UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

STACI BARBER, Plaintiff, vs. KATY INDEPENDENT SCHOOL DISTRICT; BRYAN SCOTT ROUNDS, Principal of Cardiff Junior High, sued in his individual and official capacities, Defendants.	)	CIVIL ACTION NO.: 4:24-CV-01004

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO CERTIFY

Plaintiff Staci Barber opposes Defendants' Motion to Certify. Doc. #37.[1] This Court denied Katy Independent School District's (the "District") Motion to Dismiss, determining that Plaintiff had alleged sufficient particular facts to demonstrate that the action against her occurred pursuant to District policy and custom, applying the well-established standard of *Monell v. Dep't of Soc. Servs*., 436 U.S. 658 (1978). This fact-specific application of law to fact is not the kind of pure question of law that is appropriate for extraordinary interlocutory appellate review.

ARGUMENT

Under 28 U.S.C. § 1292(b), an interlocutory order is appealable when it involves "[(i)] a controlling question of law [(ii)] as to which there is substantial ground for difference of opinion and [(iii)] that an immediate appeal from the order may materially advance the ultimate termination

[1] There is substantial overlap between the issues raised in the Motion to Certify and the Motion to Stay. Accordingly, Plaintiff incorporates her response to the Motion to Stay herein by reference.

of the litigation." *Id*. The Supreme Court has cautioned that this avenue should be resorted to sparingly and is highly disfavored: "§ 1291 requires courts of appeals to view claims of a 'right not to be tried' with skepticism, if not a jaundiced eye." *Digital Equip. Corp. v. Desktop Direct*, 511 U.S. 863, 873 (1994). "Routine resort to § 1292(b) requests would hardly comport with Congress' design to reserve interlocutory review for 'exceptional' cases while generally retaining for the federal courts a firm final judgment rule." *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 74 (1996).

The Fifth Circuit has likewise cautioned, "permission to appeal is granted sparingly, not automatically." *Alabama Labor Council v. Alabama*, 453 F.2d 922, 924 (5th Cir. 1972). It "is not a vehicle to question the correctness of a district court's ruling or to obtain a second, more favorable opinion." *Ryan v. Flowserve Corp.*, 444 F. Supp. 2d 718, 722 (N.D. Tex. 2006) (internal citation omitted). The moving party carries the burden of showing the necessity of interlocutory appeal. *Qazi v. Stage Stores, Inc.*, 2020 U.S. Dist. LEXIS 49439, *4 (S.D. Tex. Mar. 23, 2020) ("The burden of demonstrating the need for such an appeal falls on the moving party.").

The Supreme Court has held that an order denying a defendant's *Monell* argument is not automatically subject to an interlocutory appeal. *Swint v. Chambers County Comm'n*, 514 U.S. 35, 43 (1994). The Court in *Swint* emphasized the inappropriateness of reviewing a *Monell* issue before a trial court has had an opportunity to fully examine the evidence and reach a final ruling. "The District Court here ruled only tentatively on the county commission's motion and apparently contemplated receipt of further evidence from the parties before ruling definitively. . . . In view of the incomplete state of the District Court's adjudication . . . it is unlikely that a § 1292(b) certification would have been forthcoming from the District Judge." *Id.* at 47 n.5.

A. The order does not involve a controlling question of law.

This Court, applying longstanding *Monell* precedent like *Robinson v. Hunt Cnty., Tex.,* 921

F.3d 440,449 (5th Cir. 2019), to the facts presented in this case, concluded that "Plaintiff has sufficiently alleged that her constitutional rights were violated in accordance with an official policy that was promulgated or ratified by the KISD Board[.]" Doc. #34 at 11. The Court's ruling, expressly in the limited posture of reviewing the District's Motion to Dismiss, relied on the specific facts alleged in the complaint, such as the repeated references by Defendants to the religion language at issue as a policy of the Board. Defendants disagree with this Court's application of well-settled law to those particular facts. But the application of the law to a specific set of facts is not the kind of question that is certifiable. To be reviewable, "the case must present a controlling question of law as to which there is substantial ground for difference of opinion." *Clark-Dietz & Associates-Engineers, Inc. v. Basic Constr. Co.*, 702 F.2d 67, 68 (5th Cir. 1983). The Fifth Circuit has emphasized that "fact-review questions [are] inappropriate for § 1292(b) review. Even those questions that are legal may be foreclosed by the fact findings of the district court." *Id.* at 69.

