UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

MAURA O'NEILL, as administrator Of the Estate of Madelyn E. Linsenmeir, Plaintiff, v. CITY OF SPRINGFIELD, MOISES ZANAZANIAN, REMINGTON MCNABB, SHEILA RODRIGUEZ, HAMPDEN COUNTY SHERIFF'S DEPARTMENT, And JOHN/JANE DOES NOS. 1-5, Defendants	Civil Action No.: 3:20-cv-30036

MEMORANDUM IN SUPPORT OF MUNICIPAL DEFENDANTS' MOTION TO CERTIFY AND AMEND THIS COURT'S ORDER OF MAY 5, 2021 UNDER 28 U.S.C. S 1292(b) and FED. R. APP. P. 5(a)(3)

I. INTRODUCTION

The City of Springfield, Moises Zanazanian, Remington McNabb and Sheila Rodriguez (hereinafter "Municipal Defendants") request that this Honorable Court, pursuant to 28 U.S.C. § 1292(b) and F. R. APP. P. 5(a)(3) amend the order of May 5, 2021 by certifying that so much of the order that denies the motion to dismiss filed by the municipal is appropriate for interlocutory review under §1292(b). Specifically, the Defendants ask that the Court certify that the designated section of the order involves a controlling question of law, and 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.

II. BACKGROUND

The complaint filed in this matter contains four (4) Counts, of which two (2) are addressed to the Municipal Defendants, i.e. COUNT I: vs. City, Zanazanian, McNabb,

Rodriguez: Failure to provide medical care under 14th Amendment in violation of 42 USC § 1983, and COUNT IV: Against all individual defendants alleging intentionally causing wrongful death in violation of MGL c. 229, section 2.

The Complaint recounts facts which are alleged to have occurred from September 28, 2018 until Madelyn Linsenmeir's death on October 7, 2018. Specifically, the complaint, brought by and through the administratrix of the Estate of the late Madelyn Linsenmeir ("Linsenmeir"), alleges that Ms. Linsenmeir was a long time opioid addict. Comp. ¶ 13. She also had a pre-existing medical condition known as Infectious Endocarditis, a potentially life threatening condition which usually affects heart valves. Comp. ¶ 20. She allegedly communicated with her family on September 28, 2018, and told them she was very sick, but was afraid to go to the Emergency Room due to warrants for her arrest being outstanding. Comp. ¶¶ 21, 22.

Ms. Linsenmeir was arrested by the Springfield Police Department on September 29, 2018. Comp. ¶ 25. The complaint alleges that the Municipal Defendants were at all material times aware that Ms. Linsenmeir was an intravenous drug user. Comp. ¶ 32. Ms. Linsenmeir, per the complaint, was brought to the booking area of the Springfield Police Department at or about 5:34 p.m., and was visibly limping at the time. Comp. ¶ 33. Defendants Zanazanian and McNabb were members of the Springfield Police Department, and were both working in the booking area at all material times. Comp. ¶¶ 28 and 29. Defendant Rodriguez was at all material times an employee of the SPD, and worked as a matron in the holding cell and booking areas. Comp. ¶ 30. The complaint alleges Ms. Linsenmeir complained of pain, difficulty breathing, swollen extremities, was crying from pain, stated she felt like she might pass out, requested water, stated her chest hurt, and said she needed water before she could use the phone at that time. Comp. ¶¶ 39-45. She denied any need for psychiatric help, and said she "might

need to go to the hospital." Comp. ¶ 38. Her legs were allegedly too swollen to walk. Comp. ¶¶ 39-42. The complaint further alleges the SPD took pictures of her swollen right knee and leg area. Comp. ¶ 46. Defendant Rodriguez is alleged to have observed that Ms. Linsenmeir was in too much pain to lie down. Comp. ¶ 47.

At approximately 7:38 p.m. Ms. Linsenmeir allegedly re-entered the booking area. Comp. ¶ 48. The complaint alleges Zanazanian motioned for McNabb to NOT activate the audio recording equipment.

Ms. Linsenmeir spoke with Zanazanian for a few moments and then called her mother. Comp. ¶ 51. The complaint alleges that McNabb, Zanazanian and Rodriguez all overheard her conversation with her mother, and that during the call Ms. Linsenmeir advised her mother that she had been arrested, had asked for and been denied medical care, and that she was very sick, in pain and needed help. Comp. ¶¶ 51 and 52. The complaint alleges that Zanazanian told Ms. Linsenmeir and her mother that he was not going to provide Ms. Linsenmeir with medical care. Comp. ¶ 53.

