

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

LARON SHEPPARD, Individually and)
as Administrator of the ESTATE OF)
CAMELLIA N. WASHINGTON, and)
LARON SHEPPARD, Individually and)
as next friend of CAMERON)
SHEPPARD, a minor,)

Plaintiffs,)

C.A. No. 03C-01-096-MMJ

v.)

STATE OF DELAWARE)
DEPARTMENT OF HEALTH AND)
SOCIAL SERVICES, DELAWARE)
DIVISION OF ALCOHOLISM, DRUG)
ABUSE AND MENTAL HEALTH,)
DELAWARE PSYCHIATRIC)
CENTER, VINCENT P. MECONI,)
RENATTA J. HENRY, MICHAEL)
TALMO, IVAN S. COHEN, M.D., D.)
BINGHAM PH.D., and GURJEET)
MAVI, M.D.,)

Defendants.)

ORDER GRANTING LEAVE TO
APPEAL FROM INTERLOCUTORY ORDER

Submitted : May 5, 2004

Decided: May 13, 2004

This 13th day of May, 2004, certain defendants having made application pursuant to Rule 42 of the Supreme Court for an order certifying an appeal from the interlocutory order of this Court, dated April 15, 2004; and the Court having found that such order determined substantial issues and established legal rights and that the criteria of Supreme Court Rule 42(b)(i) and (v) apply; the Court finds as follows.

1. **Nature And Stage Of Proceedings.**

(A) By Order dated December 18, 2003, the Court denied Defendants' Motion to Dismiss on the grounds of sovereign immunity. The Court found that the non-moving parties had presented a reasonably conceivable set of circumstances susceptible of proof of gross negligence on the part of Defendants. The absence of gross negligence is required under 10 *Del. C.* § 4001 as a condition essential for the retention of sovereign immunity by the State of Delaware. Therefore, sovereign immunity is not available as a defense at this stage of the proceedings. Additionally, sovereign immunity is not a bar to Plaintiffs' cause of action pursuant to 42 U.S.C. § 1983 under the circumstances presented.

(B) Defendants filed a Motion for Reargument on December 30, 2003. Defendants requested that the Court reconsider denial of Defendants' Motion to Dismiss in light of the Delaware Supreme Court's December 17, 2003 decision in

Pauley v. Reinoehl.¹ Defendants also wished to readdress the issue of the application of sovereign immunity to Section 1983 claims.

(C) On January 14, 2004, the Court granted the Motion for Reargument for the sole purpose of consideration of *Pauley*. Although the parties included in their submissions upon reargument discussion of Section 1983 claims, those issues were fully considered by the Court upon Defendants' Motion to Dismiss.

(D) In *Pauley*, the Supreme Court considered whether by passing the State Tort Claims Act, the Delaware General Assembly intended to waive completely the State's sovereign immunity. The State had \$1 million in insurance coverage available to the plaintiffs. The issue was whether sovereign immunity had been waived to permit recovery by plaintiffs from the State in excess of \$1 million.² The *Pauley* Court confirmed that sovereign immunity does not apply when public officials act with gross negligence.³

(E) At this stage in this litigation, it is undisputed that there is no State insurance coverage for the allegations in this case. Therefore, this Court found, on

¹Del. Supr., No. 679, 2002 (Dec. 18, 2003).

²*Id.* at *1.

³*Id.* at *2.

April 15, 2004, that the ruling in *Pauley* is inapplicable and does not constitute a reason for this Court to alter its decision on the Motion to Dismiss.

(F) On April 23, 2004, Defendants State of Delaware Department of Health and Social Services (“DHSS”), Division of Substance Abuse and Mental Health, erroneously referred to as Delaware Division of Drug Abuse and Mental Health (“DSAMH”), the Delaware Psychiatric Center (“DPC”), Vincent P. Meconi, Renata J. Henry, Michael Talmo and D. Bingham, Ph.D. (collectively “State Defendants”) applied pursuant to Superior Court Civil Rule 74 and Supreme Court Rule 42 for a order certifying an appeal of this Court’s December 18, 2003 Order, as confirmed by Order dated April 15, 2004 after reargument.

2. Undisputed Facts For Purposes Of The Application For Certification.

(A) Plaintiffs in this case are the Estate of Camellia N. Washington (“Estate”), LaRon Sheppard (“Mr. Sheppard”), the widower of Ms. Washington, and Cameron Sheppard, minor son of LaRon Sheppard and Camellia Washington.

(B) As set forth in the Complaint, in or about May 2000, Ms. Washington began to exhibit symptoms of mental illness. Between June and November of 2000, Ms. Washington made several attempts to take her own life. As

a result, she was hospitalized on several occasions, received out-patient counseling, and was prescribed several medications.

(C) On or about December 4, 2000, Ms. Washington ingested isopropyl alcohol in an attempt to take her own life, and was taken to Meadow Wood Hospital. On December 6, 2000, she was transferred from the Meadow Wood Hospital to DPC pursuant to a civil commitment.

(D) At DPC, the personnel, including Dr. Cohen, Dr. Bingham, and Dr. Mavi, were made aware of Ms. Washington's prior mental health history, including the events that occurred from May to December of 2000. At DPC, Ms. Washington was diagnosed with recurrent major depressive disorder.

(E) During the course of Ms. Washington's commitment to DPC, there existed a Policy and Procedure Directive ("Directive"). The Directive established guidelines for the use of one-on-one observation of patients at DPC and guidelines for the use of special precautions regarding DPC patients. The Directive mandated one-on-one observation, and additional monitoring, in cases of risk of harm to the patient or others.

