UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re Flint Water Cases.

Judith E. Levy
United States District Judge

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This Order Relates To:

Carthan, et al. v. Snyder, et al.
Case No. 16-cv-10444

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ORDER DENYING CITY OF FLINT'S MOTION TO AMEND AND CERTIFY IN PART THE COURT'S AUGUST 1, 2018 OPINION AND ORDER FOR INTERLOCUTORY APPEAL [565]

Following the declaration of a financial crisis in 2012, Governor Snyder appointed an emergency manager, Edward Kurtz, to oversee and improve defendant-the City of Flint's fiscal situation. (Dkt. 546 at 8.) Kurtz was the first of several emergency managers tasked with restoring the City's economic wellbeing. To facilitate that effort, the emergency managers were given broad powers over municipal decision-making. *See* Mich. Comp. Laws Ann. § 141.1549(2) (West 2018). During the imposition of emergency management, defendant's governing body was unable to exercise any real authority over municipal functions. *See id.*

In the spring of 2014, still under the direction of emergency management, the City of Flint switched its municipal water source from that supplied by the Detroit Water and Sewerage Department to that drawn from the Flint River. (Dkt. 546 at 1.) Yet the new water was not properly treated and, as a result, contained high levels of lead and other toxic contaminants. The City's residents were not informed of the risks and continued to use the water. And in response to the injuries they allegedly suffered, they filed a multitude of lawsuits in various courts across Michigan. (*Id.* at 1–2.) To date, these lawsuits are still pending, including this one which is a consolidated class action.[1]

Plaintiffs filed the operative complaint in this case in the fall of 2017. (Dkt. 238.) Among the many claims the complaint set forth was the allegation that the City of Flint is liable under *Monell v. Dept' of Soc. Serves. of City of New York*, 436 U.S. 658 (1978) for the violation of plaintiffs' right to bodily integrity. This claim was based on defendant's alleged municipal policy of unconstitutionally providing the residents of Flint tainted water. (Dkt. 546 at 112–14.)

[1] For a more complete recitation of the facts alleged, see *Carthan v. Snyder*, No. 16-cv-10444, 2018 U.S. Dist. LEXIS 128989 (E.D. Mich. Aug. 1, 2018).

Defendant filed a motion to dismiss the complaint in its entirety. With respect to the *Monell* claim in particular, defendant pointed out that it was under the control of the state-imposed emergency managers throughout the time of the alleged wrongdoing. (*Id.*) Consequently, in defendant's view, the claim must be dismissed because the imposition of emergency management meant that any unconstitutional act was taken pursuant to state, not municipal policy. (*Id.*) In other words, the City of Flint could not be responsible for the alleged decision to provide the residents of Flint with the tainted water, when the city's governing body was unable to exercise any real authority. (*Id.*)

On August 1, 2018, the Court entered an opinion and order granting in part and denying in part defendant's motion. Defendant's requested relief was granted almost in its entirety, but the Court rejected the City's argument that it could not be held liable for the acts of the emergency managers: "When an emergency manager is appointed to run a municipality, he or she becomes a final decision-maker for the municipality . . .." (*Id.* at 115.) To decide otherwise would block *Monell* liability for the unlawful actions of officials who were acting pursuant to

prevailing city policy. (*Id.*) In effect, it would be as if the City had no government at all for constitutional purposes. (*Id.*)

Following that decision, defendant filed this motion asking the Court to certify for interlocutory appeal the question of "whether *Monell* liability applies when the final decision maker(s), with respect to the relevant alleged policy, were State officials, serving as or acting through the Emergency Managers, appointed by and accountable to the State pursuant to Michigan's Emergency Manager law, 2012 P.A. 436." (Dkt. 565 at 1.) On September 12, 2018, the Court heard oral argument, and, following the hearing, defendant's motion was denied for the reasons set forth on the record and for those described below.

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A district judge may certify an order for interlocutory appeal when she is of the opinion that "[1] such [an] order involves a controlling question of law [2] as to which there is substantial ground for difference of opinion and that [3] an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C.A. § 1292(b) (West 2018). The decision to certify an order for interlocutory appeal is a discretionary matter. *See In re Trump*, 874 F.3d

948, 951 (6th Cir. 2017); *see also* 16 Charles Alan Wright et al., Federal Practice and Procedure § 3930 (3d ed.).

