ANDREA J. DYER now ANDREA JEANNE WOODLING and BENJAMIN A. LIEBERSOHN, * Plaintiff v. ROBERT MEACHAM Defendant	IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY DOCKET NUMBER: 14-01675 CIVIL ACTION – LAW CIVIL ACTION: PROFESSIONAL LIABILITY

DECISION AND ORDER

MINORA, S.J.*

I. INTRODUCTION

In this professional liability action, *pro se* plaintiffs are asserting psychological malpractice by the defendant in acting as a court appointed expert performing psychological evaluations and custody evaluations as well as being an alleged court appointed parenting coordinator and mediator in an unrelated family law/child custody litigation setting. Plaintiffs seek to file their professional liability complaint without an expert's certificate of merit and seek to commence discovery with a request for production of documents and things directed to defendant.

For the reasons that follow, the plaintiffs' complaint will be dismissed in its entirety and the discovery sought will be denied, dismissed and rendered moot.

* Honorable Carmen D. Minora of Lackawanna County specially presiding per order of the Pennsylvania Supreme Court. (*See* Exhibit "A" attached).

Factual Background

The relevant background is as follows. On or about October 5, 2015, *pro se* plaintiffs collectively filed their page unnumbered approximately thirty-five (35) page two hundred and thirty (230) paragraph complaint alleging generally psychological malpractice by defendant Meacham acting in a court appointed capacity for an unrelated family matter.

On November 9, 2015, defendant filed a notice of intention to enter judgment of non-pros on the complaint if a certificate of merit was not filed within thirty (30) days per Pa. R.C.P. 1042.3. *Pro se* plaintiffs have not filed a certificate of merit and instead on December 3, 2015, *pro se* plaintiffs filed this motion entitled motion to determine the necessity to file a certificate of merit.

No judge was assigned due to the matter arising out of a court appointment. On January 5, 2015, an order to recuse was filed and served by the prothonotary per Pa. R.C.P. 236. Judge Richard A. Gray of Lycoming County had filed an order setting a hearing on December 9, 2015. The order was later vacated by Judge Gray on January 25, 2016.

Subsequently, on February 12, 2016, this writer was assigned this case through the Administrative Office of Pennsylvania Courts by an order dated February 19, 2016 and issued by Pennsylvania Supreme Court Chief Justice Thomas Saylor.

Pursuant to that court order, this Court took responsibility for this case on February 19, 2016 and scheduled a hearing on May 3, 2016. At that time, the Court left the record open for ten (10) days for both sides to submit supplemental briefs. *See* Transcript of Proceedings, May 3, 2016, N.T. pg. 64, lns.21-25. Accordingly,

Defendant's supplemental brief was filed on May 12, 2016 with Plaintiffs' supplemental brief filed on May 13, 2016. Thus, this matter is ripe for disposition.

Legal Overview

Pro se plaintiffs have sued their court-appointed custody evaluator for alleged harm resulting to them from the evaluator's alleged tortious misconduct in the exercise of his professional judgment during the family law/child custody litigation.

The instant issue involved, plaintiffs lack of a certificate of merit per Pa. R.C.P. 1042.1(c)(1)(xi) since the evaluator defendant is a licensed psychologist covered under the rule. (*See* Pa. R.C.P. 4010(a)(1)).

Plaintiffs argue such a certificate is not needed and there is also pending discovery which this Court placed on hold. The Court requested supplemental briefs from the parties and the time for responses is lapsed.

This Court believes other issues not specifically addressed by the parties control the outcome of this case and will raise what it believes to be defining issues *sua sponte.*

Before one gets to the issue of a certificate of merit and the voluminous pleadings in this case, one must first determine if a case recognized by law per the facts as pled in plaintiff's complaint in this case, actually exists.

In the very recent case of Grimm II v. Grimm et al., 2016 WL 5408071 decided by our Superior Court on September 28, 2016 our Superior Court was faced with an attorney malpractice case whose rationale and law we believe also control the outcome herein.

We take judicial notice of the fact that the evaluator defendant herein was court-appointed to deal with the evaluation of the parties for child custody purposes. At page 4 of Grimm, *supra*, the Superior Court noted, "We take judicial notice [of a death] . . . *See* Goff v. Ambrecht Motor truck Sales, Inc., 426 A.2d 628, 630 n.4 (Pa.Super. 1980) (this court may take judicial notice); per Pa. R. Evid. 201(b)(2)(c)(1) (a court may take judicial notice of a fact which "can be accurately and readily determined from sources whose accuracy cannot be reasonably questioned."). We consider the records of the Lycoming County Court of Common Pleas to be such a source. *See* also Kinley v. Bierly, 876 A.2d 419 (Pa.Super.2005).

