

## **APPENDIX**

## APPENDIX CONTENTS

	PAGE
Third Circuit Court of Appeals Judgment Denying Motion to Stay the Order of the District Court, dated January 2, 2019.....	1a
District Court Order Denying Motion to Stay the Court's Scheduling Order, dated November 30, 2018 .....	3a
Transcript of November 30, 2018 Telephonic Hearing Before the Honorable Anne E. Thompson.....	5a
District Court Opinion Denying Renewed Motion to Stay Discovery, dated December 13, 2018.....	21a
District Court Order Denying Renewed Motion to Stay Discovery, dated Dece- mber 13, 2019.....	30a

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT  
December 6, 2018

No. 18-3004

JAMILA RUSSELL, et. al.

v.

SUPERIOR COURT MARSHAL CHRISTOPHER RICHARDSON, et. al.

(D.V.I. No. 1-15-cv-00049)

Present: KRAUSE, ROTH and FISHER, Circuit Judges

1. Motion by Appellants to Stay the Order of the District Court entered on November 30, 2018;
2. Appellants' Letter pursuant to Fed. R. App. P. 28(j) in support of Motion to Stay the Order of the District Court entered on November 30, 2018;
3. Motion by Appellees for Leave to File Opposition to Motion to Stay the Order of the District Court Out of Time;
4. Appellees' Response in Opposition to Motion to Stay the Order of the District Court.

Respectfully,  
Clerk/nmr

ORDER

The foregoing Motion by Appellees for Leave to File Opposition to Motion to Stay the Order of the District Court Out of Time is granted. The foregoing Motion by Appellants to Stay the Order of the District Court entered on November 30, 2018 is denied.

By the Court,

s/ Cheryl Ann Krause  
Circuit Judge

Dated: January 2, 2019

NMR/cc: **Gordon C. Rhea, Esq.**  
**Yvette D. Ross-Edwards, Esq.**  
**Paul L. Gimenez, Esq.**  
**Dana M. Hrelic, Esq.**  
**Ian S.A. Clement, Esq.**

**NOT FOR PUBLICATION**

**UNITED STATES DISTRICT COURT  
DISTRICT OF THE VIRGIN ISLANDS  
DIVISION OF ST. CROIX**

**JAMILA RUSSELL and**

**Plaintiffs,**

**v.**

**SUPERIOR COURT MARSHAL  
CHRISTOPHER RICHARDSON, in his  
individual and official capacity,  
GOVERNMENT of the VIRGIN  
ISLANDS, and SUPERIOR COURT of the  
VIRGIN ISLANDS,**

**Defendants.**

**THOMPSON, U.S.D.J.<sup>1</sup>**

As stated in the proceedings held before this Court on November 30, 2018, in which  
Yvette D. Ross-Edwards, Esq., for Plaintiff and Paul L. Gimenez, Esq., for Defendants appeared;  
IT IS on this 30th day of November, 2018  
ORDERED that, for the reasons set forth in today's proceedings, the parties will proceed  
with discovery while Defendants' appeal of the Court's Summary Judgment Opinion (ECF No.  
265) is pending before the Third Circuit; and it is further

ORDERED that Defendants' Oral Motion to Stay the Court's Scheduling Order, made  
during today's proceedings, is DENIED; and it is further

ORDERED that Plaintiffs and Defendants shall each submit proposed scheduling

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<sup>1</sup> The Honorable Anne E. Thompson, United States District Judge for the District of New Jersey,  
sitting by designation.

orders—including a proposed trial date—to the Court by December 7, 2018, after which the Court will issue an official scheduling order to guide the path forward in this litigation.

*/s/ Anne E. Thompson*  
ANNE E. THOMPSON, U.S.D.J.

UNITED STATES DISTRICT COURT  
DISTRICT OF THE U.S. VIRGIN ISLANDS

JAMILA RUSSELL, et al., . Case No. 1:15-cv-00049-AET-RM  
Plaintiffs, .  
v. . 402 East State Street  
Trenton, NJ 08608  
SUPERIOR COURT OF THE .  
VIRGIN ISLANDS, .  
Defendant. .  
November 30, 2018  
11:00 a.m.

TRANSCRIPT OF TELEPHONIC HEARING  
BEFORE HONORABLE ANNE E. THOMPSON  
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

For the Plaintiffs: Law Offices of Ross-Edwards and  
Henderson, LLP  
By: YVETTE D. ROSS-EDWARDS, ESQ.  
(53A) 429 King Street, Suite 8  
Frederiksted, VI 00840

For the Superior Court of the Virgin Islands  
of The Virgin Islands and Christopher  
Richardson: Superior Court of the Virgin Islands  
By: PAUL L. GIMENEZ, ESQ.  
5400 Veteran Drive  
St. Thomas, VI 00802

For the Government of The Virgin Islands: Department of Justice  
By: ERIKA MARIE SCOTT, ESQ.  
6040 Castle Coakley  
Christiansted, VI 00820

Audio Operator: Kimberly Stillman

Proceedings recorded by electronic sound recording, transcript  
produced by transcription service.

