

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

JOHN SCIOTTO and CATHERINE P.	:	CIVIL ACTION
SCIOTTO on behalf of LOUIS	:	
SCIOTTO, a Minor, as his parents	:	
and natural guardians,	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
MARPLE NEWTOWN SCHOOL DISTRICT,	:	
JAMES SMITH, STU NATHANS, and	:	
GREG FENDLER,	:	
	:	
Defendants.	:	NO. 98-2768

M E M O R A N D U M

Reed, S.J.

October 22, 1999

Before the Court are the respective motions of defendants Marple Newtown School District (Document No. 127) and Greg Fendler (Document No. 129) for permission to appeal, pursuant to 28 U.S.C. § 1292(b), this Court’s order denying their motions for summary judgment and the responses of the plaintiffs thereto. For the following reasons, the motions will be denied.

I. BACKGROUND

This case involves an injury suffered by a high school wrestler, Louis Sciotto, on January 10, 1997, while he was wrestling with Greg Fendler (“Fendler”), an alumnus of the high school who was invited to attend a wrestling practice as part of a longstanding tradition of encouraging alumni to participate in wrestling practices at Marple Newtown High School. The parents of Louis Sciotto brought a claim on his behalf under 42 U.S.C. § 1983, asserting that the Marple Newtown School District (“Marple Newtown”), wrestling coach Stu Nathans (“Nathans”) and athletic director Jim Smith (“Smith”) violated Louis Sciotto’s constitutional right to bodily integrity under the Due Process Clause of the Fourteenth Amendment. Plaintiffs also assert

claims of assault and battery and negligence against Fendler. The motions of defendants Marple Newtown, Smith, and Nathans to dismiss the complaint were denied. See Sciotto v. Marple Newtown Sch. Dist., No. 98-2768, 1999 U.S. Dist. LEXIS 1311 (E.D. Pa. February 9, 1999) (Document No. 41).

Defendants moved for summary judgment, and on September 23, 1999, this Court denied defendants' motions. See Sciotto v. Marple Newtown Sch. Dist., No. 98-2768, 1999 U.S. Dist. LEXIS 14497 (E.D. Pa. September 23, 1999) ("Memorandum Opinion") (Document No. 111). Nathans and Smith filed notices of appeal to the Court of Appeals for the Third Circuit on the issue of qualified immunity. Defendants Marple Newtown and Fendler now seek to join Nathans and Smith in the Court of Appeals by requesting this Court's permission to appeal the denial of their motions for summary judgment.

II. ANALYSIS

The decision to allow an appeal under 28 U.S.C. § 1292(b) is completely within the discretion of the district court. See Katz v. Carte Blanche Corp., 496 F.2d 747, 754 (3d Cir. 1974). While § 1292(b) requires the district court to certify that certain criteria are met in order to grant permission to appeal, "the discretion to grant leave to appeal at the circuit level is not limited by any specific criteria ... [and] leave to appeal may be denied for entirely unrelated reasons ..." Id. Furthermore, "[t]he district court should construe requirements for certification strictly, and certify only where exceptional circumstances warrant." Able v. United States, 870 F. Supp. 468, 470 (E.D.N.Y. 1994). The moving party has the burden of showing that an immediate appeal is warranted. See Rottmund v. Continental Assurance Co., 813 F. Supp. 1104, 1112 (E.D. Pa. 1992).

The criteria set forth in § 1292(b) are: (1) the order must involve a “controlling question of law” (2) on which there is “substantial ground for a difference of opinion,” and (3) an immediate appeal may “materially advance the ultimate termination of the litigation.”

A. Marple Newtown School District

A controlling question of law is an issue that, if erroneously decided, would result in the reversal of a judgment after trial. See Katz, 496 F.2d at 755. In addressing the motion of Marple Newtown for summary judgment, this Court decided three questions of law: (1) the viability of the state-created danger theory; (2) the correct threshold standard for state-created danger claims; and (3) the proper inquiry in assessing municipal liability under a state-created danger theory.

