

that, under the master-servant control test, the Bell-Boeing joint venture was not the employer of plaintiffs' decedents. Stecyk v. Bell Helicopter Textron, Inc., No. Civ. A. 94-1818, 1997 WL 701312, at *6 (E.D. Pa. Nov. 4, 1997)(Rendell, J.). Bell now asks the court to certify that question for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). For the reasons set forth below, Bell's motion will be granted.

I. Discussion

A district judge may certify an interlocutory order for immediate appeal when "such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). The decision of whether to certify an order for interlocutory appeal lies within the sound discretion of the trial court. See Delaware Valley Toxics Coalition v. Kurz-Hastings, Inc., 813 F. Supp. 1132, 1142 (E.D. Pa. 1993). The burden is on the moving party to show that an immediate interlocutory appeal is warranted. See Rottmund v. Continental Assur. Co., 813 F. Supp. 1104, 1112 (E.D. Pa. 1992). Because the federal courts strongly disfavor piecemeal appeals as a matter of policy, orders should only be certified for interlocutory review in exceptional cases where an immediate appeal would avoid protracted and expensive litigation. See Zygmuntowicz v. Hospitality Investments, Inc., 828 F. Supp. 346, 353 (E.D. Pa. 1993); see also Orson, Inc. v. Miramax Film Corp., 867 F. Supp.

319, 321 (E.D. Pa. 1994)(interlocutory appeal allowed only in exceptional cases and only when it promotes efficient use of scarce judicial resources).

Under 28 U.S.C. § 1292(b), an interlocutory order may be immediately appealed when a district court certifies: (1) that the order involves a controlling question of law, (2) about which there is substantial ground for difference of opinion, the immediate resolution of which by the appeals court will (3) materially advance the ultimate termination of the litigation. Max Daetwyler Corp. v. Meyer, 575 F. Supp. 280, 282 (E.D. Pa. 1983).

A. Controlling Question of Law

A question of law is "controlling" if its incorrect disposition would require reversal of the final judgment. Katz v. Carte Blanche Corp., 496 F.2d 747, 755 (3d Cir. 1974). Section 1292(b) does not permit the interlocutory appeal of factual issues. Link v. Mercedes-Benz of N. Am., 550 F.2d 860, 863 (3d Cir. 1977).

Federal courts have previously considered the availability of a dispositive defense to be a controlling question of law, including the availability of the workers' compensation exclusivity bar. See Ducre v. the Executive Officers of Halter Marine, Inc., 752 F.2d 976, 990 (5th Cir. 1985)(employer's use of Workmen's Compensation Act as defense against contribution by co-tortfeasor); Caceres v. San Juan Barge Co., 520 F.2d 305, 306 (1st Cir. 1975)(disallowing workmen's compensation defense

against Jones Act suit for injury at sea).¹ With some exceptions, the Pennsylvania Workmen's Compensation Act provides that employers are immune from being sued in tort for injuries suffered by an employee acting in the course of his or her employment. See 77 Pa. Cons. Stat. Ann. § 481(a) (West 1997).² Pennsylvania law also prohibits an employee of a joint venture from maintaining "a common law action based on negligence against any one or more of the joint venturers." Richardson v. Walsh Constr. Co., 334 F.2d 334, 336 (3d Cir. 1964)(citing Greenya v. Gordon, 133 A.2d 595, 595-96 (Pa. 1957)). In such cases, the Pennsylvania Workmen's Compensation Act is the injured employee's exclusive remedy. Id. As a result, denial of summary judgment on the issue of whether or not Bell-Boeing's joint venture was the employer of plaintiffs' decedents for purposes of workers'

¹ See also Pilsbury Co. v. The Port of Corpus Christi Auth., 66 F.3d 103, 104 (5th Cir. 1995)(11th Amendment defense); Total T.V. v. Palmer Communications, Inc., 69 F.3d 298, 300-01 (9th Cir. 1995)(federal preemption defense); American Geophysical Union v. Texaco, Inc., 60 F.3d 913, 915 (2d Cir. 1994)(fair use defense in copyright action); Harley Davidson, Inc. v. Minstor, Inc., 41 F.3d 341, 342 (7th Cir. 1994)(indemnity agreement defense); United States v. Barnette, 10 F.3d 1553, 1554-55 (11th Cir. 1994)(double jeopardy in civil RICO action).

