STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

WASHINGTON, SC. **SUPERIOR COURT**

(Filed: January 11, 2013)

(DAVID) JAY JOHNSON, CHRISTINA JOHNSON, and GLORIA JOHNSON	:	
v.	:	**C.A. No. WC 2011-0366**
PETER KOSSEFF, Ph.D., KERRY RAFANELLI, Esq., and JUDITH LUBINER, Ph.D.	:	

DECISION

SAVAGE, J. This matter is before the Court on two motions to dismiss filed by Defendants Peter Kosseff and Kerry Rafanelli by which they seek to dismiss Plaintiffs'[1] Second Amended Complaint for failure to state a claim upon which relief can be granted under Rule 12(b)(6) of the Rhode Island Superior Court Rules of Civil Procedure.[2] For the reasons set forth in this Decision, this Court grants the Defendants' motions to dismiss.

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[1] Plaintiff Gloria Johnson filed the Second Amended Complaint *pro se* on behalf of herself, individually, as well as her children, (David) Johnson—an adult at the time—and Christina Johnson—a minor at the time who has since reached the age of majority. She claims that she has the authority to represent her adult son pursuant to a power of attorney and her minor daughter as her custodial parent. Second Am. Compl. ¶¶ 1-2. Yet, according to a decision of the Unauthorized Practice of Law Committee, to whom this Court referred this issue, Plaintiff Gloria Johnson lacked the authority to file the action on behalf of her children and cannot litigate the case on behalf of them. It found that:

> A non-lawyer pro se litigant may not represent the interests of his/her children in a civil action. Further, a power of attorney does not convey the authority to proceed as the legal representative of another party in a civil action. As a pro se litigant, [one] may pursue claims in [his/her] name and in [his/her] own interest only.

Letter from Richard P. D'Addario, Chairman, Unauthorized Practice of Law Comm., to Gloria Johnson (July 20, 2012) (filed with Court Oct. 25, 2012). Regardless, this Court will address the Defendants' motion to dismiss the Second Amended Complaint filed on behalf of all named Plaintiffs.

[2] The third-named Defendant, Judith Lubiner, died during the pendency of this case, and no party has been substituted in her stead.

I

Facts[3] and Travel

A

Family Court Case

Plaintiff Gloria Johnson was the plaintiff in a suit in Family Court against her husband, David B. Johnson, from roughly 2005-2010. Second Am. Compl. ¶¶ 3, 4, 8, 24. Among the issues involved in that case were child custody and visitation, as well as allegations of multiple acts of domestic violence perpetrated by Mr. Johnson against Gloria and the couple's two children, Plaintiffs (David) Jay Johnson and Christina Johnson. Id. ¶¶ 3, 12-13. It does not seem to be disputed that both Jay and Christina opposed custody and visitation by their father, Mr. Johnson.[4]

In 2005, while the Family Court case was pending, Defendant Peter Kosseff was appointed to evaluate each member of the family. Id. ¶ 4. Kosseff is a clinical psychologist in the State of Rhode Island. Id. ¶ 5. Subsequently, Kosseff's services were required regularly during the pendency of the case from 2006 to 2010. Id. ¶ 8. In 2006, Defendant Kerry Rafanelli was hired as Mr. Johnson's attorney to represent him in the case. Id. ¶ 6. Rafanelli is an attorney licensed in the State of Rhode Island. Id. ¶ 7. In 2007, Defendant Judith Lubiner was appointed to work through ongoing "therapeutic interventions" with Jay and Christina. Id. ¶ 9. Lubiner was a clinical psychologist in the State of Rhode Island who also worked "as a sub-contractor

[3] The "facts" outlined in this Decision are not findings of fact nor are they deemed by this Court to be accurate; they are the facts as alleged by Plaintiffs in their Second Amended Complaint.

[4] The Second Amended Complaint alleges that both Jay and Christina suffered from Post-traumatic Stress Disorder that was exacerbated throughout the course of the Family Court proceedings as a result of interactions with their father, Mr. Johnson. Second Am. Compl. ¶ 13. The claimed exacerbation of the children's PTSD allegedly resulted in a number of symptoms, including stress, loss of appetite, and insomnia, among others. Id.