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J&J COURT TRANSCRIBERS, INC.  
268 Evergreen Avenue  
Hamilton, New Jersey 08619  
E-mail: jjcourt@jjcourt.com

(609) 586-2311      Fax No. (609) 587-3599

1           THE COURT: Hello. Hello.

2           UNIDENTIFIED ATTORNEY: Hello.

3           MR. GIMENEZ: Hello.

4           THE COURT: This is Judge Thompson. I am here in the  
5 courtroom in Trenton and this is the matter of Russell versus  
6 the Superior Court. May I have the appearances of counsel  
7 please?

8           MS. ROSS-EDWARDS: Good morning, Your Honor. This is  
9 Yvette Ross-Edwards. I'm also appearing on behalf of Gordon  
10 Rhea. We represent the plaintiffs in this case.

11           THE COURT: Very well. Who else is on the line?

12           MR. GIMENEZ: Good morning, Your Honor. This is  
13 Attorney Gimenez appearing for the Superior Court and Chris  
14 Richardson.

15           THE COURT: Very well.

16           MS. SCOTT: Also Erika Scott on behalf of the  
17 Government.

18           THE COURT: Yes, Ms. Scott. Thank you. Now, we set  
19 this conference call to review the entire status of the case  
20 and to have a path forward delineated because this case was  
21 filed in 2015 and here we are, we're at 2018 and we don't want  
22 this case to be delayed unnecessarily.

23           Mr. Gimenez, when we talked in the Virgin Islands,  
24 you were appealing my summary judgment ruling as well as  
25 seeking to have the Virgin Islands Supreme Court give guidance.

1 Have you made your decision as to what you're planning to do at  
2 this point?

3 MR. GIMENEZ: We are not moving forward with the  
4 declaratory judgment at this point. You know, we're open to  
5 reconsider it but right now the answer is no.

6 THE COURT: No what? I don't understand. Which way  
7 are you --

8 MR. GIMENEZ: Right now we're not going to move  
9 forward with the declaratory judgment action.

10 THE COURT: And what is it that you style as the  
11 declaratory judgment action? Is that the Supreme --

12 MR. GIMENEZ: That would have been the actions that  
13 we were trying to direct to the Supreme Court.

14 THE COURT: I see. Now, what about the appeal?

15 MR. GIMENEZ: The appeal has been filed. The  
16 briefing schedule is issued. It's -- our appellant's brief is  
17 due on December 17th and that is moving forward.

18 THE COURT: All right. And on behalf of plaintiff,  
19 do you have a date for when you have to file your responsive  
20 pleadings in the Court of Appeals?

21 MS. ROSS-EDWARDS: Yes, Your Honor. I do not have  
22 that order in front of me but I believe it's something like  
23 December 31st if I'm correct.

24 THE COURT: I see. Now, as I review the history of  
25 this case, the Court issued an opinion on the motions to

1 dismiss in May of 2017 and the Court ruled that the plaintiffs  
2 have complied sufficiently with the VI Tort Claims Act and that  
3 would be Counts 2 through 5 and Count 8. We also ruled that  
4 the defendant Richardson is not entitled to qualified immunity  
5 at this time. We ruled that defendant Richardson is not  
6 entitled to quasi-judicial immunity. We ruled that the  
7 defendant Superior Court is not entitled to sovereign immunity  
8 under the Virgin Islands Tort Claims Act. And we ruled that  
9 the defendant Virgin -- Government of the Virgin Islands is not  
10 entitled to sovereign immunity under the Virgin Islands Tort  
11 Claims Act.

12 The defendants filed the motion or notice of appeal  
13 to the Third Circuit in June of 2017 on my ruling. Then the  
14 Court issued its summary judgment opinion in August of 2018 in  
15 which we ruled that the defendant Richardson is not entitled to  
16 qualified immunity, defendant Richardson is not entitled to  
17 quasi-judicial immunity, defendant Superior Court is not  
18 entitled to sovereign immunity under the Virgin Islands Tort  
19 Claims Act, defendant Superior Court is not entitled to  
20 qualified immunity, defendant Virgin Islands Government is not  
21 entitled to sovereign immunity under the Virgin Islands Tort  
22 Claims Act, defendant Government of the Virgin Islands is not  
23 entitled to qualified immunity.

24 Then this motion to certify to the Virgin Islands  
25 Supreme Court was filed by defendants in August of 2018 and

1 then December 7th the defendants filed a notice of appeal to  
2 the Third Circuit regarding my summary judgment opinion.

3           Then September 25th, 2018 the Third Circuit Court of  
4 Appeals rendered an opinion which affirmed my denial of  
5 defendant Richardson's qualified immunity, affirmed my denial  
6 of defendant Richardson's quasi-judicial immunity which  
7 affirmed the denial of the Superior Court's sovereign immunity.  
8 We were affirmed with regard to the denial of the Government of  
9 the Virgin Islands sovereign immunity. And the Third Circuit  
10 remanded in part and ruled that gross negligence should have  
11 been dismissed because the Virgin Islands Tort Claims Act  
12 waiver does not apply to injuries caused by gross negligence.  
13 In other words, defendants are protected by immunity.