As to the first question, there is no substantial ground for disagreement. The Court of Appeals for the Third Circuit has unequivocally held that the state-created danger theory is a viable theory of liability under 42 U.S.C. § 1983. See Kneipp v. Tedder, 95 F.3d 1199, 1211 (3d Cir. 1996). As to the second question, the law of this circuit is equally clear – “deliberate indifference” is the proper standard to apply to state-created danger claims. See Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 910 (3d Cir. 1997) (citing Kneipp, 95 F.3d at 1208).¹

¹ Marple Newtown argues that the decision of the Court of Appeals for the Third Circuit in Whiteland Woods, L.P. v. Township of West Whiteland, 1999 U.S. App. LEXIS 23028 (3d Cir. September 23, 1999) establishes “shocks the conscience” as the threshold standard to be applied to every § 1983 claim. However, the Court limited the application of shocks the conscience to “executive action such as police conduct,” id. at *21, and relied on cases involving high-speed chases by police. This is consistent with the holdings of the Supreme Court and the courts of other circuits, which have drawn a distinction between high-speed chases or prison riots (to which the shocks the conscience test applies) and other sorts of actions where deliberation by the state actor is possible (to which deliberate indifference applies).

Marple Newtown contends that the Supreme Court’s decisions in Collins v. Harker Heights, 503 U.S. 115, 112 S.Ct. 1061 (1992) and County of Sacramento v. Lewis, 523 U.S. 833, 118 S.Ct. 1708 (1998), definitively establish “shocks the conscience” as the threshold test. However, in Collins, the Court recognized the applicability of the deliberate indifference

Nor does the third question – concerning the proper test for municipal liability in a state-created danger case – present substantial grounds for a difference of opinion. The Court of Appeals for the Seventh Circuit considered this very question in a state-created danger case, and relied upon on the Supreme Court’s “fine tuning” of municipal liability in City of St. Louis v. Praprotnik, 485 U.S. 112, 108 S.Ct. 915 (1988) in adopting the “ratification analysis” for municipal liability. See Monfils v. Taylor, 165 F.3d 511, 517 (7th Cir. 1998), petition for cert. filed, 67 U.S.L.W. 3684 (April 28, 1999). This Court adopted the ratification analysis as the most appropriate method of addressing municipal liability under the state-created danger theory. See Sciotto, 1999 U.S. Dist. LEXIS 14497, at *49.

Defendants contend that the Court must apply the test for municipal liability set forth in Monell v. New York Dept. of Social Services, 436 U.S. 658, 98 S.Ct. 2018 (1978) and its progeny. However, as discussed more fully in the Memorandum Opinion, grafting the Monell analysis to the state-created danger theory would render the state-created danger theory a dead letter – a result that is not consistent with the jurisprudence of courts of this or any other circuit. See Sciotto, 1999 U.S. Dist. LEXIS 14497, at *46. Furthermore, the ratification analysis differs only slightly from the Monell inquiry – both require the existence of a custom or policy and a

standard to § 1983 claims against municipal officials, see 503 U.S. at 124, 112 S.Ct. at 1068, and while the Court applied shocks the conscience in Collins, the facts of that case are factually distinguishable from the present case. In Lewis, the Court maintained the longstanding distinction between prison riots and police chases, which require a “much higher standard of fault than deliberate indifference,” 523 U.S. at 853, 118 S.Ct. at 1720, and situations where “actual deliberation is practical,” where deliberate indifference is the appropriate standard. See id. at 851, 118 S.Ct. at 1719. The decisions of the Court of Appeals for the Third Circuit in Kneipp (1996) and Morse (1997), having come after the Collins decision (1992), clearly show that deliberate indifference is the standard in the Third Circuit in cases where the state actor actually deliberates or has the time to deliberate on its decision, and the Supreme Court again recognized this distinction in the above-cited language of the Lewis opinion.

showing of awareness amounting to deliberate indifference.