[sic] for the State of Rhode Island Judiciary on federally funded grant programs at the Garrahy Judicial Complex." Compl. ¶ 4; Second Am. Compl. ¶ 10.

At the time, Jay and Christina were each in therapy: Jay with Myles Glatter and Christina with Lynn Furcht. Second Am. Compl. ¶ 50. However, once court-ordered therapy began, Jay and Christina were forced to stop seeing their individual therapists and began seeing Kosseff and Lubiner exclusively.[5] Id. ¶ 13, 52. As part of their treatment, Gloria alleges that Kosseff convinced the Family Court to order a type of incremental therapy against Jay and Christina's wishes. Id. ¶ 23. "Incremental therapy" seems to refer to "highly supervised visitation" sessions between Mr. Johnson and the two children, presumably under Kosseff's supervision.[6] Id. ¶ 21-22. The original Statement of Claim alleges that Jay even wrote to the Family Court protesting enrollment in therapy with Kosseff. Compl. ¶ 24.

Moreover, it is alleged that Kosseff conspired with Lubiner to use "experimental deprogramming therapies" on Jay and Christina.[7] Second Am. Compl. ¶ 52. Furthermore, Rafanelli allegedly "colluded" with the other two Defendants to stop Jay and Christina's private therapists from "'interfering' with the deprogramming." Compl. ¶ 30. Plaintiffs claim that

[5] Aside from the allegations of collusion and conspiracy between Kosseff and Lubiner, it is unclear from the language found in the Second Amended Complaint what type of therapy each professional provided. However, it seems as though Kosseff's therapy was limited to "highly supervised visitation" sessions between Mr. Johnson and the two children, which could otherwise be described as family counseling. Second Am. Compl. ¶ 14, 21-22. Similarly, it appears as though the therapy provided by Lubiner was limited to private psychotherapy sessions with Gloria, Jay, and Christina. Id. ¶¶ 9, 13, 15.

[6] The Second Amended Complaint alleges that Kosseff initially recommended that Jay should not see Mr. Johnson "until an appointed therapist thought Jay was ready" but subsequently changed that recommendation, advising Judge Shawcross that he "wanted Jay to immediately begin visitation with Mr. Johnson." Second Am. Compl. ¶ 21-22.

[7] Despite alleging that "[i]t was Defendant Lubiner who . . . conspired with Defendant Kosseff" regarding the commencement of these "deprogramming therapies," Plaintiffs also allege that, at various other points during the Family Court proceedings, "Defendant Lubiner refused to communicate with . . . Defendant Kosseff whom [sic] was supervising the visits with Mr. Johnson." Second Am. Compl. ¶¶ 14, 52.

Gloria's attempts, as well as those of Jay's independent therapist, to reach the guardian *ad litem* were unsuccessful. Id. ¶¶ 24-25.

In addition to the issues that have arisen from the court-ordered therapy with Kosseff and Lubiner, Plaintiffs also have taken issue with the fact that Rafanelli, on behalf of Mr. Johnson, engaged in discovery during the Family Court proceedings regarding a theory of Parental Alienation Syndrome.[8] Plaintiffs allege that this "route of '[d]iscovery'" against Gloria interfered with her custody by "muddying the water . . . with junk science."[9] Second Am. Compl. ¶ 12. According to Plaintiffs, this was effectively a persecution of Gloria and her interests rather than an example of Rafanelli advocating for his client, Mr. Johnson. Id.

Based on each of these alleged acts by Kosseff, Lubiner, and Rafanelli during the Family Court proceedings, Plaintiffs claim that the Defendants breached various duties owed to them. As a result, Plaintiffs allege that they have suffered a wide variety of damages, including

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[8] "Parental Alienation Syndrome (PAS) describes a phenomenon where one parent attempts to garner the love and respect of the children and turn them against the other parent." Barbara A. Barrow, *Parental Alienation Syndrome in Divorce*, 60 R.I. B.J. 31, 31 (March/April 2012).