Once such judicial notice is taken, it becomes indisputably clear that the court-appointed child custody evaluator/mediator was acting per the court's appointment as an agent of the Lycoming County Court of Common Pleas, thus being protected from all actions by the doctrine of quasi-judicial immunity. At count five *pro se* plaintiffs claim the nature of their claim is not a breach of the standard of care but a violation of the court order which caused them to be harmed.

"Pennsylvania, like many other jurisdictions, recognizes privilege providing immunity for communications which are made in the regular course of judicial proceedings and are material to the relief sought." Schanne v. Addis, 121 A.3d 942, 947-948 (Pa. 2015), *citing*, Bochetto v. Gibson, 580 Pa. 245, 251, 860 A.2d 67, 71 (2004).n2; *See* also Restatement of Torts (Second) § 588 (1977); Clodgo v. Bowman, 601 A.2d 342 (Pa.Super.1992); Post v. Mendel, 510 Pa. 213, 217, 507 A.2d 351, 353 (Pa. 1986), *citing*, Kemper v. Fort, 219 Pa. 85, 93, 67 A. 991 (1907). The privilege covers a witness. Schanne, *supra*, 121 A.3d at 947-948 (citation omitted). Id. n.3.

"Furthermore, the privilege is absolute, meaning that, where it attaches, the declarant's intent is immaterial even if the statement is false and made with malice." Id. (citation omitted). *See* Bochetto, 580 Pa. at 251 n.12, 860 A.2d at 71 n.12." Schanne, *supra* 121 A.3d at 947-948. Absolute privilege protects the declarant against a charge of malice and cannot be lost through an abuse of privilege. Id. N.3. With the defendant acting as a court-appointed evaluator reporting to the court, he becomes such a witness in possession of such an absolute privilege.

Judicial immunity as a protection is not of recent origin and has been extended to judicial officers in our Commonwealth since the 1880's. Hanna v. Slevin, 8 Pa. Super. 509, 510 (1898).

With respect to judges, the law in Pennsylvania is well established that judges are absolutely immune from liability for damages when performing judicial acts, even if their judicial actions are in error or performed with malice, provided there is not a clear absence of all jurisdiction over the subject matter and the person. Stump v. Sparkman, 435 U.S. 349, 98 S.Ct. 1099, 1105, 55 L.Ed.2d 331 (1978) *cert. denied*, 436 U.S. 951, 98 S.Ct. 2862, 56 L.Ed.2d 795 (1978). Praisner v. Stockner, 313 Pa. Super. 332, 459 A.2d 1255, 1261 (1983).

When a judge is acting within the scope of his authority even malice does not, in and of itself, make judicial behavior actionable. Stump, *supra;* Praisner, *supra.* Plaintiffs will argue that our defendant is a psychologist, not a judge, but under the doctrine of quasi-judicial immunity similar protections have been extended to a judge's staff. In the case of Feingold v. Hill, 360 Pa. Super. 539, 547 (1987), the Superior Court stated that a judge's law clerks are appointed by judges within the scope of the

judge's constitutional authority as necessary attendants to the court in order to assist judges in the performance of their judicial functions. *See* Pa. C.S.A. § 2301(a)(1) and also *see* Sweet v. Pennsylvania Labor relations Board, 457 Pa. 456, 322 A.2d 362, 365 (1974).

The Feingold court noted that quasi-judicial immunity has been extended to magistrates, officials of state agencies and district justices. The rationale for extending a judge's judicial immunity as quasi-judicial immunity to court-appointed officials has a basis in logic. If judges, properly expected to be learned in the law can plead an official exemption, then those who are appointed by the court but from whom less is expected should also not be compelled to respond for damages that their mistakes cause.

The Feingold court *supra* at pages 547 and 548 stated with regard to law clerks who assist the court and are appointed by the court, " . . . to permit the imposition of civil liability upon law clerks who are merely performing their appointed tasks . . . would be incomprehensible and unduly harsh."

Feingold, Id. States that, "The cloak of quasi-judicial immunity must be extended to law clerks in the performance of their official duties if we are not to emasculate the independence of the judiciary itself."

This rationale was also noted to be in keeping with the policies of insuring an independent judiciary and being adverse to that which generally interferes with judges in the lawful exercise of their judicial supervising powers over appointed employees. Feingold, Id. at 547, 548.

Despite newly adopted broad statutory language, the Supreme Court has consistently held that such language " . . . did not abolish long-standing common law

immunities from and defenses to civil suits." Burns v. Reed, 500 U.S. 478, 111 S.Ct. 1934, 114 L.Ed.2d 547 (1991).