14           So, the issue now facing this lawsuit is can we  
15 proceed with full fledged discovery pending the Third Circuit's  
16 review of the summary judgment opinion from this Court? I'll  
17 hear you, plaintiffs' counsel.

18           MS. ROSS-EDWARDS: Yes, Your Honor.

19           THE COURT: Ms. Ross-Edwards, what is your view with  
20 regard to that?

21           MS. ROSS-EDWARDS: We believe that --

22           THE COURT: Speak out so I can hear you.

23           MS. ROSS-EDWARDS: This Court can exercise its  
24 discretion and retain jurisdiction on this matter if it sees  
25 that the risk of not allowing this matter to proceed to

1 discovery outweighs putting a stake on it. In this case the  
2 plaintiff whose injury occurred in 2013 is now a quadriplegic  
3 and his life span is shortened. We believe that the issues of  
4 which most of discovery would need to consult damages should be  
5 allowed to proceed given the fact that, you know, the impact it  
6 can have on the plaintiff I were this matter dragged out  
7 further.

8 Additionally, the issues have already been ruled upon  
9 by the Third Circuit as well as this Trial Court and the Court  
10 can look at the likeliness of success on the issues. The  
11 attorneys are limited to the filings already made insofar as  
12 the appeal is concerned. It's not opportunity to try new  
13 evidence or hear new evidence. And given that, the arguments  
14 that were made in the motion for summary judgment were the same  
15 arguments that were made before when this Court ruled and are  
16 the same arguments upon this Court when this Court ruled on the  
17 summary judgment motion and will be the same arguments that are  
18 presented to the Third Circuit and we believe that the  
19 likeliness of success is minimal.

20 This Court can find that, in fact, there is a high  
21 likeliness of success and given the risk factor to the parties  
22 in this case can retain jurisdiction and allow discovery to  
23 proceed. We point out that discovery was stayed against the  
24 Supreme Court and, of course, didn't do any discovery on  
25 damages and in the interest of moving this case along, it would

1 be extremely helpful and beneficial to all parties if we were  
2 allowed to proceed with discovery.

3 THE COURT: Tell me please what would be the order of  
4 discovery that you would like to pursue?

5 MS. ROSS-EDWARDS: The Court, as to the Superior  
6 Court, we would like to be able to conclude our written  
7 discovery as to the Superior Court and to depose any party,  
8 particularly a 30(b) (6) as to the Superior Court on the issues  
9 remaining in this case and then we need to do a full fledged  
10 deposition on the issue of damages. I would expect that the  
11 defendants would definitely want to do that but we do need to  
12 exchange written discovery on the issue of damages and there  
13 are some depositions that would need to occur.

14 THE COURT: Who are the people you believe you would  
15 need to depose?

16 MS. ROSS-EDWARDS: As I said, with regard to the  
17 Superior Court, right now we're just looking at a 30(b) (6) on  
18 the Court, a representative of the court and insofar as  
19 damages, some of our -- we have at least five treating  
20 physicians that reside stateside and would like to be able to  
21 secure their testimony. Plaintiff T was air-lifted out  
22 of St. Croix, two Florida Memorial and received a significant  
23 portion of his treatment in Florida. There are two treating  
24 physicians here in the Virgin Islands we would also like to  
25 have the depositions taken but we're more concerned about the

1 stateside physicians.

2 THE COURT: Wow. So --

3 MS. ROSS-EDWARDS: Securing their testimony because  
4 if we don't and we're another year, a year-and-a-half out, you  
5 know, doctors move all the time. We don't know where they will  
6 be. We'd like to be able to secure their testimony.

7 THE COURT: Yes. All right, let me hear from Mr.  
8 Gimenez.

9 MR. GIMENEZ: Excuse me. Good afternoon, Your Honor.  
10 It's the position of the Superior Court and Deputy Richardson  
11 that discovery should not go forward at this time due to the  
12 loss of jurisdiction by the District Court caused by the filing  
13 of the pending appeal. Notwithstanding the fact that many of  
14 the issues raised are the same in the initial appeal the motion  
15 to dismiss, the standard applied by the Court included  
16 treatment of the statements in the complaint as true or  
17 interpreted in favor of the plaintiff to the extent that they  
18 were considered by the Court.

19 In the summary judgment matter even though the  
20 standard of review is the same which is a de novo look at the  
21 evidence, the record has been much further developed and many  
22 of the statements made in the complaint have proven to be  
23 either inaccurate or in some cases untrue based on the  
24 testimony received from the deposition witnesses. Therefore,  
25 some of the findings made by the Appellate Division, the

1 Appellate panel in the motion to dismiss will not be carried  
2 through to the summary judgment matter.

3           In addition to that, both the Appellate panel of the  
4 Third Circuit and this Court made an application of case law in  
5 the form of Tennessee v. Garner to this matter and the review  
6 by counsel indicates that that may have been done in error so  
7 there's going to be a question of law raised in the Appellate  
8 filings by the appellants to determine whether or not Tennessee  
9 v. Garner should, in fact, have been applied to the facts of  
10 this case as developed in the discovery.