[9] While Plaintiffs assert that Parental Alienation Syndrome is "junk science," a recent article from the Rhode Island Bar Journal points out that:

> The American Psychological Association (APA) is presently considering whether to include Parental Alienation Syndrome in its catalog of mental disorders. The term was introduced in the 1980's by Richard A. Gardner, M.D. who worked to educate courts about PAS and for its acceptance in the scientific community. This work has continued through the efforts of Richard A. Warshak, M.D., author of articles and books on the subject, and others.
>
> At the annual 2011 International Conference of the Association of Family and Conciliation Courts, there was a debate on whether this syndrome should be included in the APA Diagnostic and Statistical Manual (DSM-5). Some courts have found that PAS is sufficiently established to have gained general acceptance in the scientific community and parental alienation is recognized and referred to in recent cases. Rhode Island has not yet addressed the issue.

Id.

emotional pain and suffering, loss of private therapy treatment, coercion into experimental treatment causing job loss, loss of past and future wages, loss of educational opportunity and earning capacity, hospitalization, medical expenses, and violation of civil rights. Second Am. Compl. ¶ 25.

B

Present Case

This case arises primarily out of the conduct of Kosseff, Lubiner, and Rafanelli during the course of the Family Court case. Plaintiffs generally allege malpractice and negligence on the part of all three Defendants, based upon breaches of professional duties arising from the Family Court proceedings. See id. ¶¶ 3, 18. Plaintiffs have filed several complaints at various points during this case: the Statement of Claim, the Amended Statement of Claim, and the Second Amended Complaint.[10]

While Plaintiffs' Second Amended Complaint is the operative complaint before this Court relative to Defendants' motions to dismiss, each of these complaints builds on the previously filed complaint(s). As such, this Court will navigate through a brief analysis of each of these complaints in turn.[11]

[10] In addition to these complaints, Gloria also filed a complaint with the Rhode Island Department of Health and the Board of Psychology against Kosseff in January of 2009. Def. Kosseff's Mem. at 3. After review, the Board of Psychology issued a finding of no unprofessional conduct and dismissed the complaint. Id. These are the only indications in the record that Plaintiffs pursued claims against Kosseff separate and apart from the instant proceedings, as well as the only statement as to any findings with respect to those complaints.

[11] This Court notes at the outset that the complaints that have been filed in this case often reference exhibits, none of which appear to have ever been attached to or filed with the complaints themselves.

1

Complaint

On June 6, 2011, Plaintiffs filed the original complaint entitled "Statement of Claim" ("Complaint"). The Complaint was brought against the three Defendants for "injury due to collusional [sic] and combined medical malpractice and attorney malpractice." Compl. intro., ¶ 9. Gloria filed the Complaint on behalf of herself, individually, and her children, Jay and Christina. At the time, Jay was an adult but had allegedly "signed a Power of Attorney and requested that his mother represent his interests" in the case. Second Am. Compl. ¶ 1. Christina was a minor over whom Gloria allegedly had custody. Id. Neither Jay nor Christina made any individual representations in the Complaint and the only signature on the Complaint was that of Gloria, who signed it "*pro se* & POA for Jay and Chrissy."

In the Complaint, Plaintiffs pled four counts of negligence: Count I ("Negligence Towards Jay – Malpractice"); Count II ("Negligence Towards Chris[tina] – Malpractice"); Count III ("Negligence/Informed Consent not Provided — all Plaintiffs"); and Count IV ("Negligence/Emotional & Legal Harm to Gloria"). Count I alleges negligence on the part of Kosseff and Lubiner by, among other things, violating the duty and standard of care expected of psychologists in their treatment of Jay. Count II alleges negligence and malpractice on the part of all three Defendants in their treatment of Christina. Count III alleges that Kosseff and Lubiner failed to disclose their intent to perform certain therapies on Jay and Christina and also to get the patients' informed consent. Compl. ¶¶ 35-38. Additionally, Count III alleges that Kosseff and Lubiner have "both violated the Plaintiffs [sic] human rights repeatedly." Id. ¶ 41. Finally, Count IV alleges improper treatment of Gloria by Kosseff and Lubiner, including their court-

ordered psychiatric evaluation of her, which was ordered in February 2008, and attacks Rafanelli's participation in the "scheme in court." Id. ¶¶ 42-46.