1. Controlling Question of Law

The first factor is whether an order "involves a controlling question of law." A motion to dismiss, like that at issue here, challenges the sufficiency of a complaint and undoubtedly presents a question of law. *See In re Trump*, 874 F.3d at 951. As a result, the Court need only determine whether the question in this case is controlling. For the following reasons, it is not.

As defendant correctly observes, "[a]ll that must be shown in order for a question to be 'controlling' is that resolution of the issue on appeal could materially affect the outcome of the litigation[.]" *In re Baker & Getty Fin. Servs.*, 954 F.2d 1169, 1172 n. 8 (6th Cir.1992); *see In re City of Memphis*, 293 F.3d 345, 351 (6th Cir. 2002). Yet courts have differed on what it means for a question to "materially affect the outcome" of a case. And while some see it as a relatively formal inquiry, looking no further than whether an erroneous decision would eventually require reversal, *see Fried v. JP Morgan Chase & Co.*, 850 F.3d 590, 595 (3d Cir. 2017); *Spong v. Fid. Nat. Prop. & Cas. Ins. Co.*, 787 F.3d 296, 304 (5th

Cir. 2015), others treat it more as a practical consideration and weigh whether interlocutory review presents the most efficient means to dispose of the litigation. *See Kuehner v. Dickinson & Co.*, 84 F.3d 316, 319 (9th Cir. 1996); *Eisenberg v. U.S. Dist. Court for S. Dist. of Illinois*, 910 F.2d 374, 376 (7th Cir. 1990). The Sixth Circuit leans towards the latter, rather than the former perspective. See *Gerboc v. ContextLogic, Inc.*, 867 F.3d 675, 678 (6th Cir. 2017).

With this in mind, while a question does not need to terminate an entire action to be "controlling," *In re Baker & Getty Fin. Servs.*, 954 F.2d at 1172 n. 8, it must do more than provide expeditious review of an issue that could otherwise be decided following final disposition. It must represent a question that, if appealed, would have a tangible impact on the proceedings; and, in addition, it must also save the Court and the litigants time and money. *Gerboc*, 867 F.3d at 678; *see Harriscom Svenska AB v. Harris Corp.*, 947 F.2d 627, 631 (2d Cir. 1991); 16 Charles Alan Wright et al., Federal Practice and Procedure § 3930 (3d ed.). Only then can a would be appellant gain exception to the normal rule that appeals are taken from a final order or judgment.

In this case, whether or not defendant's question is certified for interlocutory appeal, the litigation will proceed much in the same manner. Although the City of Flint is one of a number of defendants facing the allegation that it violated plaintiffs' right to bodily integrity, defendant's liability does not turn on its independent conduct. Rather, the City, as a municipality, is only liable, if at all, based on the acts of others. "[T]hose whose edicts or acts may fairly be said to represent official policy." *Monell*, 436 U.S. at 694. So, even if defendant were dismissed following an interlocutory appeal, the proceedings here in the district court would go on in much the same manner. The Court would still need to ascertain whether the emergency managers violated plaintiffs' right to bodily integrity. If defendant is not dismissed, and assuming, for the sake of argument that the emergency managers have infringed upon plaintiffs' federal interests, the Court has already decided the *Monell* issue, which is a purely legal question. It would need only to refer back to that decision to determine the outcome with respect to the City of Flint.

Conversely, defendant would save some time and money if the *Monell* question is certified for interlocutory appeal and it prevailed. Yet,

while it is true that defendant will know of its fate with greater certainty if allowed to appeal now, the same could be said of any defendant who has not been dismissed at this stage in the litigation. Thus, this on its own is an insufficient reason to certify the question.

On balance, although certifying the question of *Monell* liability will affect the outcome of the litigation to some extent, the interests are insufficient to weigh in favor of doing so. For this reason, the question is not controlling within the meaning of § 1292(b) and this first factor cuts against certification.

2. Substantial Ground for Difference of Opinion

The second factor is whether "there is substantial ground for difference of opinion" in the question that defendant wants certified for appeal. In this context, a difference of opinion exists where fair-minded jurists might reach contradictory conclusions on a novel legal issue. *In re Trump*, 874 F.3d at 952. But, in this case, the underlying legal issue is not novel. Instead, it rests on well-established precedent. And even if it were novel, fair minded jurists would not hold conflicting views on the correct outcome.