11           The general, as you know, is that when the appeal has  
12 been filed, the Court loses jurisdiction absent a finding of  
13 frivolity by the Court which, you know, tends to be an extreme  
14 following in a situation where there's a better than slight  
15 possibility that the appellants will, in fact, prevail on one  
16 or more of their arguments before the Appellate Court.

17           Essentially, Your Honor, even though the arguments  
18 are the same, the development of the factual record and the  
19 application of the legal precedent made by the Court in the  
20 interim have created additional issues and additional arguments  
21 that remain to be made before the Division of the Third  
22 Circuit. Therefore, we would at this time argue that moving  
23 forward on discovery in this case would be outside the  
24 jurisdiction of the District Court and that further actions  
25 should remain stayed until such time as the Third Circuit

1 renders a decision.

2                   The fact that we had an appellate matter moving  
3 forward prior to this while discovery was moving forward caused  
4 a little bit of confusion because we entered into a summary  
5 judgment briefing schedule before we actually got the decision  
6 of the Third Circuit and if we had been able to get that  
7 decision prior to briefing for summary judgment, we would have  
8 had an opportunity to address some of these issues in advance  
9 and make some slightly different arguments to the Court on  
10 summary judgment.

11                  I don't think we want to run into the same situation  
12 again where we're moving forward on discovery, filing documents  
13 in the District Court and still haven't received a decision  
14 from the Third Circuit. It's inefficient use of judicial  
15 resources, it creates a confusion among the parties sometimes  
16 when arguments are made and then addressed by the Third Circuit  
17 after the fact and I think that's one of the guiding principles  
18 behind the divestiture of jurisdiction when the appeal is filed  
19 to avoid those kinds of, as the one of the Courts put it,  
20 procedural morass where both Courts are moving forward at the  
21 same time, actions are being taken in the trial court while the  
22 Appellate panel is considering the appeal and things are  
23 getting confused.

24                  We understand that this case has been in kind of  
25 suspension for awhile given when it was filed and the period of

1 time that has passed but these are important issues for the  
2 Government not just for the parties in this case but for the  
3 Government as a whole and we think that they should addressed  
4 fully and completely before the trial court moves forward.

5 THE COURT: Thank you very much and I appreciate the  
6 memoranda that have been submitted on this issue.

7 MR. GIMENEZ: You're welcome, Your Honor.

8 THE COURT: And I have given it some real concern and  
9 consideration because the injury about which this lawsuit  
10 focuses occurred, as I understand it, in 2013 and here we are  
11 now five years out and to wait for the Court of Appeals to  
12 render another opinion gives one great concern just in terms of  
13 the timeliness of responding to a lawsuit.

14 As a general rule, the timely filing of a notice of  
15 appeal is an event of jurisdictional significance immediately  
16 conferring jurisdiction on the Court of Appeals and divesting a  
17 District Court of its control over those aspects of the case  
18 involved in the appeal. However, not all notices of appeal  
19 result in a District Court's divestment. There are two  
20 exceptions that have been discussed to the general rule that  
21 the filing of a notice of appeal divests the District Court of  
22 its control over those aspects of the case, first, if the  
23 appeal is from an order or a judgment that is dilatory and  
24 frivolous, or (2) if the appeal is taken from a non-appealable  
25 order.

1           Here, denying the claims of immunity on a motion for  
2 summary judgment is properly appealable and I can understand  
3 why Mr. Gimenez would argue that the defendant's notice of  
4 appeal divested the Court of its jurisdiction. However, the  
5 Court has held, the Supreme Court has held that a District  
6 Court's denial of a claim of qualified immunity is an  
7 appealable final decision within the meaning of 28 U.S.C. 1291,  
8 notwithstanding the absence of a final judgment but only to the  
9 extent that the appeal turns on an issue of the law as compared  
10 to an issue of fact.

11           So, there are some slight exceptions and I would find  
12 that in this case discovery should go ahead because the Court  
13 of Appeals has just ruled on the motion to dismiss opinion from  
14 this Court. Their opinion discusses immunity. The likelihood  
15 that the present appeal which is again immunity as perhaps  
16 enhanced somewhat by the additional discovery that occurred,  
17 the likelihood that that's going to change the position of the  
18 Court of Appeals is reduced.

19           It's the same basic law that the defendants are  
20 arguing for quasi, for judicial, for qualified immunity and so  
21 it seems to me on balance that the plaintiffs' entitlement to  
22 have this matter litigated in a timely fashion outweighs the  
23 defendant's position with regard to the pending appeal and I am  
24 going to order that the discovery in this matter proceed and I  
25 will send out a scheduling order to you which will outline

1 dates and times so that we can proceed with this five-year-old  
2 case. Now, I say five-year-old case, obviously we're talking  
3 about from the time of the injury.