2

Amended Complaint

Prior to the Defendants filing any responses to the Complaint, Plaintiffs filed an "Amended Statement of Claim" on June 24, 2011 ("Amended Complaint").[12] In their Amended Complaint, Plaintiffs attempted to incorporate the first Statement of Claim to provide "clarity on causes of action and prayers for relief." Am. Compl. at 1. Similar to the Complaint, Plaintiffs alleged a pattern of conduct by the Defendants that caused personal injury and other harms to each plaintiff. Id. Plaintiffs added that they have Post-traumatic Stress Disorder that "psychologically and emotionally disables them" and is a result of having been persecuted for Parental Alienation Syndrome during the Family Court proceedings.[13] Id. at 3.

Plaintiffs also alleged Interference with Parental Rights and Loss of Consortium. Am. Compl. at 4-5. Plaintiffs further alleged claims against the Defendants as third parties under R.I. Gen. Laws § 9-1-51 for failing to protect Jay and Christina from the sexual abuse of their father.[14] Am. Compl. at 5-6. Finally, Plaintiffs claimed that they were deprived of their right to

[12] Unlike the other complaints in this case, the "Amended Statement of Claim" is not divided into numbered paragraphs and, therefore, will be cited by page number in this Decision. See Am. Compl.

[13] Plaintiffs further claimed that their PTSD prevents their claims from being time-barred under the statutes of limitation in R.I. Gen. Laws §§ 9-1-14.1 and 9-1-14.3. Am. Compl. at 2-3. Section 9-1-14.1 allows for legal malpractice claims to be brought within three years of the time the malpractice should have been discovered. R.I. Gen. Laws § 9-1-14.1. Section 9-1-14.3 allows for personal injury claims to be brought by disabled persons within three years "from the removal of the disability." Id. § 9-1-14.3.

[14] Section 9-1-51 is a statute of limitation applicable only to claims against an alleged perpetrator of sexual abuse of a minor; it creates no substantive cause of action such as that alleged by Plaintiffs.

privacy under R.I. Gen. Laws §§ 9-1-28.1(1) and 9-1-28.1(4)(B)(ii)(b), as a result of alleged interference with their medical treatment by Kosseff and Lubiner. Am. Compl. at 7.

On July 1, 2011, Lubiner filed a Motion for a More Definite Statement pursuant to Rhode Island Superior Court Rule of Civil Procedure 12(e). On July 8, 2011, Rafanelli filed a Motion to Dismiss pursuant to Rule 12(b)(6). With his motion, Rafanelli filed an Answer to the Complaint, which included a statement that he "did not, at any time, represent the interests of any plaintiff and at all material times was the legal representative of the Family Court defendant, David Johnson, whose interests were adverse to those of the complaining parties." Answer intro. On July 11, 2011, Kosseff filed an answer to both the Complaint and the Amended Complaint. On August 25, 2011, Plaintiffs filed an objection to Rafanelli's Motion to Dismiss.

3

Second Amended Complaint

Defendant Lubiner's Motion for a More Definite Statement and Defendant Rafanelli's Motion to Dismiss came before this Court for hearing on September 19, 2011. Following that hearing, and given the concerns that Plaintiffs' Amended Complaint lacked definiteness, this Court entered an Order that directed Plaintiffs to file "a new complaint entitled Plaintiffs' Second Amended Complaint," which would become the operative complaint in this case. See Order, entered Sept. 23, 2011. The Defendants were ordered to file answers or motions to respond to this Second Amended Complaint. Id. ¶¶ 3-4.

Pursuant to this Court's Order, Gloria filed a Second Amended Complaint on October 3, 2011 on behalf of herself, individually, and her children, Jay and Christina. The Second Amended Complaint is twenty-two pages long and includes seventy-four numbered paragraphs that are organized into the following sections: Statement of Facts; Argument; Count I: Defendant

Rafanelli; Count II: Defendant Kosseff; Count III: Defendant The Estate of Defendant Lubiner; and Conclusion. In it, Gloria asserts again that she has power of attorney to file the pleading on behalf of Jay and that she also can act on behalf of Christina because Christina is a minor over whom she has custody. Second Am. Compl. ¶¶ 1-2.

In the "Statement of Facts," Plaintiffs essentially recap the Family Court proceedings. Additionally, they assert that Rafanelli "has a candor to uphold to the Opposition" and "an ethical and legal obligation for respect to third parties." Id. ¶ 11. According to Plaintiffs, certain laws apply in this instance, including the Health Insurance Portability and Accountability Act ("HIPAA"), the Americans with Disabilities Act Amendment Act of 2008 ("ADAAA"), and the Violence Against Women Act ("VAWA"). Id. They also assert that Rafanelli "tortuously [sic] interfered" with Christina's right to choose her representation in Court. Id. ¶ 23.