Whether the Legal Issue is Novel

Defendant characterizes the legal issue as "whether *Monell* liability can apply when a municipality is controlled by state officials, stripped of independent policymaking authority, and forced to implement a State policy." (Dkt. 565 at 13.) In defendant's view, this issue is novel because it is one of first impression. (*Id.*)

Here, the underlying legal question is actually more general—when is a government official considered a municipal policymaker for *Monell* purposes? And although the full inquiry is admittedly more specific—whether Flint's emergency managers, in particular, were City of Flint policymakers—it is the underlying question that must be novel to warrant interlocutory appeal. Otherwise, any issue resolved at the motion to dismiss stage could be reduced to a unique question suitable for certification.

Defendant counters that the Court acknowledged in its August 1, 2018 opinion and order that the issue was one of first impression. (Dkt. 565 at 13.) Defendant is correct, yet it ignores the context in which that phrase was used. The Court explained that "whether a state-appointed emergency manager is a final decision maker for Flint appears to be a

matter of first impression." (Dkt. 564 at 114.) And since no other court had previously addressed whether the state-appointed emergency managers could be policymakers for the City, this was a true statement. Yet that does not make the question outside the bounds of established precedent.

Indeed, the underlying legal issue here is anything but novel. To the contrary, the controlling caselaw has developed over many decades and is well established. When deciding whether a government employee is a policymaker for *Monell* purposes, courts do not look at whether an official is responsible for policymaking in general. *McMillian v. Monroe Cty., Ala.*, 520 U.S. 781, 785–86 (1997). Rather, the question is whether an official is responsible for setting policy in relation to a specific issue. *See Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989). State law guides the analysis, but a state's characterization of a government employee as a state or municipal official is not controlling. *McMillian*, 520 U.S. at 786.[2] Courts are instructed to look at the actual function of

[2] For similar reasons, although the Michigan Court of Appeals has ruled that emergency managers are state employees for the limited purpose of jurisdiction under Michigan's Court of Claims Act, *Mays v. Snyder*, 323 Mich. App. 1, 50–51 (2018), this does not control the *Monell* inquiry. *See McMillian*, 520 U.S. at 786.

an official in municipal affairs, *id.*, and to work under the assumption that someone has responsibility for setting policy in a given area. *See City of St. Louis v. Praprotnik*, 485 U.S. 112, 125 (1988) (plurality opinion) ("[W]e can be confident that state law . . . will always direct a court to some official or body that has the responsibility for making law or setting policy in any given area of a local government's business."); *id.* at 122 ("[G]overnmental bodies can act only through natural persons."). Finally, if an individual with policymaking authority is also responsible for making a final decision on whether to implement that policy, even a single act by that decision-maker could constitute a policy for the purposes of *Monell* liability. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 485 (1986); *see also Jack M. Beermann*, Municipal Responsibility for Constitutional Torts, 48 DePaul L. Rev. 627, 657 (1999) ("An official is not a policymaker merely because he or she is vested with final decision-making authority over an area, unless he or she is also vested with authority to establish the standards under which that authority is exercised.")

The controlling caselaw is therefore well established and, as set forth below, its application in this case leads to a single, reasonable answer.

Whether Fair Minded Jurists Would Reach Contrary Conclusions

Even if the underlying legal issue were novel, defendant must still show that "fair-minded jurists" might come to a contrary answer. Defendant fails to meet this burden.

In the opinion and order at issue in this motion, the Court applied the facts to the principles just discussed and arrived at the only reasonable conclusion. The Court decided that "emergency managers imposed by the State of Michigan were officials whose edicts or acts may fairly be said to represent [Flint's] official policy . . .." (Dkt. 564 at 114–15.) This decision was compelled by state law. *See McMillian*, 520 U.S. at 786. Emergency managers "act for and in the place and stead of the governing body and the office of chief administrative officer of the local government." (*Id.*, citing Mich. Comp. Laws Ann. § 141.1549(2) (West 2018)). Further, "[f]ollowing [the] appointment of an emergency manger . . . the governing body and the chief administrative officer of the local government shall not exercise any of the powers of those offices except as

may be specifically authorized in writing by the emergency manager . . ..." (Dkt. 564 at 114–15, citing § 141.1549(2).)