What makes an act "judicial" depends upon whether it is a function normally performed by the judge and whether the parties dealt with the judge in his official capacity. Stump, *supra* 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978).

Now we are faced with the issue of whether or not this quasi-judicial immunity case be extended to the court's masters who act as agents of the court. While we could find no definitive appellate guidance on this precise fact pattern, we have found a federal court case on a similar issue.

In the case of Humphrey v. Court of Common Pleas of York County, 640 F.Supp. 1239, (M.D. Pa 1986), our federal district court found that judicial immunity applies to masters and other judicial officers where their actions are taken in a judicial capacity. The court concluded that judicial immunity applied even though the masters or judicial officers in this case were biased in how they handled the matter. Judicial immunity attached because the masters or judicial officers were not acting in a clear absence of jurisdiction. Since jurisdiction was present then so was the protection afforded by immunity.

Here, the essence of the "malpractice claim" is that an evaluator communicated misinformation to the Court of Common Pleas of Lycoming County thus resulting in harm to them. Such communication is absolutely privileged and cannot be the basis for a lawsuit because even if proven the defendant is immune from any remedy attempted to be imposed by the court. Such an outcome implicates the jurisdiction and power of the court as well as plaintiffs' standing to bring such an action.

Plaintiffs' Standing

In Grimm, *supra*, the doctrine of standing was addressed by the court at page 5 and 6 at notes 2,3 and 4, the court stated that, "The doctrine of standing is a prudential judicially created principle designed to winnow out litigants who have no direct interest in a judicial matter. For standing to exist, the underlying controversy must be real and concrete such that the party initiating the legal action has in fact been aggrieved." (citations omitted). Emphasis added.

Here, plaintiffs have sued a defendant while defendant was acting as an agent of the court in possession of quasi-judicial immunity. Accordingly, even if plaintiffs possess a direct interest in the judicial matter they seek a result that is a judicial impossibility to achieve. They seek a result, which even if favorably achieved, would be null and void due to the inability of the court to provide a lawful remedy.

The Court lacks judicial power to adjudicate plaintiffs' claim since Defendant possesses quasi-judicial immunity. We are unable to order or effect a certain outcome even were plaintiffs able to prevail. Therefore, since we lack judicial power to remedy plaintiffs' claim, they possess no real and concrete claim. Therefore they have no standing to pursue the matter. Grimm, *supra.*

No Professional Liability Relationship – No Duty

In this case, the defendant/evaluator/mediator was hired by the court to perform the judicially assigned tasks as ordered by the court in a family law context.

The defendant never had a doctor/patient relationship with either plaintiff party. There was no confidentiality as the defendant had a judicial obligation to report to the

court and to conduct some tasks in a public setting. The Grimm case cited Guy v. Liederbach, 501 Pa. 47, 459 A.2d 744 (1983) as standing for the proposition that in order to pursue a legal malpractice claim there must be an attorney client relationship, i.e. privity between the attorney and the client. The same requirement exists in a malpractice case based upon a psychologist patient relationship. In our case, the defendant never had a doctor/patient treatment relationship with either plaintiff.

Privity in a contract means that the parties have reached a mutual agreement, exchanged consideration or something of value and outlined the terms of their contract with sufficient clarity to show their intent and expectations. Green v. Oliver Reality, 526 A.2d 1192 (Pa.Super.1987). None of these requirements happened here. Defendant's contractual relationship was with the Court of Common Pleas of Lycoming County not with either plaintiff. There was no agreement, no value exchanged nor clear terms between the plaintiffs and defendant. Therefore, no privity of contract exists. Without privity of contract, there exists no duty between plaintiff and defendant. Without a duty (which in our case duty would go from defendant to the court) there can be no breach of duty to the plaintiff.

If there is no duty and therefore no breach of that duty or standard of care, the essence of any malpractice case involving any profession is non-existent rendering the putative lawsuit null and void. There is no contractual basis for finding duty herein. There is no special relationship to plaintiffs. The defendant is an agent of the court. Defendant's duty is to the court and only to the court. That duty is absolute as is the associated quasi-judicial immunity as noted.

Throughout these proceedings, *pro se* plaintiffs have flaunted numerous rules of procedures as well as substantive rules of law. This lawsuit is a collateral attack attempting to circumvent their lack of a direct appeal of the family law order, a product of defendant's work.