Plaintiffs also claim that Lubiner's treatment of Jay and Christina caused them further harm, exacerbating the symptoms of their PTSD, including stress, loss of appetite, and insomnia. Id. ¶¶ 13-14. Plaintiffs further assert that, in addition to the harm caused to the children, Lubiner's individual treatment of Gloria caused her to be "re-traumatized" in a meeting with Mr. Johnson, resulting in a car accident. Id. ¶ 16-17. Plaintiffs claim that Gloria suffered "exacerbated PTSD, bruised carotid artery, head concussion, and other injuries" from the collision. Id. ¶¶ 15-17. Plaintiffs also assert that Kosseff's actions caused Jay and Christina to be removed from Gloria's care for over a week following the car accident. Id. ¶ 19. At the time, Kosseff had written "a letter to the Court saying that [Gloria] was intoxicated by alcohol when she had her automobile accident." Id.

Plaintiffs claim further that the Defendants "schemed" to use the theory of Parental Alienation Syndrome in Court and even recommended that Jay and Christina undergo treatment

for it in Texas. Id. ¶ 26. According to Plaintiffs, all of the Defendants' actions caused injury, including: mental and emotional pain and suffering, therapeutic loss, loss of educational opportunity and future earnings, medical expenses, and impaired mental functioning. Id. ¶ 25. Further, they claim that the Defendants' actions resulted in Christina's hospitalization following a nervous breakdown, the loss of Gloria's job, and various violations of Plaintiffs' civil and constitutional rights. Id.

In the "Argument," Plaintiffs assert that Gloria was Jay and Christina's legal guardian and that neither Kosseff nor Lubiner obtained her signed consent for treatment. Id. ¶ 29. Accordingly, Kosseff and Lubiner are alleged to have violated the following: R.I. Gen. Laws §§ 5-37, 3-4, 5-44, 8-10-7, and 8-10-8, as well as APA Code §§ 10.02 and 3-04. Id. ¶ 30-33.

Following the "Argument" section, individual counts against the Defendants make up the remainder of the Second Amended Complaint. Count I is brought by Plaintiffs against Rafanelli. It asserts that Rafanelli perpetuated a fraud on the Court and interfered with justice. Id. ¶¶ 41-42. Further, it asserts that he owed them a duty of candor and good faith and discriminated against them. Id. ¶¶ 40, 45-48.

Count II is brought by Plaintiffs against Kosseff. It asserts that Kosseff owed them a duty to provide an ethical and lawful standard of care and that he breached this duty, causing them injury. Id. ¶¶ 49-54. This Count also alleges that Lubiner and Kosseff conspired with each other to begin "experimental deprogramming therapies" and sets forth a timeline for the treatment by Kosseff and its alleged effects. Id. ¶¶ 52-62. Plaintiffs further claim that they did not agree to the treatment and that because Parental Alienation Syndrome is not a diagnosis and was inappropriately used, the insurance billing must have been incorrect. Id. ¶¶ 63-68. Finally,

it is alleged that Kosseff and Lubiner committed fraud upon the Plaintiffs and upon the Court along with the assistance of Rafanelli. Id. ¶ 69.

Count III is brought by Plaintiffs against the Estate of Defendant Lubiner.[15] Plaintiffs claim that Lubiner owed them a duty of care, which she breached as a result of negligence. Id. ¶¶ 72, 74. Plaintiffs allege that, as part of this negligence, Lubiner conspired with the other Defendants "in a scheme to defraud the Court regarding the domestic abuse." Id. Reference is also made in this Count to doctor-patient confidentiality; however, there does not appear to be a specific allegation that such a duty was breached. Id. ¶ 73.