In *Ahrenholz v. Board of Trustees of the University of Illinois*, 219 F.3d 674 (7th Cir. 2000), the Seventh Circuit focused in some detail on clarifying the type of questions appropriate for § 1292(b) appeal. It concluded that "'question of law' as used in § 1292(b) has reference to a question of the meaning of a statutory or constitutional provision, regulation, or common law doctrine rather than to whether the party opposing summary judgment had raised a genuine issue of material fact." *Id.* at 676. The term "question of law" does not mean the application of settled law to fact. *Id.* It does not mean any question the decision of which requires searching through the record in search of genuine issues of fact. *See id.* Instead, "[t]he idea was that if a case turned on a pure question of law, something the court of appeals could decide quickly and cleanly without having to study the record, the court should be enabled to do so[.]" *Id.* at 677.

The Fifth Circuit has cited *Ahrenholz* approvingly and likewise emphasized the limited purpose of interlocutory review; it is to review purely legal questions, not fact questions such as to "review whether the Board presented sufficient evidence to raise a genuine issue of material fact to preclude summary judgment." *La. Patients' Comp. Fund Oversight Bd. v. St Paul Fire & Marine Ins. Co.*, 411 F.3d 585, 588 (5th Cir. 2005) (citing, *inter alia*, *Ahrenholz*, 219 F.3d at 676–77). In that case, the Fifth Circuit emphasized that it could not review through an interlocutory appeal whether a party breached a duty owed and was limited in its review to pure legal questions. "The legislative history of 28 U.S.C. § 1292(b) indicates that an interlocutory appeal is to be used only in extraordinary cases where a decision on interlocutory appeal may avoid protracted and expensive litigation, but is not intended merely to provide review of difficult rulings in hard cases." *LaFarge v. Kyker*, 2009 U.S. Dist. LEXIS 114100, *2 (N.D. Miss. Nov. 23, 2009).

Defendants cite authority about whether a question is "controlling." All well and good. Plaintiff concedes that the *Monell* question is controlling of many issues before this Court. (Although it affects neither the claims against Defendant Rounds nor the state law claims.) But this Court's *Monell* analysis does not pose a pure question of law. Defendants summarize the issue they seek to certify with the sentence, "Barber's Section 1983 claims hinge on this Court's determination that Katy ISD's Board of Trustees ratified the employee handbook." Doc. #37 at 3. That summary makes clear that the issue the District seeks to certify is a question of fact, or at best, the question of the application of law to fact, not a pure question of law. Appellate review would consist of reviewing very specific factual allegations in order to determine whether Plaintiff Barber sufficiently alleged that her rights were violated according to District custom or policy. The Fifth Circuit has emphasized many times that fact-specific review, i.e., the application of law to facts, is not the kind of issue appropriately certified for appeal.

Here, this Court's fact determination, at the Motion to Dismiss stage, is what Defendants seek to certify. Appellate review would be an examination of the record, that is, the complaint, to determine whether it sufficiently alleges a policy or custom under *Monell*. That kind of review is not the purpose of certification. The legal standard is not in dispute. In other words, there is no pure question of law to certify here. What Defendants challenge is this Court's *application* of the law to determine that Plaintiff Barber sufficiently alleged facts in her complaint that meet the undisputed *Monell* standard. This problem is fatal to Defendants' motion—a problem they do not address. "[A] question of law does not mean the application of settled law to disputed facts." *Estrada v. White*, 2015 U.S. Dist. LEXIS 106172, *6 (S.D. Tex. Aug. 12, 2015).

