statute of limitations of Plaintiffs’ claims is clearly a controlling question of law. The Order precludes Plaintiffs from recovering damages based on Defendants’ activities prior to November 10, 1998, thereby precluding a trial on those damages. If the Third Circuit were to find the Order erroneous after a trial addressing only Defendants’ activities after November 10, 1998, the Court would have to conduct another trial based on Defendants’ conduct prior to November 10, 1998. Thus, if erroneous, the Order would constitute reversible error on final appeal.

Substantial Ground for Difference of Opinion⁹

Although the Court is confident that the Order is correct, substantial ground for difference of opinion as to its correctness exists. The issue of when the discovery rule applies to toll the statute of limitations is frequently disputed, as evidenced by the Third Circuit’s recent opinion in Debiec v. Cabot Corp., 352 F.3d 117 (3d Cir. 2003), which Plaintiffs believe is analogous to this case. The application of the discovery rule is fact sensitive and unlike the instant case, which

⁸ Id.

⁹ The Court has issued different, yet reconcilable, rulings on the statute of limitations issue. Plaintiffs mistakenly rely on these different rulings as evidence of a substantial ground for difference of opinion. Defendants filed their first motion for summary judgment on statute of limitations grounds on April 12, 2002, well before the completion of discovery. The Court denied this motion on January 14, 2003, noting that there were genuine issues of material fact regarding when the statute of limitations began to run. Following this ruling, the parties conducted significant additional discovery, including more than fifty depositions and numerous document productions, Plaintiffs amended their complaint twice, and Defendants’ renewed their motion for summary judgment on statute of limitations and other grounds. Because the Court had a more complete record when Defendants again raised the statute of limitations, the Court revisited the issue, and Plaintiffs did not object to the Court doing so. That the Court granted Defendants’ second motion for summary judgment on statute of limitations grounds after denying Defendants’ first motion for summary judgment on the same issue is not evidence of the existence of substantial ground for difference of the opinion. Nevertheless, for the reasons set forth herein, the Court finds substantial ground for a difference of opinion to exist as to the correctness of its April 29, 2004 Order granting Defendants’ motion for summary judgment.

involves injury to animals, Debiec and the vast majority¹⁰ of discovery rule cases deal with injury to humans. Specifically, the Debiec decision addressed “how to measure the impact of a professional medical diagnosis on a court's evaluation of whether a plaintiff has exercised reasonable diligence in investigating her condition.”¹¹ It has yet to be decided how the Debiec decision applies to a case such as this one where Plaintiffs allegedly relied on the opinions of “veterinarians and others involved in the field of animal health.”¹² Thus, there is a difference of opinion as to how the holdings in Debiec and similar cases involving injury to humans apply to Plaintiffs’ reliance on the purported animal health specialists in this case.

Advance the Ultimate Termination of the Litigation

Finally, an immediate appeal of the Order will advance the ultimate termination of this litigation. An immediate appeal and resolution by the Third Circuit eliminates the possibility of having duplicative trials, as would occur if the Third Circuit were to find the Order erroneous after a trial on Defendants’ conduct after November 10, 1998. In light of the parties’ indication to the Court that a trial in this case will last at least four weeks, the avoidance of such a scenario would be consistent with one of the main policies behind § 1292(b): “the avoidance of possibly wasted trial time and litigation expense.”¹³ Accordingly, the Court finds that each of the requirements of §

¹⁰ Neither party cited to, nor could the Court find on its own, any cases dealing with the application of the discovery rule in a case involving injuries to animals.

¹¹ Debiec, 352 F.3d at 130.

¹² Pls.’ Mem. of Law In Supp. of Mot. for Certification at 4. Plaintiffs blatantly mischaracterize the Court’s holding in its April 29, 2004 Memorandum Opinion, stating that the Court “held that reliance on veterinarians and others involved in the field of animal health was unreasonable as a matter of law.” The Court’s holding was not nearly so broad. The Court simply held that in this case Plaintiffs’ reliance was unreasonable. The Court did not hold that there are no circumstances under which reliance on the opinions of veterinarians or animal health specialists would be unreasonable.

¹³ Katz, 496 F.2d at 756.

1292(b) have been satisfied and that an immediate appeal is appropriate.

The Court therefore amends its April 29, 2004 Order and certifies it for immediate appeal. An appropriate Order follows.

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ORDER

AND NOW, this 10th day of May, 2004, upon consideration of Plaintiffs' Motion for Certification of Interlocutory Appeal and Stay of Proceedings [Doc. #134] and Defendants' Response thereto [Doc. #136], it is hereby **ORDERED** that Plaintiffs' Motion is **GRANTED IN PART** and **DENIED IN PART** Plaintiffs' Motion is **GRANTED** as to Certification of Interlocutory Appeal pursuant to 28 U.S.C. § 1292(b) and **DENIED** as to a stay of proceedings. It is further **ORDERED** that the Order of April 29, 2004 [Doc. #133] is **AMENDED** as follows:

1. Defendants' Motion for Summary Judgment is **GRANTED** and **JUDGMENT IS ENTERED** in favor of Defendants on Plaintiffs' claims based on Defendants' activities prior to November 10, 1998.
2. The Order in the previous paragraph involves a controlling question of law as to which there is substantial ground for difference of opinion and an immediate appeal from the Order may materially advance the ultimate termination of this litigation.
3. All other terms of the April 29, 2004 Order shall remain unchanged.

It is so **ORDERED**.

BY THE COURT:

CYNTHIA M. RUFÉ, J.