

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

JANE DOE 30's Mother, Individually,)
and as Parent Guardian, and Next)
Friend of JANE DOE 30, a Minor Child,)
Individually, and on behalf of all others)
similarly situated,)

Plaintiffs,)

C.A. No. N10C-05-023 JRS

v.)

&

EARL B. BRADLEY, M.D.;)
BAY BEES PEDIATRICS, P.A., a)
Delaware Corporation; BEEBE)
MEDICAL CENTER, INC., a Delaware)
Corporation; MEDICAL SOCIETY)
OF DELAWARE, a Delaware)
Corporation; MEDICAL SOCIETY)
OF DELAWARE INSURANCE)
SERVICES, INC., a Delaware)
Corporation; JAMES P. MARVEL, JR.,)
M.D.; CAROL A. TAVANI, M.D.;)
LOWELL F. SCOTT, JR., M.D.; and)
LOWELL F. SCOTT, M.D., P.A.,)

C.A. No. N10C-10-317 JRS

Defendants.)

Date Submitted: February 7, 2011

Date Decided: February 11, 2011

ORDER GRANTING LEAVE TO APPEAL
FROM INTERLOCUTORY ORDER

Plaintiffs, Jane Doe 30 (a minor child) and Jane Doe 30's mother, have initiated this action on behalf of a putative class comprised of pediatric patients of Earl B Bradley, M.D. (“Dr. Bradley”) who seek compensatory and exemplary damages against not only Dr. Bradley and his medical practice, but also Beebe Medical Center, The Medical Society of Delaware and its affiliate, Medical Society of Delaware Insurance Services, Inc., James P. Marvel, Jr., M.D., Carol A. Tavani, M.D., Lowell F. Scott, Jr., M.D. and Dr. Scott’s medical practice. The factual predicate of the complaint is an allegation that Dr. Bradley abused “hundreds” of pediatric patients in his medical practice, including Jane Doe 30. As to the defendants other than Dr. Bradley, plaintiffs allege that each defendant owed the members of the class both a common law and statutory duty to report information they each knew or should have known about Dr. Bradley’s abusive conduct to appropriate State regulatory and/or law enforcement agencies. According to the plaintiffs, the defendants breach of this duty was a proximate cause of their injuries.

The Medical Society of Delaware and two of its members, Drs. Marvel and Tavani (collectively “The Medical Society defendants”) moved for judgment on the pleadings on the grounds that they owed no common law or actionable statutory duty

to the plaintiffs to take any action to report Dr. Bradley's abusive conduct to appropriate authorities. On January 21, 2011, this Court issued its Memorandum Opinion and Order granting the Medical Society defendants' motion (the "Opinion") on the grounds that the Medical Society defendants owed neither a common law nor a statutory duty to the plaintiffs upon which a viable cause of action could be based. The Court granted leave to plaintiffs to amend their complaint so that they could attempt to plead additional facts that might implicate a common duty of care under certain sections of the Restatement (Second) of Torts. Plaintiffs have since indicated their intent to file an amended complaint.

In the conclusion of the Opinion, the Court stated that it would look favorably upon an application for certification of an interlocutory appeal because, in the Court's view, the Opinion "meets the criteria of Delaware Supreme Court Rule 42 in that it: (a) [] determined a substantial issue (the effect of the [Medical Practices Act] and [the Child Abuse Prevention Act] on plaintiffs' claims); (b) established a legal right (The Medical Society defendants' right to be free of civil liability under [these statutes] for failing to report as required therein); (c) addressed an issue of first impression as per Supreme Court Rule 41(b)(i) ([whether there is a] private right of action under [these statutes]); and (d) construed [these statutes] in a manner not yet

settled by the Supreme Court (as per Supreme Court Rule 41(b)(iii)).”¹

Plaintiffs have accepted the Court’s invitation to file an application for certification of an interlocutory appeal not only on the grounds identified in the Opinion, but also on the grounds that the Court determined a substantial issue and established a legal right when it declined to apply certain provisions of the Restatement (Third) of Torts and when it determined that the Medical Society defendants did not maintain a special relationship with either Dr. Bradley or his alleged victims/patients such that a common law duty to act for plaintiffs’ protection would be triggered. In other words, plaintiffs seek to appeal not only the Court’s determination that the Medical Society defendants owed no statutory duty of care to them (which the Court already has concluded meets the criteria of Supreme Court Rule 42), but also the Court’s decision that these defendants owed no common law duty of care.²

The Medical Society defendants have responded to plaintiffs’ application by noting that they do not oppose the application and, in fact, they agree that the Court’s opinion meets the Supreme Court’s criteria for interlocutory appeal. They request,

¹ *Doe v. Bradley*, C.A. No. N10C-05-023 JRS & N10C-10-317 JRS, , Slights, J., Mem. Op. at 56 (Del. Super. Ct. Jan. 21, 2011).