² Section 481(a) provides:

The liability of an employer under this act shall be exclusive and in place of any and all other liability to such employes [sic], his legal representative, husband or wife, parents, dependents, next of kin or anyone otherwise entitled to damages in any action at law or otherwise on account of any injury or death as defined in section 301(c)(1) and (2) or occupational disease as defined in section 108.

compensation immunity was dispositive as to Bell's continued presence in this litigation.

The determination of employment status "is a question of law turning also on the degree of control exercised by the employer over the employee, and on a determination of for whose benefit the employee is performing his services." Trailways Lines v. Trailways, Inc. Joint Council, 785 F.2d 101, 106 (3d Cir. 1986), cert. denied, 479 U.S. 932; see also Red Line Exp Co., Inc. v. W.C.A.B. (Price), 588 A.2d 90, 93 (Pa. Commw. Ct. 1991)("The question of whether an employer-employee relationship exists is one of law, based upon the facts of each case."). The court has already resolved the factual issue of whether the Bell-Boeing joint venture exercised sufficient control over plaintiffs' decedents to be considered their employer -- it did not.³ See Stecyk v. Bell Helicopter Textron, Inc., No. Civ. A. 94-1818, 1997 WL 701312, at *6 (E.D. Pa. Nov. 4, 1997)(Rendell, J.). The legal question which Bell submits should be certified is whether

³ In making this determination, the court employed Pennsylvania's master-servant control test, Stecyk, 1997 WL 701312 at *4 -- i.e., "whether the alleged employer assumes the right of control with regard not only to the work to be done by the alleged employe [sic], but also to the manner of performing it.'" Kelly v. W.C.A.B. (Controlled Distribution Services, Inc.), 625 A.2d 135, 137 (Pa. Commw. Ct. 1993). Indicia of such control may include: (1) control over the manner in which the work is to be done; (2) responsibility for the result; (3) the terms of agreement; (4) the nature of the work or occupation; (5) the skills required for performance; (6) which party supplies the tools; (7) whether payment is by time or by job; (8) whether the work performed is part of the regular business of employer; and (9) the right of the employer to terminate employment at any time. Id.

the master-servant control test traditionally utilized by Pennsylvania courts to ascertain the existence of an employment relationship also applies to joint ventures, or whether all the members of a joint venture are considered employers of all those engaged in the venture's work as a matter of law.⁴

An appellate decision for Bell on this issue would necessitate reversal of a final judgment against Bell. Therefore, the availability of the workers' compensation exclusivity bar to Bell is appropriately viewed as a controlling question of law under § 1292(b).

B. Substantial Grounds for Difference of Opinion

Whether there is a substantial ground for difference of opinion as required by § 1292 requires inquiry into the merits of the claim, and such a substantial ground may be demonstrated by adducing conflicting and contradictory opinions of courts which have ruled on the issue. See Oyster v. Johns-Manville Corp., 568 F. Supp. 83 (E.D. Pa. 1983).

The court finds that there is a substantial ground for difference of opinion on the question to be certified. On the one hand is Pennsylvania's consistent reliance on the elements of control as indicia of the employment relationship in cases involving joint or dual employment. See, e.g., Costigan v. Philadelphia Fin. Dep't Employees Local 696, 341 A.2d 456, 461

⁴ In other words, where there is more than one employer in a joint venture, is an employee working for one employer to be considered an employee of the other employers for purposes of workers' compensation immunity?