4                   This plaintiff, this young man is in a wheelchair.  
5 He was rolled into court and I saw him and the invalid state  
6 that he is in and the kind of care that is required for his  
7 well being at this point. This issue needs to be resolved and  
8 I believe that the needs of the plaintiff to have this case  
9 moved forward outweigh the defendants' entitlement to review or  
10 immediate review on the issues of immunity.

11                  So, counsel, thank you very much. I appreciate your  
12 hard work and your devotion to this case and we will be sending  
13 out today a scheduling order for proceeding immediately with  
14 discovery. You've got a lot of work to do if you're going to  
15 have to depose doctors in Florida. I agree with plaintiffs'  
16 counsel that keeping up with where these doctors are is -- can  
17 be a very difficult task. The injuries occurred in 2013. This  
18 is -- we're going into 2019. Further delay is not warranted.  
19 All right, thank you very much.

20                  MR. GIMENEZ: Okay. Your Honor?

21                  THE COURT: Is there anything either side has to say?

22                  MR. GIMENEZ: Yes, Your Honor. Before we close this  
23 proceeding, I just want to put on the record that the  
24 depositions and discovery that plaintiff alluded to are not the  
25 only ones that would have to be taken. We're talking about re-

1 deposing many of the people who have already been deposed and  
2 getting answers to the questions that plaintiff objected to  
3 that's beyond the scope of the limited discovery for and that  
4 includes re-deposing the plaintiffs in this matter themselves  
5 including the young man.

6                   We're also talking about expert witness testimony and  
7 we're talking about re-issuing of many of the written  
8 discovery. This is an extensive undertaking that we're talking  
9 at this time. And although the Third Circuit may not alter  
10 their decision, we want to point out that generally the  
11 instances of summary judgment denials being reversed is much  
12 higher than the instances of motions to dismiss reversals  
13 occurring.

14                  THE COURT: I understand that, Mr. Gimenez. And if  
15 you would like to weigh in on the scheduling order, today is  
16 Friday the 30th of November, I can give you until Friday,  
17 December 7th, to have in my hands your proposed discovery  
18 schedule.

19                  MR. GIMENEZ: All right, I will do that but I would  
20 also like to --

21                  THE COURT: Including a trial date. Including a  
22 trial date. And let me just say to Ms. Ross-Edwards, the same.  
23 Simultaneously submit to me by December 7th a proposed  
24 scheduling order including trial date.

25                  MR. GIMENEZ: Yes, Your Honor. But I'd also like to

1 at this point make an oral motion to stay that scheduling order  
2 pending delivery of a written motion.

3 THE COURT: All right, that's denied. All right,  
4 thank you very much.

5 MR. GIMENEZ: Thank you, Your Honor.

6 THE COURT: I'll look to hear from you next week,  
7 December 7th, with a proposed scheduling order and I will take  
8 your submissions, review them and design a scheduling order  
9 that seeks to accommodate both sides as to what they seek.

10 MS. ROSS-EDWARDS: Thank you, Your Honor.

11 THE COURT: Ms. Ross-Edwards, are you on board?

12 MS. ROSS-EDWARDS: I am on board, Your Honor.

13 THE COURT: And can you do this?

14 MS. ROSS-EDWARDS: Yes, I can.

15 THE COURT: All right, December 7th. That's the date  
16 in my hands. Thank you very much and I appreciate your  
17 cooperation. Very well.

18 \* \* \* \* \*

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**C E R T I F I C A T I O N**

I, MARY POLITO, court approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter, and to the best of my ability.

/s/ Mary Polito

MARY POLITO

J&J COURT TRANSCRIBERS, INC. DATE: December 4, 2018

**NOT FOR PUBLICATION**

**UNITED STATES DISTRICT COURT  
DISTRICT OF THE VIRGIN ISLANDS  
DIVISION OF ST. CROIX**

**JAMILA RUSSELL and L  
T**

**Plaintiffs,**

**v.**

**SUPERIOR COURT MARSHAL  
CHRISTOPHER RICHARDSON, in his  
individual and official capacity,  
GOVERNMENT of the VIRGIN  
ISLANDS, and SUPERIOR COURT of the  
VIRGIN ISLANDS,**

**Defendants.**

**Civ. No. 15-49**

**OPINION**

**THOMPSON, U.S.D.J.<sup>1</sup>**

**INTRODUCTION**

This matter comes before the Court on the Motion to Certify Controlling Question of Law to the Virgin Islands Supreme Court ("Motion to Certify") (ECF No. 264) and the Renewed Motion to Stay Discovery (ECF No. 284) brought by both Defendant Christopher Richardson ("Defendant Richardson") and Defendant Superior Court of the Virgin Islands ("Defendant Superior Court") (collectively, "Defendants"). The Court has decided the Motions on the written submissions of the parties and without oral argument pursuant to Rule 78(b) of the Federal Rules of Civil Procedure. For the following reasons, both Defendants' Renewed Motion to Stay Discovery and Defendants' Motion to Certify are denied.

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<sup>1</sup> The Honorable Anne E. Thompson, United States District Judge for the District of New Jersey, sitting by designation.