While this may be a question of first impression in this circuit, “the fact that this case may involve an issue of first impression does not warrant certification pursuant to § 1292(b).” Larsen v. Senate of the Commonwealth of Pennsylvania, 965 F. Supp. 607, 609 (M.D. Pa. 1997). In its Memorandum Opinion, this Court applied an analysis that is firmly based on the jurisprudence of the Supreme Court and validated by a U.S. Court of Appeals. In light of the substantial similarity between the ratification and the Monell analyses of municipal liability, and the clear foundation for the ratification analysis in the Supreme Court’s decision in Praprotnik, I cannot conclude that there are substantial grounds for a difference of opinion on this legal issue.

I now move to the third criterion, “[i]n determining whether certification will materially advance the ultimate termination of the litigation, a district court is to examine whether an immediate appeal would (1) eliminate the need for trial, (2) eliminate complex issues so as to simplify the trial, or (3) eliminate issues to make discovery easier and less costly.” See Orson, Inc. v. Miramax Film Corp., 867 F. Supp. 319, 322 (E.D. Pa. 1994). An immediate appeal in this case will not necessarily accomplish any of these goals. Even if the appellate court were to decide in Marple Newtown’s favor, the individual defendants could stand trial. The complexity of the issues would not be substantially reduced by the absence of Marple Newtown as a defendant. And, as discovery is completed, an appeal would have no meaningful effect on the costs of discovery.

Finally, I believe that the ultimate termination of the litigation will be materially advanced by exposing Marple Newtown to trial. This defendant has adequate resources to defend itself at trial and the catastrophic injuries to the plaintiff with their attendant high damage

potential will help the decisionmaking of the school district representatives to move toward a settlement. This Court has spent many hours with the parties in caucus and in joint meetings, and thus has a unique perspective on the importance of the third criterion of the statute in this case. I do believe as well that the appeal of the individual defendants, Nathan and Smith will, if expedited by the court of appeals, provide guidance to this court without the need to burden the record on appeal with another appellant.

The motion of Marple Newtown fails to meet all of the criteria set forth in §1292(b), and therefore the request for permission to appeal will be denied.

B. Greg Fendler

Two controlling issues of law are presented by the Court's Memorandum Opinion on the motion for summary judgment: (1) whether, under Pennsylvania law, a person's belief that the consequences of his or her conduct are substantially certain to result satisfies the intent element of assault and battery; and (2) whether the fact that an individual "acted on behalf" of a municipality, without more, suffices to bring an individual within the definition of "employee under Pennsylvania's Political Subdivision Tort Claims Act, 42 Pa. C.S.A. § 8501, et seq., ("the Act") and thus entitle the individual to immunity.

There can be no substantial ground for difference of opinion on the first issue. The Second Restatement of Torts, on which the highest courts of Pennsylvania regularly rely,² clearly provides that intent exists when "the actor desires to cause the consequences of his act, or that he *believes the consequences are substantially certain to result from it.*" Restatement (Second) of

² See, e.g., Rossino v. R.C. Titter Construction, Inc., 553 Pa. 168, 172, 718 A.2d 755, 756 (1998); Nationwide Mutual Ins. Co. v. Hassinger, 325 Pa.Super. 484, 489, 473 A.2d 171, 173 (1984).

Torts, § 8A (1965) [emphasis added].³ Fendler argues that the Restatement’s definition of intent contradicts the opinions of Pennsylvania courts. However, the Superior Court of Pennsylvania held, in a battery case, that “intent extends both to the desired consequences and to the *consequences substantially certain to follow from the act.*” Field v. Philadelphia Electric Co., 388 Pa.Super. 400, 417, 565 A.2d 1170, 1178 (1989) [emphasis added]; see also Hassinger, 325 Pa.Super. at 489, 473 A.2d at 173.