With this in mind, state law provides that the emergency managers have the authority to make wide-ranging policy decisions and were final decision-makers for the City of Flint with respect to those choices. Since state law indicates that the emergency managers are responsible for setting policy with regards to Flint's water supply, *see* § 141.1549(2) (detailing that state law gives emergency managers broad powers to assure a municipality's capacity to provide services essential to the public health, safety, and welfare)—something that defendant does not dispute—and because the emergency manager's decisions were final, the Court concluded that defendant is liable for the alleged policy of providing its residents with tainted water. *See Pembaur*, 475 U.S. at 485. The Court indicated that it was "not a difficult question" and stands by that decision. (Dkt. 564 at 114.) In the Court's view, no "fair-minded jurist" would reach a different result given these facts and the applicable law.

Defendant offers two arguments to the contrary. First, defendant claims that a municipality cannot be held liable under *Monell* unless a

municipal official creates the allegedly unlawful policy. In support, defendant looks to the words of *Monell*, that "'local governing bodies . . . can be sued directly under § 1983 . . . where . . . the action that is alleged to be unconstitutional implements or executes a policy . . . officially adopted and promulgated by *that* body's officers.'" (Dkt. 565 at 8, citing *Monell*, 436 U.S. at 690 (emphasis added).) This was a contention that defendant repeatedly returned to during oral argument. (Dkt. 613 at 26, 29–30, 32.)

However, in *Monell*, the Court not only explained that "a local government . . . [may] be sued under § 1983 for an injury inflicted solely by its employees or agents," but also when an injury has been inflicted by "those whose edicts or acts *may fairly be said to represent* official policy." *Monell*, 436 U.S. at 694 (emphasis added). Post-*Monell* cases have also implicitly rejected defendant's position, recognizing that the policymaking power of municipal governments could be wielded by a wide array of government actors. *See Praprotnik*, 485 U.S. at 127 ("[O]ne may expect to find a rich variety of ways in which the power of government is distributed among a host of different officials and official bodies."). Perhaps for this reason, courts have decided that a municipal employee

may even be a state or federal policymaker in the context of *Monell* liability. *E.g.*, *Burley v. Gagacki*, 729 F.3d 610, 619 (6th Cir. 2013) (ruling that a municipal employee was acting as a federal official and therefore could not be a municipal policymaker); *Cady v. Arenac Cty.*, 574 F.3d 334, 345 (6th Cir. 2009) (deciding that a municipal employee was acting as a state agent and could not be a municipal policymaker as a result). Equally, a state employee may be considered a municipal policymaker if the circumstances so warrant. *See McMillian*, 520 U.S. at 786 ("That is not to say that state law can answer the question for us by . . . simply labelling as a state official an official who clearly makes county policy.")

Ultimately, defendant focuses its first argument on a single sentence from *Monell*—when others lead to a different conclusion. But since *Monell* was decided, countless decisions have helped shape that body of law. The *Monell* decision itself even warned that it was not providing the complete contours of municipal liability. 436 U.S. at 695.

Next, defendant argues that plaintiffs should be prohibited from shifting liability from the state to a municipality in order to sidestep sovereign immunity. (Dkt. 565 at 15.) Again, defendant contends that the emergency managers are state officials, immune from suit for damages

in their official capacity under the Eleventh Amendment. (Dkt. 565 at 15.)

Defendant's second argument fails because it confuses distinct legal concepts. On the one hand, *Monell* deals with when a municipality may be liable for the actions of government actors. On the other, Eleventh Amendment immunity addresses when a state may be sued as a limitation on subject matter jurisdiction. So, for the purposes of *Monell*, the concept of Eleventh Amendment immunity is irrelevant. If anything, the question would be whether defendant can claim immunity even if liable because the allegedly unconstitutional policy was set by a state official. Defendant asserted as much at length in its motion to dismiss. (Dkt. 276 at 43–55.) Yet that argument is foreclosed by a Sixth Circuit decision. *Boler v. Earley*, 865 F.3d 391, 409–10 (6th Cir. 2017).