## BACKGROUND

This civil rights case, filed on July 9, 2015, arises from the shooting of an unarmed fifteen-year-old boy, Plaintiff L. T. by Defendant Richardson, Deputy Marshal for the Superior Court of the Virgin Islands. The facts pertinent and necessary for the disposition of the Motions currently before this Court are as follows.

On May 16, 2017, the Court granted in part and denied in part Defendants' Motion to Dismiss ("Motion to Dismiss Opinion"). (Mot. to Dismiss Op., ECF No. 115.) Of import here, the Court concluded that (1) Defendant Richardson is not entitled to qualified immunity; (2) Defendant Richardson is not entitled to quasi-judicial immunity; and (3) Defendant Superior Court is subject to suit under the Virgin Islands Torts Claim Act (the "VITCA"), 33 V.I.C. § 3401, *et seq.* (Mot. to Dismiss Op. at 4–5.) Defendants appealed the Motion to Dismiss Opinion to the Third Circuit on June 5, 2017. (ECF No. 119.) While the appeal was pending, the parties conducted limited discovery concerning whether Defendants are entitled to any of the various forms of immunity. The Third Circuit issued its opinion on November 7, 2018, and affirmed this Court's decision denying immunity to Defendants in all respects except one; this Court had declined to entertain whether waiver under the VITCA applied if an injury is caused by gross negligence because Defendants did not raise this argument until their reply brief, but the Third Circuit found that the waiver of sovereign immunity is jurisdictional and thus may not be waived, so the gross negligence claim should have been dismissed. (ECF No. 270.)

On August 13, 2018, the Court denied Defendants' Motion for Summary Judgment ("Summary Judgment Opinion"). (ECF No. 262.) Of import here, the Court concluded that (1) Defendant Richardson is not entitled to qualified immunity (*id.* at 17–20); (2) Defendant Richardson is not entitled to quasi-judicial immunity (*id.* at 15–17); (3) Defendant Superior

Court is not entitled to sovereign immunity under the VITCA (*id.* at 20–22); and (4) Defendant Superior Court is not entitled to qualified immunity (*id.* at 23).

On August 31, 2018, Defendants filed the instant Motion to Certify. (ECF No. 264.) Defendants request that the Court certify two questions related to the VITCA.<sup>2</sup> On September 7, 2018, seven days after filing the Motion to Certify, Defendants appealed the Summary Judgment Opinion to the Third Circuit. (ECF No. 265.)

On November 14, 2018, the Court held an in-person status conference with the parties. (ECF No. 273.) During that conference, as subsequently memorialized in an order, the Court ordered that the parties file papers detailing their positions regarding whether discovery may proceed while Defendants' appeal of the Summary Judgment Opinion is pending. (ECF No. 275.) The parties filed papers detailing their positions on November 28, 2018. (ECF Nos. 277–79.) On November 30, 2018, the Court held a telephonic status conference with the parties to discuss their recently filed papers. (ECF No. 280.) As stated orally in those proceedings and subsequently memorialized in an order, the Court ordered that the parties will proceed with discovery while Defendants' appeal of the Court's Summary Judgment Opinion is pending. (ECF No. 281.) The Court also denied Defendants' Oral Motion to Stay the Court's Scheduling Order made during those proceedings. (*Id.*) On December 6, 2018, Defendants filed the instant Renewed Motion to Stay Discovery. (ECF No. 284.)

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<sup>2</sup> More specifically, Defendants pose: (1) "Whether in the light of its decisions in *Brann v. Dowdye*[,] 59 V.I. 899, [910–11 (2013)] and *Cruz v. Fleming*[,] 62 V.I. 702, 718 (2015) the Notice of Intent filed by the Plaintiffs in this matter is in substantial compliance with the requirements of the [VITCA]" (Mot. to Certify at 5); and (2) "Whether the requirement for filing a claim under the [VITCA] has been met in this action and whether a trial court is authorized under the [VITCA] to [s]ua [s]ponte treat an unverified Complaint as a claim without a prior 33 [V.I.C.] Section 3409(b) application made within two years after the accrual of the action" (*id.* at 7).

## DISCUSSION

### I. Renewed Motion to Stay Discovery

Defendants “request that the Court reconsider” the denial of Defendants’ oral motion to stay discovery made during the November 30, 2018 telephonic status conference. (Defs.’ Renewed Mot. at 1, ECF No. 284.) Although Defendants title this filing a “Renewed Motion,” the Court construes this request as a motion for reconsideration. *See Wiest v. Lynch*, 710 F.3d 121, 127 (3d Cir. 2013) (noting the prevalence of courts construing requests as motions for reconsideration); *see also Mathis v. Christian Heating & Air Conditioning, Inc.*, 91 F. Supp. 3d 651, 655–56 (E.D. Pa. 2015) (construing request as motion to reconsider because “plaintiff’s Motion actually seeks reconsideration”).