(Pa. 1975)(finding joint employment relationship where control of terms of employment was shared between parties); Steamfitters, Local 449, AFL-CIO v. Pennsylvania Labor Relations Bd., 613 A.2d 155, 157 (Pa. Commw. Ct. 1992)(holding that parties were joint employers because both exercised control over employees); Magaw v. Bloomsburg Heating Co., 178 A. 411, 412 (Pa. Super. Ct. 1935)(finding no joint employment or joint liability for workers' compensation because only one party controlled decedent's terms of employment). On the other hand is the substantial split of authority among state courts on this issue. Several decisions from other jurisdictions support the finding that all members of a joint venture are considered to be employers of all those engaged in the venture's work as a matter of law. See, e.g., Mitchell v. A.F. Roosevelt Ave. Corp., 615 N.Y.S.2d 707, 709 (N.Y. App. Div. 1994)(holding that where there is more than one employer in joint venture, employee working for one employer is considered employee of other employers in joint venture); Lawler v. Dallas Statler-Hilton Joint Venture, 793 S.W.2d 27, 34-35 (Tex. App. 1990)(finding that joint venturers are employers of joint venturers' employees and rejecting control theory).⁵ The

⁵ These cases appear to stand for the broad proposition that, for purposes of workers' compensation, any employee of an employer engaged in a joint venture is considered an employee of the other employers in the joint enterprise, regardless of whether the employee actually performed work for the joint venture. Other decisions are distinguishable in that the employee was injured either in the course of his or her employment by the partnership/joint venture itself, or in furtherance of the goals of the partnership/joint venture, and therefore the workers' compensation bar protected all members of

contrary view, which the court embraced in its November 4, 1997 order, also enjoys significant support. See, e.g., Kalnas v. Layne of N.Y. Co., 414 A.2d 607, 609 (N.J. Super. Ct. App. Div. 1980)(holding that whether each joint venturer can be deemed employer of all employees engaged in work of joint enterprise depends upon facts and circumstances surrounding joint venture); Bulgrin v. Madison Gas & Electric Co., 373 N.W.2d 47, 52 (Wis. Ct. App. Div.)(holding that the "better reasoned cases support using the control test in the joint venture context"), review denied, 378 N.W. 2d 291 (Wis. 1985).

For the reasons contained in the order of November 4, 1997, Stecyk, 1997 WL 701312 at *3-6, the court believes that the Pennsylvania Supreme Court would apply the master-servant control test to determine the existence of an employment relationship in the context of a joint venture. It is apparent, however, that there are substantial grounds for disagreement on this question.

the partnership/joint venture from individual liability. See Conner v. El Paso Natural Gas Co., 599 P.2d 247, 249 (Ariz. Ct. App. 1979); Sonberg v. Bergere, 34 Cal. Rptr. 59, 60 (1963); Boatman v. George Hyman Constr. Co., 276 S.E.2d 272, 275 (Ga. Ct. App. 1981); Carlson v. Carlson, 346 N.W.2d 525, 527 (Iowa 1984); Vincent v. Lake Charles Refining Co., 434 So.2d 170, 171 (La. Ct. App.), cert. denied, 440 So.2d 758 (La. 1983); Rhodes v. Rogers, 675 S.W.2d 107, 109 (Mo. App. 1984); Papp v. Rocky Mountain Oil and Minerals, Inc., 769 P.2d 1249, 1257 (Mont. 1989); Haertel v. Sonshine Carpet Co., 757 P.2d 364, 366 (Nev. 1988); Mazzuchelli v. Silberberg, 148 A.2d 8, 12-13 (N.J. 1959); W.B. Johnston Grain Co. v. Self, 344 P.2d 653, 658 (Okla. 1959); Long v. Springfield Lumber Mills, Inc., 327 P.2d 421, 426 (Or. 1958); Greenya v. Gordon, 389 Pa. 499, 133 A.2d 595, 596 (1957); Daniels v. Roumillat, 216 S.E.2d 174, 176-77 (S.C. 1975); Cook v. Peter Kiewit Sons Co., 386 P.2d 616, 618 (Utah 1963); Candler v. Hardware Dealers Mutual Ins. Co., 203 N.W.2d 659, 661 (Wis. 1973).

The second requirement for certification under § 1292(b) is therefore met.

C. Materially Advancing the Termination of the Litigation

"Section 1292(b) 'is designed to allow for early appeal of a legal ruling when resolution of the issue may provide more efficient disposition of the litigation.'" Rottmund, 813 F. Supp. at 1112 (quoting Ford Motor Credit Co. v. S.E. Barnhart & Sons, Inc., 664 F.2d 377, 380 (3d Cir. 1981)). The parties anticipate that six weeks will be necessary to try this case against the current roster of defendants. It is conceded that an appellate ruling favorable to Bell on the joint employer immunity issue would terminate Bell's presence in this litigation. Stecyk, 1997 WL 701312 at *3 n.4.