At oral argument, defendant developed a third argument. It claimed that an *Ex parte Young* action against the state would be necessary to enjoin an emergency manager in his or her official capacity from enforcing an unconstitutional policy. (Dkt. 613 at 33.) Based on this premise, defendant thought it logically inconsistent to hold a municipality liable under *Monell* when injunctive relief involving the

same allegedly unconstitutional policy would demand a suit against the state. (*Id.*) But, here, although the emergency managers were acting pursuant to state law, they were acting on behalf of the City of Flint—they were setting Flint's policy. And an injunctive suit does not lie against the state if it seeks to enjoin municipal directives. Thus, *Ex parte Young* does not apply, contrary to defendant's position.

In the end, the thrust of defendant's argument is that the allegedly unconstitutional policy was a state policy and had nothing to do with the City. But the City of Flint still existed as a legal entity, despite the fact that the Legislature could have chosen to dissolve it at any time and for any reason. *See Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907) ("Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them."). So, someone had to be making municipal policy. *See Praprotnik*, 485 U.S. at 125 ("[S]tate law . . . will always direct a court to some official or body that has the responsibility for . . . setting policy in any given area of a local government's business."). Although defendant asks the Court to certify this question because, in its view, reasonable jurists would reach conflicting outcomes, defendant

does not provide an alternative answer and instead appears simply to disagree with the Court's decision. *See United States v. Grand Trunk W. R. Co.*, 95 F.R.D. 463, 471 (W.D. Mich. 1981) (merely questioning the decision is not enough to warrant certification). Because the Court reached the only reasonable conclusion, the second factor also cuts against certification.

3. Materially Advance Termination of the Litigation

The third factor is whether "an immediate appeal from the order may materially advance the ultimate termination of the litigation."

"When litigation will be conducted in substantially the same manner regardless of [the] decision [to review a question on interlocutory appeal], the appeal cannot be said to materially advance the ultimate termination of the litigation." *In re City of Memphis*, 293 F.3d at 351, quoting *White v. Nix*, 43 F.3d 374, 378–79 (8th Cir.1994). This inquiry is closely tied to the first requirement that an order involve a controlling question of law. *The Duplan Corp. v. Slaner*, 591 F.2d 139, 148 n. 11 (2d Cir. 1978); *Newsome v. Young Supply Co.*, 873 F. Supp. 2d 872, 878 (E.D. Mich. 2012). The expenditure of judicial resources and litigant expense is therefore again a relevant consideration, *see Newsome*, 873 F. Supp. 2d

at 878, as courts must grapple with whether interlocutory appeal presents the most efficient way to resolve the proceedings. *See McNulty v. Borden, Inc.*, 474 F. Supp. 1111, 1120–1122 (E.D. Pa. 1979).

For those reasons set forth above, certifying this issue for interlocutory review would not materially advance the termination of the litigation. This is because even if defendant were dismissed following an appeal, the proceedings would continue in much the same manner. And although the litigation would change to some extent, interlocutory appeal is not a vehicle to provide early review absent exceptional circumstances. *See Milbert v. Bison Laboratories, Inc.*, 260 F.2d 431, 433 (3d Cir.1958). There are none here. The third factor thus additionally cuts against certification.

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The Court is cognizant that it should certify questions for interlocutory appeal sparingly and only under exceptional circumstances, *In re City of Memphis*, 293 F.3d at 350, as interlocutory appeal was not intended to open the floodgates to a vast number of appeals. *Milbert*, 260 F.2d at 433. While the issue defendant seeks to appeal is undoubtedly important, the Court decided it on the basis of well-established caselaw

and sees no reason to certify it at this time. It may be that defendant is ultimately vindicated on an appeal following a final order—importantly, defendant does not lose the right to appeal at this later time. But irrespective of that future possibility, this litigation will proceed in much the same fashion whether defendant appeals now or later. Therefore, the Court declines to exercise its discretion to certify defendant's question for interlocutory appeal.

Accordingly, **IT IS ORDERED** that defendant's motion to amend and certify in part the Court's August 1, 2018 opinion and order for interlocutory appeal [565] is **DENIED**.

IT IS SO ORDERED.

Dated: October 31, 2018
Ann Arbor, Michigan

s/Judith E. Levy
JUDITH E. LEVY
United States District Judge

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon counsel of record and any unrepresented parties via the Court's ECF System to their respective email or First Class U.S. mail addresses disclosed on the Notice of Electronic Filing on October 31, 2018.

s/Shawna Burns
SHAWNA BURNS
Case Manager