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

DONNA ROBERSON	:	**CIVIL ACTION**
	:	
v.	:	
	:	
DETECTIVE PATRICK PELOSI	:	**NO. 99-3574**

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J. **May 21, 2001**

Donna Roberson ("Roberson"), Crystal Garrison, Tameka Roberson, LaTonya Goode, and Helene Roberson, both individually and as a parent and guardian of Carleshia Roberson (collectively, “co-plaintiffs”), brought this action alleging a violation of 42 U.S.C. §1983 and pendent state claims of intentional and reckless infliction of emotional distress against the City of Philadelphia ("the City"), former Police Commissioner Richard Neal ("Neal"), Officer Patrick Pelosi ("Pelosi"), Officer Sterling Staton ("Staton"), Officer Darryl Johnson ("Johnson"), individually and in their official capacities,[1] and against other officers who have since been dismissed.[2] Summary judgment was granted in favor of: the City and all individual defendants other than Pelosi on Roberson’s federal claims; all individual defendants on

[1]Plaintiffs were ordered to withdraw all claims against Neal in his individual capacity by Order dated September 17, 1999.

[2]Officers Mark Moore and Salters Davis were dismissed with prejudice by Order dated January 4, 2000.

Roberson's state law claims; and all defendants on all co-plaintiffs' claims.[3] By Order dated March 20, 2001, plaintiffs' motion for reconsideration was denied as untimely.

Plaintiffs have now moved for certification of final judgment under Federal Rule of Civil Procedure 54(b) in order for the co-plaintiffs to appeal the grant of summary judgment against them, or in the alternative, under 28 U.S.C. §1292(b)for the court to certify for interlocutory appellate review the issue of "what constitutes a 'state-created danger,' in particular with regard to the foreseeability prong?" It appears that all plaintiffs' moved under §1292(b) to certify this issue. Section 1292(b), however, applies to interlocutory appeals – appeals from judgments not yet final. The grant of summary judgment in favor of all defendants on all co-plaintiffs' claims is a final judgment; co-plaintiffs, by definition, cannot file an interlocutory appeal under §1292(b). The Rule 54(b) motion for entry of final judgment will be considered as to co-plaintiffs' claims and the §1292(b) motion for interlocutory appeal will be considered as to Roberson's claims. For the reasons stated herein, the motions will be denied.

[3]Roberson v. City of Philadelphia, No. Civ. A. 99-3574, 2001 WL 210294 (E.D. Pa. Mar. 1, 2001).

FACTS

Roberson made a complaint against members of the Daniels family after an incident on August 6, 1997, in which Roberson and two of her friends were harassed and then physically assaulted by her neighbors, Sharmonique, Yoyo and Patricia Daniels.[4] Compl. at ¶12. After Roberson became a complaining witness against them, their threats against her escalated in hostility and frequency. Compl. at ¶16. As a result, Roberson, by a complaint filed with the District Attorney's office ("D.A.'s office"), alleged witness intimidation against members of the Daniels family. Compl. at ¶17. Roberson was advised that the Daniels would be arrested. Compl. at ¶ 18. Pelosi, the detective handling her complaint, did not execute the arrest warrants he obtained for the three Daniels, but informed them the warrants had issued and requested that they self-surrender. Compl. ¶19. Between the time she filed the witness intimidation complaint and September 23, 1997 (the date of the assault at issue), Roberson contacted Detective Pelosi regarding continuing threats by the Daniels. Compl. at ¶21.

The Daniels' threats and intimidation against Roberson and her family increased as a result of Pelosi's actions.[5] Compl. ¶

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[4]Patricia Daniels is the mother of Sharmonique and Yoyo Daniels.

[5]This is undisputed for purposes of summary judgment. Defendants' Memorandum of Law in Support of Their Motion for Summary Judgment ("Def.'s Memo") at 4.

20. The intimidation and harassment culminated on September 23, 1997. When Roberson was moving from the neighborhood to avoid the Daniels, the Daniels called the police and complained that Roberson and the co-plaintiffs were harassing them. Officers Staton and Johnson arrived at the scene, spoke first with the Daniels, and then with the plaintiffs. The plaintiffs advised the officers of the Daniels' continuing threats and asked for police protection while Roberson and the co-plaintiffs removed Roberson's belongings from her house. Compl. at ¶ 22. The officers did not remain and shortly after they left, the plaintiffs were assaulted with bats and fists by the Daniels and their friends. Compl. at ¶25.