The second question of law concerns the definition of “employee” under the Act, and its consequences for immunity. Fendler argues that a mere act on behalf of a municipality, and nothing more, suffices to confer employee status and its consequent immunity. The Act does not lend itself to Fendler’s interpretation. The definition of employee in the Act offers examples – volunteer firefighters and elected or appointed officials – none of which describe or even bear remote similarity to Fendler. General words used in a statute are to be interpreted as applying only to persons or things of the same general kind or class as those specifically mentioned.⁴ Fendler, an alumnus who was invited to participate in one wrestling practice at his former high school, cannot be considered in the same general kind or class as elected officials or volunteer firefighters.⁵

³ Fendler relies on Esmond v. Liscio, 209 Pa.Super. 200, 224 A.2d 793 (1966) for the proposition that animus or a desire to injure qualifies as intent. However, Esmond contains no substantive discussion of intent – instead, it merely sets forth boilerplate language in a footnote, and cites as support a *criminal* assault case from 1943. Such a case does not create substantial ground for difference of opinion.

⁴ See Beecham v. United States, 511 U.S. 368, 371, 114 S. Ct. 1669 (1994).

⁵ Furthermore, it seems an unreasonable interpretation of the Act to conclude that nothing more than an act on behalf of a municipality confers employee status. Such an interpretation would immunize people who have even the most tenuous relationship to a municipality, but

As discussed in the Memorandum Opinion, the relevant cases appear to require more than a mere act on behalf of the government to qualify an individual for employee status. See Murray v. Zarger, 164 Pa.Comm. 157, 642 A.2d 575 (1994); Wilson v. Miladin, 123 Pa.Comm. 405, 553 A.2d 535 (1989). Both cases identified additional factors in support of their conclusions that the individual was an employee – factors that are not present in the case of Fendler.

Furthermore, Fendler, like Marple Newtown, fails to meet the third statutory criterion, because an immediate appeal will not necessarily advance the termination of the litigation. Even if Fendler were to receive a favorable ruling on appeal, a trial could go forward against Marple Newtown, Fendler would appear as a witness and the issues would be no less complex in Fendler's absence as a party.

Fendler therefore fails to meet the statutory criteria for granting an appeal under §1292(b).

III. CONCLUSION

Based on the foregoing analysis, I find that Marple Newtown and Fendler have failed to satisfy the criteria set forth in 28 U.S.C. § 1292(b), and have not met their burden of demonstrating exceptional circumstances that warrant an immediate appeal in this case.

Furthermore, I have concluded upon a thorough review with the parties that this case can and should be settled, and I believe that the prospects for settlement will dim sharply if the appeals were to be certified. Therefore, the motions of Marple Newtown and Fendler will be denied on

nevertheless act for or on behalf of the municipality even in the most tangential way. Under Fendler's interpretation, a parent who drives other individuals' children home from school, a guest speaker at an elementary school assembly, or a person who voluntarily sweeps a city sidewalk or picks up trash may find themselves designated employees by the city or school district.

the foregoing grounds and in the exercise of my discretion. An appropriate Order follows.

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SCIOTTO on behalf of LOUIS	:	
SCIOTTO, a Minor, as his parents	:	
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Plaintiffs,	:	
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v.	:	
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MARPLE NEWTOWN SCHOOL DISTRICT,	:	
JAMES SMITH, STU NATHANS, and	:	
GREG FENDLER,	:	
	:	
Defendants.	:	NO. 98-2768

ORDER

AND NOW, this 22nd day of October, 1999, upon consideration in omnibus fashion of the motions of defendants Marple Newtown School District (Document No. 127) and Greg Fendler (Document No. 129) for permission to appeal this Court's order denying their motions for summary judgment, having concluded for the reasons set forth in the foregoing memorandum that this Court's order denying summary judgment does not involve a "controlling question of law as to which there is substantial ground for difference of opinion," 28 U.S.C. § 1292(b), and that immediate appeal from the order will not "materially advance the ultimate termination of the litigation," *id.*, and in the exercise of my discretion, it is hereby **ORDERED** that the motions are **DENIED**.

LOWELL A. REED, JR., S.J.