Our Supreme Court has delineated those considerations that must be weighed by a court when the court confronts facts which ought to result in the creation of a legal duty. In Gardner v. Conrail, 524 Pa. 445, 573 A.2d 1016 (1990), our Supreme Court explained:

> "In determining the existence of a duty of care it must be remembered that the concept of duty amounts to no more than the sum total of those considerations of policy which led the law to say that the particular plaintiff is entitled to protection from the harm suffered. Leong v. Takasaki, 55 Haw.398, 520 P.2d 758, 764 (1974). To give it any greater mystique would unduly hamper our system of jurisprudence in adjusting to the changing times. The late Dean Prosser expressed this view as follows:
>
> These are shifting sands and no fit foundation. There is a duty if the court says there is a duty; the law, like the Constitution, is what we make it. Duty is only a word with which we state our conclusion that there is or is not liability; it necessarily begs the essential question. When we find duty, breach and damage everything has been said. The word serves a useful purpose in directing attention to the obligation to be imposed upon the defendant, rather than the causal sequence of events; beyond that it serves none. In the decision whether or not there is a duty, many factors interplay. The hand of history, our ideas of moral and justice, the convenience of administration of the rule, and our social ideas as to where the loss should fall. In the end the court will decide whether there is a duty on the basis of the mores of the community, always keeping in mind the facts that we endeavor to make a rule in each case that will be practical and in keeping with the general understanding of mankind."

There have been a line of case that imposed a duty to a third person in a medical malpractice context but only where special circumstances exist.

The general rule from Restatement (Second) of Torts § 315 is that there is no duty to control the conduct of a third party to protect another from harm absent a special relationship between the actor, in our case the defendant, and the third person in this case the plaintiffs.

Those exception cases do not apply herein for two reasons. First, the issue of judicial immunity is absent from those cases. Second, there is no actionable specific threat to a specific victim.

The case of Emerich v. Philadelphia Center for Human Development, 554 Pa. 209, 720 A.2d 1032 (1998) created a carefully designed and very limited cause of action based upon a mental health provider's failure to warn a third party of a specific threat conveyed to the mental health provider conveying a specific threat to harm an actual identified specific victim.

Our case has no threat, plaintiffs quite simply are unhappy with defendant's determination conveyed to the court regarding their suitability to act in a family law/child custody case. Dissatisfaction with a court's judgment is not an actionable harm especially when the defendant is a court-appointed agent with quasi-judicial immunity.

Having removed plaintiffs' ability to fit into the exception to the general rule we now apply the general duty concepts to our facts.

Going back to the cases of Sinn v. Burd, 486 Pa. 146, 404 A.2d 672, 681 (1979); Althaus v. Cohen, 562 Pa. 547, 756 A.2d 1166 (2000) and Brisbine v. Outside In School of Experimental Education, 2002 Pa. Super. 138, 799 A.2d 89, we have learned how to apply Dean Prosser's lessons in determining if duty is present in a set of facts.

These cases tell us that certain facts derived from the Prosser and Gardner principles should apply in determining the existence of a duty. First, we must look at the relationship between the parties. Here there is only a judicially compelled relationship. Plaintiffs were ordered to present themselves for a review by the defendant who then had a duty to report his conclusions to the court. There is no contract with plaintiffs and defendant and a total lack of privity. There is no treatment relationship herein nor a doctor patient relationship.

This relationship exists in order to give the Court of Common Pleas of Lycoming County the best information possible in order to equip the court to best decide a family law case. The nature of the relationship between the parties herein can best be characterized as compulsory. If a relationship is forced it does not exist contractually and only exists with the legal compulsion of the court.

The second factor is the social utility of the actor's conduct. It is beyond cavil that the defendant's conduct in providing his expertise to the Court of Common Pleas of Lycoming County provides the court with the best information possible to render the best decision possible. This is entirely socially desirable and acceptable.

The next factor is the nature of the risk imposed and the foreseeability of the harm incurred. The harm alleged by plaintiff is essentially a dissatisfaction with a decision and order rendered by the court in a family law case. It is undeniable that this decision and order is not a harm directed to the plaintiff by the defendant. It is the court who renders a decision and order in reliance upon defendant's report. The court is not compelled to follow the expert's report. The court can find the expert's conclusions not credible and decide not to be influenced by them or the court can chose to accept the

professional judgments of defendant. The defendant is acting as an expert witness on behalf of the court. The court has total discretion whether to accept or reject those conclusions of the expert. In sum, there is some foreseeability of "harm" in that the court may follow a negative expert's report, however, some may view this as a proper decision by the court, thus, nullifying any risk or harm since these legal results cannot be characterized as risk or harm.

The last two factors will be dealt with jointly. The consequences of imposing a duty upon the actor and the overall public interest in the proposed solution.