In response to the Second Amended Complaint, Kosseff filed a Motion to Dismiss on October 12, 2011. On October 28, 2011, Rafanelli filed a Motion to Dismiss the Second Amended Complaint along with a Motion to Adjudge the Plaintiff in Contempt, a Motion for an Evidentiary Hearing, and a Motion for Sanctions. Plaintiffs filed a Motion for an Extension of Time to file responses to these motions that was granted by this Court, thereby extending the response period until January 6, 2012. Plaintiffs then filed their objections to Rafanelli and Kosseff's Motions to Dismiss on January 5, 2012, along with a Motion for Substitution seeking to substitute the Estate of Judith Lubiner as a party plaintiff as a result of Lubiner's death. On January 10, 2012, Lubiner's representatives objected to the Motion for Substitution.

All of these motions came before this Court for hearing on January 30, 2012. At the hearing, this Court denied Plaintiffs' Motion for Substitution on the grounds that they had merely attempted to substitute the "Estate of Judith Lubiner" without determining whether an estate had been opened or naming a particular party (such as the administrator or executor of the estate or

[15] This Court notes that although an oral suggestion of Lubiner's death was made on the record after the Court raised the issue of her untimely death, neither her Estate nor any other party has been substituted as a party Defendant.

individual heirs). Hr'g Tr. 3:13-18 Jan. 30, 2012. Indeed, Gloria represented to the Court at the hearing that she had contacted the Probate Court regarding the Lubiner estate and had been told that an estate had not been opened. Id. at 2:16-18, 3:2-3.

This Court further refrained from ruling on the merits of the motions to dismiss filed by Defendants Rafanelli and Kosseff (or any of the other motions filed by Rafanelli). It instead transferred the case to the Unauthorized Practice of Law Committee based on allegations that: (1) Plaintiffs' filings were ghost written; and (2) Gloria was engaging in the unauthorized practice of law by representing her two children. Id. 9:1-11. This Court's own concern about ghost writing and the unauthorized practice of law arose out of Gloria's use of Crystal Morgan, an advocate from Legal Victims Assistance Advocates who was appointed by the Supreme Court to assist Gloria in these proceedings. Id. 11:5-7, 13:15-19. This advocate, by her own admission, is not a licensed attorney. Id. 11:17-20. Yet, she appeared to advocate as an attorney on Gloria's behalf at the hearing, leading this Court to question whether her role in assisting Gloria had moved beyond assisting Gloria with her disability to acting as her counsel in drafting pleadings and making oral arguments. Id. 1:14-15, 9:14-23, 11:9-20.

The Unauthorized Practice of Law Committee ultimately found no evidence of ghost writing, although the extent of its inquiry into that matter is unclear to this Court. See Letter from Richard P. D'Addario, Chairman, Unauthorized Practice of Law Comm., to Gloria Johnson (July 20, 2012) (filed with Court Oct. 25, 2012). The Committee indicated to Gloria, however, that she was unauthorized to represent the interests of her children in this case and that—if she continued to do so—she would be culpable for engaging in the unauthorized practice of law. See id. The Unauthorized Practice of Law Committee plainly stated that "[a] non-lawyer pro se litigant may not represent the interests of his/her children in a civil action." Id.

After the case was transferred back to the Superior Court, this Court held a hearing on October 25, 2012 to address its procedural posture. It indicated to the parties that it would proceed to decision on Defendants' motions to dismiss and render that decision no later than January 15, 2013. Rafanelli sought leave to submit a supplemental memorandum on or before October 26, 2012, which this Court allowed. This Court then gave Plaintiffs the opportunity to file a reply memorandum, which Gloria agreed to do on or before November 2, 2012. The Court advised Christina Johnson that, according to the decision of the Unauthorized Practice of Law Committee, her mother, Gloria, could not represent her in the case. Christina said that she understood, represented that she had filed an Entry of Appearance that day and further stated, in response to an inquiry from defense counsel, that she would turn eighteen in November 2012.[16]

Rafanelli filed a supplemental memorandum on October 25, 2012.[17] Plaintiffs did not file a timely reply memorandum within the timeframe to which they had agreed, as set forth by this Court.[18] On November 13, 2012, however, Gloria filed three motions seeking: (1) substitution of Lubiner's estate, (2) "declaratory judgment of public official roles and bonds," and (3) "declaratory judgment on rules & procedures." The Court scheduled those motions—

[16] The Court file reflects that Christina Johnson filed an Entry of Appearance on October 25, 2012. It further reflects that Plaintiffs took no action to further amend the Second Amended Complaint after the decision of the Unauthorized Practice of Law Committee.