The complaint alleges that after the phone call Ms. Linsenmeir continued to ask for medical attention, that she was crying and distressed, that she was pointing to her chest and her knee, and that she had great difficulty walking back to her cell. Comp. ¶ 57.

Per the complaint, Ms. Linsenmeir was transferred the next day to the custody of the Hampden County Sheriff's Department ("HCSD") office. Comp. ¶ 62. She remained in the custody of the HCSD until her death on October 7, 2018. Comp. ¶ 74. She had been admitted to a hospital on October 4, 2018. Comp. ¶¶ 71-72.

On May 11, 2020 the municipal defendants filed a motion to dismiss the complaint under F.RuleCiv.P. Rule 12 (b) (6). The Defendants moved to dismiss Count I, arguing that since the Plaintiff was not in the custody of the municipal defendants at the time of her death (and had not been for 8 days) as a matter of law they could not be found liable for a violation of Ms. Linsenmeir's 14th amendment rights under of 42 USC § 1983. The municipal defendants moved to dismiss Count IV, brought under MGL c. 229, section 2, for intentionally causing Ms. Linsenmeir's death, as the facts as pled are insufficient as a matter of law to state a claim under that statute.

III. ARGUMENT

A. Standard For Discretionary Interlocutory Review

28 U.S.C. § 1292(b) provides a methodology for discretionary interlocutory appeal. Such statute provides:

> When a district judge, in making 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, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: provided, however, that application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

Appellate Rule 5(a)(3) provides that the district court can amend the underlying order to include the certifying statement.

The Defendants file this request aware that "the instances where Section 1292(b) may appropriately be utilized will, realistically, be few and far between" and is "hen's teeth rare." *Camacho v. Puerto Rico Port Auth.*, 369 F.3d 570, 573 (1st Cir. 2004). Nonetheless, the Defendants suggest that the circumstances of this case make a compelling case for this Court to exercise its discretion and certify this matter for interlocutory review. Such interlocutory review should be sparingly used "and only in exceptional circumstances and where the proposed intermediate appeal presents one or more difficult and pivotal questions of law not settled by controlling authority." See *Heddendorf v. Goldfine*, 263 F.2d 887, 888 (1st Cir. 1959) (quoting *Kroch v. Texas Co.*, 167 F. Supp. 947, 949 (D.C.S.D.N.Y. 1958)) (Section 1292(b) "should be used sparingly and only in exceptional cases").

The order or ruling at issue must present: (1) a "controlling question of law," (2) over which there is a "substantial ground for difference of opinion," and (3) an immediate appeal will "materially advance the ultimate termination of the litigation . . . ." Moreover, the First Circuit has indicated that "[i]n applying these standards, the court must weigh the asserted need for the proposed interlocutory appeal with the policy in the ordinary case of discouraging 'piecemeal appeals." *Heddendorf*, 263 F.2d at 889; "Perhaps there is always some hardship caused by the application of the 'final decision' rule. Yet the rule is beneficial in most applications, because piecemeal appeals would result in even greater hardships and tremendous additional burdens on the courts and litigants which would follow from allowing appeals from interlocutory orders on issues that might later become moot. The 'discretion' of the appellate court should be exercised in the light of this fundamental consideration."

B. The Order at Issue Presents a Controlling Issue

As set out above, the issue of whether the plaintiff can pursue claims against the municipal defendants will materially alter the presentation of the case, and the burden and expense on the parties.

In order to show the issue is controlling, it is necessary to examine what impact the disposition of the matter on appeal will have on the case at the trial court level. See *Bank of New York v. Hoyt*, 108 F.R.D. 184, 188 (D.R.I. 1985) ("[A] legal question cannot be controlling if litigation would be conducted in much the same manner regardless of the disposition of the question upon appeal.") Here, it is obvious that the course of the trial will be fundamentally altered if the municipal defendants are entitled to dismissal as a matter of law. See also *Bank of New York v. Hoyt*, 108 F.R.D. 184, 188 (D.R.I. 1985) ("[A] legal question cannot be controlling if litigation would be conducted in much the same manner regardless of the disposition of the question upon appeal.").

Where a reversal of the district court's ruling would terminate the action it is sufficient to satisfy the controlling issue prong. See *Philip Morris, Inc. v. Harshbarger*, 957 F. Supp. 327, 330 (D. Mass. 1997) (citing *Klinghoffer v. S.N.C. Achille Lauaro*, 921 F.2d 21, 24 (2d Cir. 1990)) and *Arizona v. Ideal Basic Indus.*, 673 F. 2d 1020, 1026 (9th Cir. 1982) (stating that all 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 the district court); *Bank of New York v. Hoyt*, 108 F.R.D. 184, 188 (D.R.I. 1995) (defining "controlling" to mean "serious to the conduct of the litigation, either practically or legally").