In a similar case, a district court refused to certify a *Monell* question with an analysis that is helpful here: "questions one and three take issue, not with the Court's articulation of the established standards for *Monell* liability, but with its application of that standard to the facts, and in that sense do not present 'controlling questions of law.' Essentially, the City challenges the sufficiency of the evidence to support the *Monell* claim." *Roberts v. Cnty. of Essex*, 2023 U.S. Dist. LEXIS 66597, *21 (D.N.J. Apr. 17, 2023). That is precisely the problem here; the District does not challenge the legal standard this Court applied but challenges instead the sufficiency of the allegations in the complaint to meet that undisputed standard. That is clearly not a certifiable question. "These questions are very far from being purely legal, and an interlocutory appeal is not a prudent exercise of discretion." *Id.*

B. There is no substantial ground for difference of opinion.

Defendants argue that this Court ruled contrary to *McClelland v. Katy Independent School District,* 63 F.4th 996 (5th Cir. 2023). They are wrong. The Court discussed that decision at length and explained crucial factual allegations distinguishing the facts here from *McClelland*, such as the fact that Defendants affirmatively referred to the language at issue here as District policy.

Defendants accuse this Court of differing with the *McClelland* decision without any attempt to address the Court's analysis or the unique facts present here, simply asserting, as an *ipse dixit*, that this Court's decision conflicted with controlling precedent. That alone does not show substantial ground for differences of opinion. But more importantly, the difference between *McClelland* and this case highlights the fundamental reason why this case should not be certified; the legal standard, the pure issue of law, is not in dispute. *McClelland* differs from this case not in the law, but the facts; here, unlike there, Defendants affirmatively adopted the language at issue as their policy. That factual difference is not the kind of issue that merits certification. Neither Plaintiff nor this Court has any difference of opinion with the *McClelland* legal standard; instead, this case simply contains different facts.

The standard for a substantial ground of disagreement is a high one: courts have found substantial ground for difference of opinion where:

> a trial court rules in a manner which appears contrary to the rulings of all Courts of Appeals which have reached the issue, if the circuits are in dispute on the question and the Court of Appeals of the circuit has not spoken on the point, if complicated questions arise under foreign law, or if novel and difficult questions of first impression are presented.

Ryan v. Flowserve Corp., 444 F. Supp. 2d 718, 724 (N.D. Tex. 2006) (quoting Am. Jur. 2d Appellate Review § 128 (2005)). That court emphasized that "simply because a court is the first to rule on a question or counsel disagrees on applicable precedent does not qualify the issue as one over which there is substantial disagreement. Nor does a party's claim that a district court has ruled incorrectly demonstrate a substantial disagreement." *Id.* (citation omitted). The kinds of disagreements *Ryan* rejected as insufficient are precisely the kind evidenced here. Defendants disagree with this Court's application of controlling precedent, which alone is insufficient to constitute substantial ground for difference of opinion.

C. An immediate appeal will not materially advance the ultimate termination of litigation.

Plaintiff has filed a Partial Motion for Summary Judgment where the *Monell* issue would be at the center of this Court's consideration of the ultimate merits of the case. Doc. #35. Defendants, however, seek to appeal the *Monell* issue now, at the preliminary dismissal stage. That would create a delay of several months (at a minimum) while the Fifth Circuit considers the issue, resulting potentially in remand and this Court's new consideration of the issue again. Such piecemeal litigation would be costly on all parties and is particularly unnecessary in light of the already pending Partial Motion for Summary Judgment on the same issue. The clearest way to conserve judicial resources is for the Court to first consider summary judgment on the *Monell* issue and then weigh potential certification after reaching a more final decision. What Defendants do not discuss in their Motion for Certification is that certification would lead to them appealing the application of the *Monell* issue under a standard where all facts alleged in the complaint would be viewed with deference to the Plaintiff. That limited consideration is necessarily very different from consideration of the *Monell* issue at the summary judgment stage, and duplicating potential appellate consideration of the issues would be a significant waste of judicial resources. In short, immediate appeal of the underlying question of law in this case will substantially delay the ultimate termination of the litigation. Keeping the *Monell* issue against Katy ISD in this Court is the most efficient use of judicial resources.

CONCLUSION

For these reasons, Plaintiff Staci Barber respectfully requests that the Court deny Defendants' Motion to Certify and proceed to address Plaintiff's Partial Motion for Summary Judgment.

Dated: April 29, 2025 Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby affirm that a true and correct copy of the foregoing document was served upon all counsel of record through the Court's e-filing system on April 29, 2025.

/s/ Nathan J. Moelker
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