(F) During the entire course of her commitment to DPC, Ms. Washington was under special precautions. She was supposed to be checked by a staff member either every fifteen minutes or every thirty minutes.

(G) On December 24, 2000, Ms. Washington tried to hang herself with a shoelace, and was put on one-on-one observation until December 26, 2000. On January 12, 2001, Ms. Washington expressed the opinion that she did not feel as though she could make it through her depression. At or about 3:00 p.m. on January 14, 2001, Ms. Washington was found hanging in the shower. Revival efforts were unsuccessful, and she was pronounced dead.

(H) At the time of her death, Ms. Washington was under special precautions mandating that she be checked every fifteen minutes. Ms. Washington was last checked by a staff member at 2:30 p.m. on January 14, 2001.

(I) Plaintiffs contend that the facts alleged in the complaint clearly establish a claim of gross negligence. Mrs. Washington was suffering from severe depression. She was admitted under the care of the staff of DPC which included certain Defendants. She had attempted to kill herself previously by hanging herself with a shoelace. She was placed on one-on-one observation given her severe mental condition. Those protocols were grossly violated. As a result Ms. Washington took her life leaving the Plaintiffs, her husband LaRon Sheppard and five-year-old son Cameron, without a wife and mother.

3. Questions Of Law Should Be Certified To The Supreme Court Of The State Of Delaware For The Following Reasons.

(A) Supreme Court Rule 42 provides the criteria for determining whether an issue should be certified for interlocutory appeal. The issues raised by the State Defendants' Application are: (1) whether 10 *Del. C.* § 4001 constitutes a waiver of sovereign immunity in this case involving allegations of gross negligence where the State has not provided insurance coverage; and (2) whether an action for money damages may be maintained against the State and its agencies pursuant to 42 U.S.C. § 1983.

(B) “The denial of a motion to dismiss a complaint is an interlocutory order and, as such, is not appealable unless it has determined substantial legal rights.”⁴ A determination that sovereign immunity does not apply, and the Court's decision that Plaintiffs may pursue a Section 1983 action, both are substantial issues, establishing the important legal rights of whether the State Defendants must bear the time and expense of defending this action.

(C) To consider whether certification is proper, one of the five criteria set forth in Supreme Court Rule 42(b)(i) - (v) must be satisfied.⁵ Under Rule 42(b)(i),

⁴*Wilmington Medical Center, Inc. v. Coleman*, 298 A.2d 320, 322 (Del. 1972).

⁵Supreme Court Rule 42(b)(i)-(v) reads as follows:

(b) *Criteria to be applied in determining certification and acceptance of interlocutory appeals.* No interlocutory appeal will

the Court may look to the criteria established by Rule 41. Rule 41(b)(iii) may apply to the first issue because the question relates to the construction of 10 *Del. C.* § 4001 and is not firmly settled. The Court's decision may be appealed on an interlocutory basis pursuant to Rule 42(b)(v), as review of both issues may result in dismissal of the State Defendants from the litigation on issues unrelated to the merits of the underlying causes of action.

(D) The United States Court of Appeals for the Third Circuit has held that although the appellate court generally does not have jurisdiction to review denial of a motion to dismiss on an interlocutory basis, there is a "well-established exception

be certified by the trial court or accepted by this Court unless the order of the trial court determines a substantial issue, establishes a legal right and meets 1 or more of the following criteria:

- (i) Same as certified question. Any of the criteria applicable to proceedings for certification of questions of law set forth in Rule 41; or
- (ii) Controverted jurisdiction. The interlocutory order has sustained the controverted jurisdiction of the trial court; or
- (iii) Substantial issue. An order of the trial court has reversed or set aside a prior decision of the court, a jury, or an administrative agency from which an appeal was taken to the trial court which had determined a substantial issue and established a legal right, and a review of the interlocutory order may terminate the litigation, substantially reduce further litigation, or otherwise serve considerations of justice; or
- (iv) Prior judgment opened. The interlocutory order has vacated or opened a judgment of the trial court; or
- (v) Case dispositive issue. A review of the interlocutory order may terminate the litigation or may otherwise serve considerations of justice.

for orders denying motions to dismiss for reasons of immunity.”⁶ The United States Supreme Court repeatedly has applied the collateral-order doctrine to hold that orders denying absolute immunity are reviewable by interlocutory appeal.⁷ That Court also has found that a motion to dismiss a 42 U.S.C. § 1983 claim on the basis of qualified immunity was the proper subject for an interlocutory appeal.⁸

(E) The certified issues are wholly unrelated to the merits of the underlying litigation, *i.e.*, whether Plaintiffs are entitled to money damages from Defendants as a result of the death of Camellia N. Washington. To delay final resolution of this Court’s jurisdiction over the State Defendants could result in the unnecessary expenditure of public resources in discovery and trial of the litigation, should this Court’s decision be reversed.

⁶*Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 364 F.3d 102, 102 (3d Cir. 2004); *In re Montgomery County*, 215 F.2d 367, 373 (3d Cir. 2000).

⁷*See, e.g., Nixon v. Fitzgerald*, 457 U.S. 731 (1982); *Helstoski v. Meanor*, 442 U.S. 500 (1979); *Abney v. United States*, 431 U.S. 651 (1977).

⁸*Richardson v. McKnight*, 117 S.Ct. 2100, 2102 (1997).

IT IS ORDERED that the Court's order of April 15, 2004 is hereby certified to the Supreme Court of the State of Delaware for disposition in accordance with Rule 42 of that Court.

Mary M. Johnston, Judge