Also weighing in favor of finding the issue controlling is the impact on both the Court's resources and the parties. The courts consider the saving of time and expense in determining the "practical" component. *Ashmore v. Northeast Petroleum Div. of Cargill, Inc.*, 855 F. Supp. 438, 440 (D. Me. 1994) (holding that the controlling issue of law element is met if interlocutory reversal might save time for the district court and time and expense for the litigants). The difficulty and general importance of the question presented, the probability of reversal, the significance of the gains from reversal, and the hardship on the parties in their particular circumstances, [should] all be considered. In *Lipsett v. Univ. of P.R.*, the court stated that "advantages and disadvantages of immediate appeal in light of the guidelines provided in the statute" should be considered. 740 F. Supp. 921, 923 (D.P.R. 1990). Here, there is significant burden on the parties of having to litigate a claim where a genuine issue as to the status of the law exists,

Also weighing in favor of allowing interlocutory review is the nature of the issue, which is wholly one of law. A question is deemed to be one of law where it is "something the court of appeals can decide quickly and cleanly, without reviewing the record." *United Airline Inc. v. Gregory*, 716 F. Supp. 2d 79, 91 (D. Mass. 2010) (quoting *Ahrenholtz v. Bd. of Tr. of Univ. of Illinois*, 219 F.3d 674, 676-77 (8th Cir. 2000)). In other words, if the issue requires reference to disputed facts or the record, it could possibly repudiate the request for interlocutory appeal.

In the instant case, the resolution of whether the *Monell* claim should be tried first, or not, is not tied to any facts peculiar to the case at bar. Indeed, the Court noted at the hearing on this matter that it has been presented with the issue of bifurcation in police misconduct cases repeatedly over the years.

C. The Order at Issue Presents an Issue Where There Is Substantial Ground for Difference of Opinion

Substantial grounds for difference of opinion arise when an issue involves "one or more difficult and pivotal questions of law not settled by controlling authority." *Philip Morris, Inc. v. Harshbarger*, 957 F. Supp. 330 (D. Mass. 1997) When the difference of opinion is substantial, there is usually significant uncertainty and conflict presented in the case law, marked room for varying opinion, confusion, or a question of first impression. *Natale v. Pfizer, Inc.*, 379 F. Supp. 2d 161, 182, aff'd, 424 F.3d 43 (1st Cir. 2005) The purpose of the appeal is not to "review the correctness of an interim ruling, but rather to avoid harm to litigants or to avoid unnecessary or repeated protracted proceedings." *Lipsett v. Univ. of Puerto Rico*, 740 F. Supp. 921, 923 (D.P.R. 1990).

The Court has held that a claim of first impression satisfies the second prong under §1292 in that there is grounds for different results. See *Springfield School Committee v. Bank*sdale, 348 F.2d 261, 262 (1st Cir. 1965) (noting importance of the jurisdictional question); *Lawson v. FMR LLC., 670 F.3d 61, 62* (1st Cir. 2010) (noting certified order "raised important questions of first impression"); *Greenwood Trust Co. v. Commonwealth of Mass.*, 971 F.2d 818, 821 (1st Cir. 1992) (holding that "in light of the pivotal importance and broad commercial consequences of the question, we accepted certification"); *In re San Juan Dupont Plaza Hotel Fire Litig.*, 859 F.2d 1007, 1010 (1st Cir 1988) (holding that the work product issue was "sufficiently novel and important and the circumstances sufficiently out of the ordinary to justify review under 1292(b)"); and *Lane v. First Nat. Bank of Bos.*, 871 F.2d 166, 167 (1st Cir. 1989) (holding that "because we agree that the issue was 'sufficiently novel and important' we allowed the intermediate appeal to proceed").

In the instant case, the municipal defendants moved to dismiss the claim since Ms. Linsenmeir was not in their custody at the time of her death. The defendants acknowledge that the First Circuit has recognized a claim under the 14th Amendment for failure to provide medical care to pre-trial detainees. "A state and its subdivisions are under a substantive obligation imposed by the Due Process Clause of the Fourteenth Amendment to refrain at least from treating a pretrial detainee with deliberate indifference to a substantial risk of serious harm to health. *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244, 103 S.Ct. 2979, 77 L.Ed.2d 605 (1983); *seeFarmer v. Brennan*, 511 U.S. 825, 835, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994) (standard of deliberate indifference except as to excessive force claims)." *Coscia v. Town of Pembroke, Mass.*, 659 F.3d 37, 39 (1st Cir., 2011).