² The Court’s opinion addressed only the issues relating to the statutory duty of care (negligence *per se*) when discussing the criteria for interlocutory appeal.

however, that the Court “recommend” to the Supreme Court of Delaware that any appeal should be stayed pending the plaintiffs’ filing of an amended complaint and the resolution of any motion practice related thereto. In the absence of such a stay, the Medical Society defendants are concerned that they would be exposed to “piecemeal litigation” of case dispositive issues, i.e., litigation relating to the disposition of plaintiffs’ first complaint (now pending) and the disposition of motions relating to plaintiffs’ soon-to-be-filed amended complaint.³

The Court is mindful that Supreme Court Rule 42 sets forth a rigid time sequence within which parties must seek certification of an interlocutory appeal. Plaintiffs have appropriately sought review of the Court’s opinion in accordance with this time sequence. Indeed, the Court invited them to do so. The Medical Society defendants, likewise, have appropriately and correctly noted their concern that the Court’s Opinion granting plaintiffs leave to amend their complaint will likely generate further motion practice and that they will, therefore, be exposed to “piecemeal litigation” should the Supreme Court accept this interlocutory appeal and order that it proceed at the same time the parties litigate the viability of the amended

³ See *E.I. duPont de NeMours & Co. v. Allstate Ins. Co.*, 686 A.2d 1015, 1016 (Del. 1997)(noting that the decision to grant interlocutory review is “discretionary and highly case specific,” and that “[t]he goal, in all events, is to facilitate the orderly disposition of claims without inadvertently promoting a piecemeal approach to litigation.”).

complaint in this Court. Unfortunately, this Court did not consider this dynamic when it took the unusual step of inviting the parties to seek an interlocutory appeal of the Opinion.⁴ Of course, even if the Court denied this application in response to the Medical Society defendants' concerns, plaintiffs could still (and likely would) file a notice of appeal in the Supreme Court if for no other reason than to preserve the appeal given the applicable deadlines.⁵

Under these circumstances, the Court is satisfied that its Opinion and Order, dated January 21, 2011, **should be, and hereby is, certified** to the Supreme Court of the State of Delaware for disposition in accordance with Rule 42 of that Court. The Court continues to believe that the Opinion's resolution of the statutory duty issues staisfy the criteria for interlocutory appeal for the reasons stated in the opinion and reiterated herein. While less novel, the Court's resolution of the common law duty issues also justify interlocutory appellate review in that the Supreme Court of Delaware arguably has left open the possibility that it might adopt at least some provisions of the Restatement (Third) of Torts and the Opinion rejected plaintiffs'

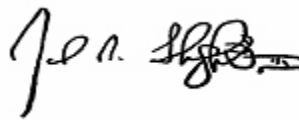
⁴ The Court suspects that plaintiffs would have applied for certification of the interlocutory appeal in any event given the nature of the claims addressed in the Opinion and the legal issues considered therein.

⁵ See Delaware Supreme Court Rule 42(d) (allowing party to seek interlocutory appeal in the Supreme Court even if certification is refused by the trial court).

request that this Court do so in this case.⁶

The parties are free to request that the Supreme Court of Delaware accept the interlocutory appeal but stay further proceedings until such time as this Court disposes of the anticipated dispositive motion practice on the plaintiffs' soon-to-be-filed first amended complaint. If that should occur, this Court will endeavor to address those issues as expeditiously as possible.

IT IS SO ORDERED.



Judge Joseph R. Slights, III

cc: Bruce L. Hudson, Esquire
Ben T. Castle, Esquire
Craig A. Karsnitz, Esquire
Collins J. Seitz, Jr., Esquire
Matthew F. Boyer, Esquire
John D. Balaguer, Esquire

⁶ See *Riedel v. ICI Ams. Ins.*, 968 A.2d 17, 20 (Del. 2009) (“*At this time*, we decline to adopt any sections of the Restatement (Third) of Torts.”)(emphasis supplied).