The Daniels were arrested the next day, prosecuted and convicted for this assault, as were two of their friends who had participated. Compl. at ¶26. The plaintiffs sought relief against the City and the police under 28 U.S.C. §1983 and against defendants Pelosi, Staton and Johnson for intentional or reckless infliction of emotional distress and punitive damages under state law.

DISCUSSION

I. Rule 54(b)

A. Standard of Review

Under Fed. R. Civ. P. 54(b),

> [w]hen more than one claim for relief is presented in an action . . . or when multiple parties are involved, the

> court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

"[Rule] 54(b) orders should not be entered routinely or as a courtesy or accommodation to counsel." Panichella v. Penn. R.R. Co., 252 F.2d 452, 455 (3d Cir. 1958)(vacating district court's Rule 54(b) order certifying as a final judgment a grant of summary judgment on a third-party claim because the issue could become moot upon adjudication of the remaining issues, the plaintiff was not a party to the appeal, and allowing the appeal would delay trial). "[T]he burden is on the party seeking final certification to convince the district court that the case is the 'infrequent harsh case' meriting a favorable exercise of discretion." Allis- Chalmers Corp. v. Phila. Elec. Co., 521 F.2d 360, 365 (3d Cir. 1975)(vacating Rule 54(b) certification of final judgment).

In determining whether to certify an otherwise non-appealable order for appellate review under Rule 54(b), a district court must find that: (1) the judgment is "final;" and (2) there is no just reason for delay. See Waldorf v. Shuta, 142 F.3d 601, 610 (3d Cir. 1998)(accepting appellate jurisdiction over a damages award in an action in which the defendants stipulated to liability). These findings must be expressly made by the district court; a statement of reasons for the certification must accompany the certification order. See

Curtiss-Wright Corp. v. General Elec. Corp., 446 U.S. 1, 3 (1980)(vacating appellate court determination that the district court abused its discretion in certifying a grant of summary judgment under Rule 54(b) because district court balancing of equities was reasonable); Carter v. City of Philadelphia, 181 F.3d 339, 343 (3d Cir. 1999)(accepting appellate jurisdiction under Rule 54(b) because the district court's dismissal of the action as to certain defendants was an ultimate disposition of claims against defendants and there was no risk of duplicative appeals); Waldorf, 142 F.3d at 611.

Here, the co-plaintiffs request the court to enter final judgment with regard to its grant of summary judgment in favor of all defendants on all co-plaintiffs' claims so they can take an immediate appeal.

B. Finality

A "final" judgment is "a decision upon a cognizable claim for relief" which is "'final' in the sense that it is 'an ultimate disposition of an individual claim entered in the course of a multiple claims action.'" Curtiss-Wright, 446 U.S. at 7. The court's March 1, 2001 grant of summary judgment in favor of defendants on all co-plaintiffs' claims ended the litigation on its merits and left nothing for the court to do with regard to those plaintiffs. See Sussex Drug Prods. v. Kanasco, Ltd., 920 F.2d 1150, 1153 (3d Cir. 1990)(reversing order certifying partial grant of summary judgment under Rule 54(b) because the judgment

was not final.). That judgment against these co-plaintiffs was "final." See Carter, 181 F.3d at 346-47.

C. Just Reason For Delay

To determine whether "there is no just reason for delay" of an appeal, a district court must balance judicial administrative interests, such as the federal policy against piecemeal litigation, with the equities involved. See Curtiss-Wright, 446 U.S. at 8; Carter, 181 F.3d at 346. Factors to consider include: (1) the presence of a claim or counterclaim that could result in a set-off against the judgment sought to be made final; (2) the relationship between the adjudicated and unadjudicated claims; (3) the possibility that the need for review might or might not be mooted by future developments in the trial court; (4) the possibility that the reviewing court might be obliged to consider the same issue a second time; and (5) miscellaneous factors such as delay, economic and solvency considerations, shortening trial time, frivolity of competing claims, and expense. See Waldorf, 142 F.3d at 609; Allis-Chalmers, 521 F.2d at 364.