Pursuant to Rule 59(e) of the Federal Rules of Civil Procedure and Local Civil Rule 7.1(i), a motion for reconsideration must be based on one of three grounds: (1) an intervening change in controlling law, (2) new evidence not previously available, or (3) a clear error of law or manifest injustice. *N. River Ins. Co. v. CIGNA Reinsurance Co.*, 52 F.3d 1194, 1218 (3d Cir. 1995). Generally, a motion for reconsideration is intended “to correct manifest errors of law or fact or to present newly discovered evidence.” *Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir. 1985). “Reconsideration is an extraordinary remedy that is granted very sparingly.” *Brackett v. Ashcroft*, 2003 U.S. Dist. LEXIS 21312, at \*2 (D.N.J. Oct. 7, 2003) (internal citations omitted); *see also L. Civ. R. 7.1(i), cmt. 6(d)*. A motion for reconsideration may be granted only if there is a dispositive factual or legal matter that was presented but not considered that would have reasonably resulted in a different conclusion by the court. *White v. City of Trenton*, 848 F. Supp. 2d 497, 500 (D.N.J. 2012). Mere disagreement with a court’s decision should be raised

through the appellate process and is thus inappropriate on a motion for reconsideration. *United States v. Compaction Sys. Corp.*, 88 F. Supp. 2d 339, 345 (D.N.J. 1999).

In their Renewed Motion to Stay Discovery, Defendants reiterate many of the same arguments advanced during the November 30, 2018 status conference, with the exception of including some citations to case law here. (See, e.g., Defs.' Renewed Mot. at 2-3 (arguing that because Defendants' appeal "is potentially dispositive of the entire action, the filing of that notice of appeal automatically and completely divested this Court of jurisdiction and its authority to issue the discovery order"); *id.* at 3 (arguing that "[t]his divestiture of jurisdiction is particularly compelling the circumstances where immunity has been claimed").) Defendants' citations, however, identify cases that favor staying discovery where immunity issues are undecided at the motion-to-dismiss stage. (See, e.g., *id.* at 4 (citing *Thomas v. Independence Twp.*, 463 F.3d 285, 301 (3d Cir. 2006))). As the Court noted in the November 30, 2018 status conference, the Court previously held that Defendants were not entitled to immunity both at the motion-to-dismiss stage—which the Third Circuit affirmed—and at the summary-judgment stage after the parties conducted limited discovery. Defendants "simply repeat[] the . . . arguments previously analyzed by the court . . . [and have] filed the motion merely to disagree with or relitigate the court's initial decision." *Hanover Architectural Serv., P.A. v. Christian Testimony-Morris, N.P.*, 2015 U.S. Dist. LEXIS 94916, at \*3 (D.N.J. July 21, 2015). Because Defendants do not identify (1) an intervening change in controlling law, (2) new evidence not previously available, or (3) a clear error of law or manifest injustice, *N. River Ins. Co.*, 52 F.3d at 1218, Defendants' Renewed Motion to Stay Discovery fails.

## II. Motion to Certify Controlling Question of Law

Defendants seek input from the Virgin Islands Supreme Court on “important questions of Virgin Islands law regarding its waiver of sovereign immunity under the [VITCA].” (Defs.’ Mot. to Certify at 1, ECF No. 264.) However, Defendants have not identified any local civil rule—neither from the District of the Virgin Islands nor the District of New Jersey—that permits this Court to certify a question of law to the Virgin Islands Supreme Court. Defendants instead gather a patchwork of court rules derived from three different judicial bodies.

Defendants first point to the procedure for certifying a question of law to the highest court of a state from the U.S. Court of Appeals for the Third Circuit. Defendants identify Rule 110 of the Local Appellate Rules 110 (“LAR 110”), adopted by the Third Circuit:

When the procedures of the highest court of a state provide for certification to that court by a federal court of questions arising under the laws of that state which will control the outcome of a case pending in the federal court, this court . . . may certify such a question to the state court in accordance with the procedures of that court . . . .

Defendants then contend that this Court is authorized to adopt LAR 110 pursuant to Rule 83(b) of the Federal Rules of Civil Procedure.<sup>3</sup> Rule 83(b) “grants the district courts the power to ‘adopt and amend rules governing its practice,’ and the Supreme Court of the United States has recognized the inherent power of the courts to take appropriate action to secure the just and prompt disposition of cases.” *Wilson v. Iron Tiger Logistics, Inc.*, 628 F. App’x 832, 834 n.2 (3d Cir. 2015) (internal citations omitted). “Rule 83(b) allows courts discretion to manage cases when the rules are silent on an issue in any manner not inconsistent with the Federal Rules of Civil Procedure or statute. ‘The manner and enforcement of such regulations rests in the court’s

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<sup>3</sup> “A judge may regulate practice in any manner consistent with federal law, rules adopted under 28 U.S.C. §§ 2072 and 2075, and the district’s local rules.” Fed. R. Civ. P. 83(b).

sound discretion and will not be interfered with by an appellate tribunal in the absence of a showing of arbitrariness or fundamental unfairness.”” *Id.* (quoting *In re United Corp.*, 283 F.2d 593, 596 (3d Cir. 1960)).