If we are to impose the duty of the malpractice risk on the court's agent and defendant in this case. The foreseeable results are that the court would not be able to secure the expert testimony it requires in order for the court to do its best job possible. That would harm the overall public interest immeasurably.

Decisions made by any court in any context are not an exact science. Perhaps most so in the family law context. Were we to allow the continuation of this lawsuit, we would paralyze the court's ability to best perform its significant work on behalf of society.

Plaintiffs are, at their core disgruntled litigants who failed to directly appeal the adverse decision and order rendered against them. They are dissatisfied with the decision and order of the family law custody case. To remedy their failure to directly appeal, they have concocted this bogus collateral attack which is null and void and lacks any scintilla of legal merit.

Conclusion

The expansion of such a similar duty has already been addressed by our legislature. At 50 P.S. 7114, a statute entitled "Immunity for Civil and Criminal Liability" under the Mental Health Procedures Act requires that willful misconduct or gross negligence be present before suit may be brought against " . . . any authorized person who participates in a decision that a person be examined or treated under this act . . ."

Similarly such a duty expansion attempted by plaintiffs, effectively abolishing judicial and quasi-judicial immunity, would most appropriately be addresses by the legislature and not the courts. Accordingly, the plaintiffs' lawsuit is denied and dismissed in its entirety for the reasons already articulated including but not limited to lack of duty, lack of standing, lack of judicial power to impose a remedy or result, arguable waiver and judicial immunity and quasi-judicial immunity.

Ultimately, plaintiffs' dissatisfaction is with the court's decision and order which they voluntarily never appealed. This is the essence of why judicial immunity exists so parties appeal the issue rather than attack the parties. The plaintiffs also have arguably waived their ability to proceed on this collateral track when they did not engage in a direct appeal of the underlying family court order which was arguably a product of the defendant's professional work.

This also moots the issue of outstanding discovery and whether or not the issues have been waived by Plaintiff by not appealing the underlying family law matter.

It is so ordered and an appropriate order follows.

ANDREA J. DYER now ANDREA JEANNE WOODLING and BENJAMIN A. LIEBERSOHN, Plaintiff v. ROBERT MEACHAM Defendant	: : : : : : : : : : : : : :	IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY DOCKET NUMBER: 14-01675 CIVIL ACTION – LAW CIVIL ACTION: PROFESSIONAL LIABILITY

ORDER

AND NOW, this 2nd day of December 2016, **IT IS HEREBY ORDERED and DECREED,** the lawsuit filed by both plaintiffs is **DENIED and DISMISSED** in its entirety and the Prothonotary/Clerk of Courts is **ORDERED** to enter this Order as Final Order triggering any dissatisfied party's rights to direct appeal.

IT IS SO ORDERED.

BY THE COURT:

, S.J.

Carmen D. Minora, S.J., Specially Presiding

12/2/16

Cc: Written notice of the entry of the foregoing Memorandum and Order has been provided to each party pursuant to Pa.R.C.P. 326(a)(2) by mailing time-stamped copies to:

Pro Se Plaintiffs:
Andrea J. Woodling and Benjamin A. Liebersohn
1885 Ravine Road
Williamsport, PA 17701

Attorney(s) for Defendant(s):
Suzanne M. Utke, Esquire
Justin P. McGlynn, Esquire
Christie & Young
1880 JFK Boulevard
10th Floor
Philadelphia, PA 19103

EXHIBIT "A"

SUPREME COURT OF PENNSYLVANIA
ADMINISTRATIVE OFFICE OF PENNSYLVANIA COURTS
REQUEST FOR ASSIGNMENT OF JUDGE

To the Court Administrator of Pennsylvania: **Date: Thursday, January 7, 2016**

I, Nancy L. Butts, President Judge of Judicial District No. 29 request that the Supreme Court of Pennsylvania temporarily assign a judge to sit at Lycoming County Court of Common Pleas.

☑ To try all proceedings in Woodling and Liebersohn vs. Meacham commencing 02/12/2016

Common Pleas docket number: 14-01675

The above request is required:
Reason Type:
Additional Details: Full Bench Recusal

Signed Nancy L. Butts, President Judge

To the Supreme Court of Pennsylvania:

I hereby certify the availability of and recommend Carmen D. Minora

☑ a Senior Judge

AOPC case number: 16 FEB145

Signed Thomas B. Darr, Court Administrator of Pennsylvania

ORDER

By virtue of PA RJA 701(C)(2), the foregoing recommendation is approved, and the judge assigned is vested with the same power and authority as the judges of the requesting district for the purposes and period set forth.

Date of Order: 02/19/2016

Signed Thomas G. Saylor, Chief Justice of Pennsylvania

Docket Number: 30072 SEN