Here, there is no claim or counterclaim that could result in a set-off against the final judgment. This factor militates in favor of certification for immediate appeal.

The relationship between the adjudicated and unadjudicated claims is a close one. Both Roberson and the co-plaintiffs alleged violations of their Fourteenth Amendment rights to Due Process by Officers Staton and Johnson and the City on the same

day, in the same way, in the same incident at the same place. Additionally, all plaintiffs alleged violations of state law. If only co-plaintiffs' §1983 and state law claims are reviewed now, Roberson may still appeal the summary judgment on her claims in favor of Staton, Johnson and the City after a jury determination on her remaining claim against Pelosi. This factor weighs against immediate appeal.

The need for review of final judgment will not be mooted by any further developments in this court. Regardless of the jury's decision on Roberson's claim against Pelosi, co-plaintiffs (and Roberson) may still seek appellate review of their claims against the defendants who have been dismissed. Roberson will still be able to appeal the grant of summary judgment in favor of Staton, Johnson and the City on her federal claims and in favor of Staton, Johnson, and Pelosi on her state law claims. It would be preferable for the Court of Appeals to review the issues involved in the claims in light of the facts found by the jury on Roberson's claim against Pelosi rather than on facts in dispute viewed in the light most favorable to plaintiffs. This factor also weighs against immediate appeal so that the reviewing court will not be obliged to consider the same issues a second time.

Summary judgment was granted in favor of Pelosi on co-plaintiffs' §1983 claim but not on Roberson's §1983 claim against Pelosi. A subsequent appeal after verdict will raise substantially the same issues as the appeal of the summary

judgment on co-plaintiffs' §1983 claim against him. Such duplicative review is an inefficient use of judicial resources and weighs in favor of a denial of the Rule 54(b) motion.

Co-plaintiffs have argued that delay of their appeal may result in duplicative trials in the district court (if the Court of Appeals reverses this court's grant of summary judgment) so that judicial economy favors immediate appeal. See Pls.' Memo at 2. If this court certified co-plaintiffs' claims for immediate appeal, it would postpone trial of Roberson's remaining claim. This would prejudice the administration of justice by delaying an otherwise trial-ready claim.

The best way to avoid duplicative review is to preclude co-plaintiffs from seeking appellate review until there in a final judgment in the entire action. The co-plaintiffs will suffer little hardship because of a delay in appellate review of their claims compared to the inefficiency of duplicative appellate review. They have advanced no valid reason this is an "infrequent harsh case" meriting certification for immediate review. The motion for certification of final judgment as to co-plaintiffs' claims under Rule 54(b) will be denied.

B. **28 U.S.C. §1292(b)**

A. Standard of Review

28 U.S.C. §1292(b) provides, in relevant part:

> 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 substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, [s]he shall so state in writing in such order.

28 U.S.C.A. §1292(b)(West 1993 & Supp. 2000). For a court to certify an issue for interlocutory appeal there must be: (1) a controlling issue of law; (2) substantial grounds for a difference of opinion; and (3) material advancement of the ultimate termination of the litigation. See Katz v. Carte Blanche Corp., 496 F.2d 747, 754 (3d Cir. 1974)(reversing class certification on interlocutory appeal); Courtney v. La Salle University, Nos. Civ. A. 92-3838, 92-4069, 1996 WL 363910, *1 (E.D. Pa. June 28, 1996)(Shapiro, J.)(certifying under §1292(b) a partial grant of summary judgment on a statute of limitations issue); Zygmuntowicz v. Hospitality Investments, Inc., 828 F. Supp. 346, 353 (E.D. Pa. 1993)(denying defendants' motion for certification for immediate appeal under section 1292(b)).

"Congress intended that section 1292(b) should be sparingly applied." Milbert v. Bison Labs, Inc., 260 F.2d 431, 433 (3d Cir. 1958)(application for permission to appeal under section 1292(b) denied). See also CHARLES ALAN WRIGHT ET AL., 10 FEDERAL PRACTICE AND PROCEDURE §2658.2, at 89 (West 1998 & Supp. 2000)(Section 1292(b) "is meant to be applied in a relatively few situations and [is not] a significant incursion on the traditional federal policy against piecemeal appeals."). "It is to be used only in exceptional cases when an immediate 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." Milbert, 260 F.2d at 433; Zygmuntowicz, 828 F. Supp. at 353.