As noted by the Court in *Coscia*, the Fourteenth Amendment duty to pre-trial detainees springs from the unique circumstances of detention. *Id.* at 40-41. "The government's obligation to prevent avoidable harm by providing medical care during custody is, in other words, a substitute for the responsibility that a reasonable person would bear for himself, if he were not detained." *Id*.

In *Coscia*, the Court declined to extend liability to post custody loss. The decedent in *Coscia* was arrested following an automobile accident; he expressed suicidal ideation over the course of his detention, and was not placed in a cell, but rather was held under suicide protocols. *Id*. at 37-38. He was released at about 6 o'clock in the evening, and killed himself at about 8:00 a.m. the next morning. *Id*.

This Court distinguished the circumstances here from those presented in Coscia because Ms. Linsenmeir was not released into her own custody, but was rather transferred to the custody of an entirely different state actor. Neither the Court nor the Plaintiff has any cases supporting

that distinction, and it is thus a case of first impression. It is, moreover, a set of circumstances likely to recur, since detainees are often transferred to other jurisdictions as a result of outstanding legal issues.

Since the issue herein is novel, important and one of first impression, the second prong is satisfied.

As to the state law claim under M.G.L. c. 229, the City moved to dismiss since the facts as alleged fail to make out a claim for intentional wrongful death. The standard to bring a claim under that statute is by design very high, and the courts have been wary of Plaintiffs bringing claims under that statute in order to avoid the cap on damages contained in M.G.L. c. 258, the Massachusetts State Torts Claims Act (MTCA). In order to avoid the limitations of the MTCA the intentional act must be such that the actor intended harm to the Plaintiff. *Foster v. McGrail*, 844 F.Supp. 16, 25 (D.Mass.,1994). No such intent can be inferred from the actions of the municipal defendants named herein.

This Court acknowledged in its ruling denying the motion to dismiss that this claim barely survived. As it is a pendant state law claim, even if the First Circuit chooses not to disturb the ruling, assuming the federal issue is resolved in the Defendants favor it is more appropriate for the Intentional Wrongful Death claim to proceed in the State Court.

D. The Interlocutory Appeal Is Likely to Materially Advance the Litigation

Whether the appeal may materially advance the ultimate termination of the litigation "is closely tied to the requirement that the order involve a controlling question of law." *Philip Morris, Inc. v. Harshbarger*, 957 F. Supp. 327, 330 (D. Mass. 1997). It has been generally accepted that where the appellate determination would result in either litigation or similar actions benefiting from prompt resolution of the question, certification is favored. *Natale v. Pfizer, Inc.*,

379 F. Supp. 2d 161, 182 (quoting *Camacho v. P.R. Port Auth.*, 369 F.3d 570, 573 (1st Cir. 2004)). The "materially advance termination of the litigation" criteria can be met by showing that there is high possibility that any trial will be eliminated; that the significant issues or questions impacting the case will be eliminated and will greatly narrow the remaining disputes; and where the review would otherwise significantly narrow the scope and cost of discovery. *U.S. ex rel. Lavalley v. First Nat'l Bank of Bos.*, No. 86-236-WF, 1990 WL 112285, at 5 (D. Mass. July 30, 1990).

If the Court's ruling is reversed, then obviously the litigation as to the municipal defendants will be terminated. Moreover, with the issue of law resolved, even if not in the defendants' favor, it would seem to increase the likelihood of a pre-trial settlement.

IV. CONCLUSION

For the foregoing reasons, the Defendants respectfully request this Court amend its order of May 5, 2021 by certifying that so much of the order that denies the motion to dismiss filed by the municipal is appropriate for interlocutory review under §1292(b).

The Defendants,
City of Springfield, Moises Zanazanian,
Remington McNabb and Sheila Rodriguez,
By their attorneys,

Date: May 18, 2021

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CERTIFICATE OF SERVICE

I, the undersigned hereby certify that a true copy of the within document was this day served upon Plaintiff via the Federal District Court ECF to all parties. I am unaware of any party who is a non-registered participant and therefore electronic filing is the sole means of this document.

SIGNED under the pains and penalties of perjury.

Dated: May 18, 2021

/s/ Lisa C. deSousa
Lisa C. deSousa, Esq.