Plaintiffs, however, argue that an interlocutory appeal by Bell, even if successful, would not terminate this litigation because defendants GM/Allison and CDI/Macrotech do not make claims of workers' compensation immunity, and the case would still go forward as to them. While that may be true, "a question of law need not completely dispose of the litigation to be 'controlling.' . . . Thus a court will require only that the appeal present a controlling question of law on an issue whose determination may materially advance the ultimate termination of the case." 19 James W. Moore et al., Moore's Federal Practice § 203.31[3] (3d ed. 1997). Complete cessation of the litigation as to all claims and all parties is not required in order for a resolution of a question to materially advance the termination of

the litigation under § 1292(b). Ford Motor Credit, 664 F.2d at 380 ("The [interlocutory] order need not be a final one nor need it decide all of the issues with respect to one party or one or more claims."). Furthermore, Bell accurately notes that "four of the six complex design defect theories alleged by plaintiffs have been lodged only against Bell." Bell Reply Br. at 2. Therefore, eliminating Bell as a defendant would significantly reduce the number of issues to be litigated, the amount of time necessary to try the case, and the expense of a costly six-week trial for Bell.

Favoring plaintiffs, however, is the fact that the issue at hand is a matter of first impression under Pennsylvania law. Faced with a similarly-unsettled state law issue, the district court in Olejar v. Powermatic Div. of DeVlieg-Bullard, Inc. reasoned that certification would not materially advance the termination of the litigation because "the Third Circuit will have to undertake the same process of predicting Pennsylvania's choice of law as this Court has already done." 808 F. Supp. 439, 445 (E.D. Pa. 1992). "By not taking an expedited appeal, the Pennsylvania courts are given more time to possibly reach, and decide," the issue at hand. Id. The circumstances in Olejar, however, are distinguishable from the present case. At the time Olejar was decided, Pennsylvania was one of only three states which had embraced the product line exception to successor corporate liability. Id. at 444. In doing so, the Pennsylvania Supreme Court effectively adopted the New Jersey rule on that

issue. Id. The district court in Olejar was confronted with predicting how Pennsylvania's Supreme Court would apply the product line exception when the plaintiff cannot demonstrate that the actual transfer of assets between the transferor and acquiring corporation destroyed the cause of action against the original manufacturer (the "causal element" requirement). Id. at 440. The Olejar court therefore looked to New Jersey -- which had already rejected the causal element requirement -- for guidance on how to resolve the issue of the causal element requirement's applicability under Pennsylvania corporate successor liability law. Id.

The circumstances present in Olejar, where the district court could look to the Pennsylvania Supreme Court's clear decision to follow the reasoning of a sister state's highest court with respect to a relevant minority viewpoint, are not present in this case. It cannot be said that Pennsylvania generally follows the lead of any other court in determining the applicability of the master-servant control test.

Accordingly, the court believes that immediate appellate review of this controversial state law issue would materially advance the termination of this litigation. See Metro Transport. Co. v. Underwriters at Lloyds of London, Civ. A. No. 88-3325, 1990 WL 72968, at *1 (E.D. Pa. May 23, 1990)(certifying "matter of first impression involving complex state statutory issues that have not been addressed" by the Pennsylvania Supreme Court). Section 1292(b)'s third requirement for certification is thus

satisfied.

II. Conclusion

For the foregoing reasons, the master-servant control test's applicability to members of a joint venture for purposes of employer immunity under Pennsylvania's Workmen's Compensation Act is a controlling question of law about which there are substantial grounds for disagreement, the immediate resolution of which by the Court of Appeals will materially advance the ultimate termination of this litigation. The court therefore certifies the Order in this case dated November 4, 1997, for appeal to the Third Circuit Court of Appeals pursuant to 28 U.S.C. § 1292(b), insofar as it deals with the above-mentioned question of law. An appropriate order follows.