The decision to certify is within the discretion of the district court; the moving party bears the burden of showing "exceptional circumstances" requiring immediate appeal. See Yeager's Fuel, Inc. v. Penn. Power & Light Co., 162 F.R.D. 482, 489 (E.D. Pa. 1995)(denying defendant's section 1292(b) motion to certify controlling issue on class certification because there was no substantial ground for difference of opinion).

B. Issue for Certification

The issue Roberson wants to certify to the Third Circuit is "what constitutes a 'state-created danger,' particularly with regard to the foreseeability prong?"[6] But this court found the danger that befell Roberson was foreseeable within the meaning of the state-created danger exception. See Roberson, 2001 WL 210294 at *8. Roberson is asking for certification of an issue decided in her favor.

What constitutes "foreseeability" for the state-created

[6]The wording of the issue Roberson is asking the court to certify for interlocutory appeal is confusing; the language leaves unclear whether Roberson wants the Third Circuit to review the "foreseeability" prong of the state-created danger exception only or if she wants the court to consider the presence of all four prongs of the exception. In the context of the motion in its entirety, it appears Roberson seeks certification on the "foreseeability" issue only.

danger exception is a frequently disputed issue. See Morse, 132 F.3d 132 F.3d 902, 908-910 (3d Cir. 1997)(the harm that ensued after construction workers left a school door unlocked was not foreseeable; it did not cause the ultimate attack on plaintiff); Kneipp v. Tedder, 95 F.3d 1199, 1208 (3d Cir. 1996) (foreseeable that an obviously intoxicated woman deprived of an escort would be likely to injure herself if left unescorted); Mark v. Borough of Hatboro, 51 F.3d, 1137, 1153 (3d Cir. 1995) (not foreseeable that the negligent hiring of a psychologically-impaired firefighter would result in his setting fire to plaintiff's business); Schieber v. City of Philadelphia, Civ. No. A. 98-5648, 2001 U.S. Dist. LEXIS 5887, *12 (E.D. Pa. May 9, 2001)(death could be a foreseeable and direct result of police officers' inaction); Beswick v. City of Philadelphia, No. Civ. A. 00-1304, 2001 WL 210292, *12 (E.D. Pa. Mar. 1, 2001)(foreseeable that 911 call misdirected to a private ambulance company could result in serious harm or death.); White v. City of Philadelphia, 118 F. Supp.2d 564, 570 (E.D. Pa. 2000)(not foreseeable that officers' failure to respond to screaming would result in murder); Henderson v. City of Philadelphia, Civ. No. A. 98-3861, 1999 WL 482305, *7-*8 (E.D. Pa. July 12, 1999)(foreseeable that plaintiff's decedent would harm himself when officers left him alone with knowledge he was a danger to himself).

Summary judgment was granted in favor of Staton and Johnson on Roberson's §1983 claim against them not because of non-

foreseeability, but because she did not meet the fourth prong of the state-created danger exception; she did not show that Staton and Johnson created a danger that would not otherwise have existed. Id. at *12. Summary judgment was granted in favor of the City on plaintiffs' §1983 claim because they failed to establish the existence of a custom, policy or practice or a plausible nexus between such a custom and the constitutional harm suffered. See id. at *14. An immediate appeal will not eliminate the need for trial and materially advance the ultimate termination of the litigation unless the denial of summary judgment on Roberson's claim against Pelosi were reversed. There is the possibility of duplicative trials if the grants of summary judgment to defendants other than Pelosi are reversed. But on balance it is better to avoid piecemeal review and have a full review in the normal manner when all issues have been resolved. This case is trial-ready and there are really no exceptional circumstances warranting an immediate interlocutory appeal.

CONCLUSION

Plaintiffs have failed to set forth criteria entitling them to immediate appeal either under Rule 54(b) or section 1292(b). Their motion will be denied.

An appropriate Order follows.

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ORDER

AND NOW, this 21st day of May, 2001, for the reasons stated in the foregoing memorandum, it is **ORDERED** that plaintiffs' request for judgment under Federal Rule of Civil Procedure 54(b) and certification for interlocutory appeal under 28 U.S.C.A. §1292(b) [Docket #52] is **DENIED.**

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S.J.