If this Court were to adopt LAR 110 pursuant to Rule 83(b) and thus allow a motion to certify to proceed, Defendants finally argue that the Virgin Islands Supreme Court would be receptive to the certification. Defendants identify Rule 38 of the Virgin Islands Rules of Appellate Procedure (“VIRAP 38”),<sup>4</sup> which allows the

Supreme Court of the Virgin Islands [to] answer questions of law certified to it by a court of the United States . . . if there is involved in any proceeding before the certifying court a question of law which may be determinative of the cause then pending in the certifying court and concerning which it appears there is no controlling precedent in the decision of the Supreme Court.

Defendants do not identify any other instance where a district court in this Circuit has cleared this type of procedural hurdle in order to certify a question of law to the highest court of a state or territory.

Even assuming, however, that Defendants present a viable procedural mosaic—which the Court does not hold is so—Defendants fail to satisfy the requirements under VIRAP 38, which is fatal under LAR 110. *See* LAR 110 (allowing certification only “in accordance with the procedures of [that state’s highest] court”). VIRAP 38 requires that the question of law be “pending in the certifying court,” but no question of law is currently before the Court. Defendants filed this Motion to Certify only *after* the Court issued its Motion to Dismiss Opinion and its Summary Judgment Opinion. Indeed, “numerous federal court[s] of appeals have held that certification by a federal district court is not appropriate after the district court has already

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<sup>4</sup> In their Motion to Certify, Defendants label this rule as “Rule 38 of the Virgin Islands Supreme Court Rules.” (See, e.g., Defs.’ Mot. to Certify at 8.)

resolved the issue by predicting how the pertinent court of last resort would rule.” *See Hall v. Hall*, 2018 V.I. Sup. LEXIS 5, at \*5 (Apr. 18, 2018) (declining certification under VIRAP 38 where the question of law “could have been certified at a significantly earlier stage of the litigation, before the District Court issued a prediction of Virgin Islands law”). Defendants’ Motion to Certify seems unlikely to “save time, energy, and resources”—the underlying purpose of certification. *Banks v. Int’l Rental & Leasing Corp.*, 55 V.I. 967, 973 (2011) (quoting *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974)).

The Court also questions whether “no controlling precedent”—a requirement for certification under VIRAP 38—exists on the issues on which Defendants request guidance. Indeed, Defendants themselves identify numerous cases decided by the Virgin Islands Supreme Court that are instructive. (See Defs.’ Mot. to Certify at 2 (citing *Albert*, *Brunn*, and *Cruz*).) It seems more likely that Defendants merely disagree with the Court’s Summary Judgment Opinion and simply seek a second opinion. For example, Defendants contend that

the *Albert v. Abramson’s Enterprises, Inc.*, 790 F.2d 380, [383] (3d Cir. 1986) opinion relied on by the Court in support of its [Summary Judgment Opinion] is distinguishable on its face from the instant action and appears to be at odds with the decisions of the Virgin Islands Supreme Court in *Brumm v. Dowdy*[,] 59 V.I. 899, [910–11 (2013)] and *Cruz v. Fleming*[,] 62 V.I. 702, 718 (2015) as well as with several recent decisions by Virgin Islands courts regarding the VITCA.

(See, e.g., Defs.’ Mot. to Certify at 2.) Because of the Court’s foregoing concerns, coupled with the fact that “[a] decision to certify an order for appellate review is soundly within the discretion of the trial judge,” *Chitalie v. Bank of Nova Scotia*, 62 V.I. 85, 89 (Super. Ct. 2014) (citing *In re Le Blanc*, 49 V.I. 508 (2008)), the Court denies Defendants’ Motion to Certify.

**CONCLUSION**

For the reasons stated herein, Defendants' Renewed Motion to Stay Discovery and Defendants' Motion to Certify are both denied. An appropriate order will follow.

Date: 12/12/18

  
ANNE E. THOMPSON, U.S.D.J.

**NOT FOR PUBLICATION**

**UNITED STATES DISTRICT COURT  
DISTRICT OF THE VIRGIN ISLANDS  
DIVISION OF ST. CROIX**

**JAMILA RUSSELL and L  
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**Plaintiffs,**

**v.**

**SUPERIOR COURT MARSHAL  
CHRISTOPHER RICHARDSON, in his  
individual and official capacity,  
GOVERNMENT of the VIRGIN  
ISLANDS, and SUPERIOR COURT of the  
VIRGIN ISLANDS,**

**Defendants.**

**Civ. No. 15-49**

**ORDER**

**THOMPSON, U.S.D.J.<sup>1</sup>**

For the reasons stated in the Opinion issued this same day,

IT IS, on this 12<sup>th</sup> day of December, 2018,

ORDERED that Defendants' Motion to Certify Controlling Question of Local Law to the Virgin Islands Supreme Court (ECF No. 264) is DENIED; and it is further

ORDERED that Defendants' Renewed Motion to Stay Discovery (ECF No. 284) is DENIED.

  
**ANNE E. THOMPSON, U.S.D.J.**

<sup>1</sup> The Honorable Anne E. Thompson, United States District Judge for the District of New Jersey, sitting by designation.