[17] Rafanelli's memorandum is entitled "Defendant Kerry Rafanelli, Esq.'s Joint Memorandum in Support of Motion to Dismiss Plaintiffs' Second Amended Complaint Pursuant to R.C.P. Rule 12(b)(6) and Motion for Sanctions." Despite being filed as a "joint memorandum," there is no evidence that it was filed on behalf of either of the other defendants, as there are no references to the other defendants in it and the memorandum is signed only by Rafanelli's attorneys. See Rafanelli's Joint Mem. at 1, 14.

[18] On December 12, 2012, Gloria filed a document entitled "Objection to Multiple Outstanding Motions to Dismiss and All Such Memorandum in Support of Concomitant to Pending Declaratory Judgments." This objection, however, was filed more than a month after the November 2, 2012 deadline set by this Court and, in fact, was received subsequent to the drafting of this Decision for publication. As such, it will not be considered by this Court; however, the Court notes that, even if it were to consider this untimely filing, it would not change the outcome of this Decision.

which are irrelevant to the motions to dismiss presently pending decision before this Court—for hearing on January 15, 2013.

II

Standard of Review

Motions to dismiss, filed pursuant to Rule 12(b)(6) of the Rhode Island Superior Court Rules of Civil Procedure for failure to state a claim upon which relief can be granted, "test the legal sufficiency of a claim for relief in any pleading." R.I. Super. R. Civ. P., Comm. § 12:9. In other words, "Rule 12(b)(6) does not deal with the likelihood of success on the merits, but rather with the viability of a plaintiff's bare-bones allegations and claims as they are set forth in the complaint." Hyatt v. Village House Convalescent Home, Inc., 880 A.2d 821, 823 (R.I. 2005). Because "the sole function of a motion to dismiss is to test the sufficiency of the complaint," review is confined to the four corners of that pleading. Palazzo v. Alves, 944 A.2d 144, 149 (R.I. 2008) (quoting Rhode Island Affiliate, ACLU, Inc. v. Bernasconi, 557 A.2d 1232, 1232 (R.I. 1989)).

Pleadings are governed by Rule 8 of the Rhode Island Superior Court Rules of Civil Procedure. Under that rule, "[a] pleading which sets forth a claim for relief . . . [must] contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief the pleader seeks." R.I. Super. R. Civ. P. 8(a). However, if the pleader is alleging fraud, "the circumstances constituting fraud . . . [must] be stated with particularity." R.I. Super. R. Civ. P. 9(b).

Thus, in ruling on a Rule 12(b)(6) motion to dismiss, the Court must look to the allegations in the Complaint in a light most favorable to the plaintiff and assume them to be true. Palazzo, 944 A.2d at 149 (citing Ellis v. Rhode Island Public Transit Authority, 586 A.2d 1055,

1057 (R.I. 1991)). In doing so, the Court must "resolve any doubts in a plaintiff's favor." Rhode Island Affiliate, ACLU, Inc., 557 A.2d at 1232. The Court may only grant the Rule 12(b)(6) motion to dismiss "'when it is clear beyond a reasonable doubt that the plaintiff would not be entitled to relief from the defendant under any set of facts that could be proven in support of the plaintiff's claim.'" Palazzo, 944 A.2d at 149-50 (quoting Ellis, 586 A.2d at 1057).

III

Analysis

A

Defendant Rafanelli's Motion to Dismiss

On October 28, 2011, Rafanelli filed a Motion to Dismiss Plaintiffs' Second Amended Complaint, pursuant to Rule 12(b)(6), for failure to state any claims upon which relief could be granted. He also filed a supporting memorandum and later filed a supplemental memorandum on October 26, 2012. In these memoranda, Rafanelli argues that: (1) Plaintiffs are inappropriately attempting to "use the Superior Court as a court of appeal from a Family Court order;" (2) Plaintiffs improperly seek to use alleged violations of the Rules of Professional Conduct as a basis for a malpractice cause of action; (3) Plaintiffs fail to allege any particular duty that Rafanelli owed to them; and (4) the Second Amended Complaint provides no facts to support a claim of fraud, which is referenced throughout that complaint.

First, Rafanelli argues that Plaintiffs' Second Amended Complaint should be dismissed because Plaintiffs are collaterally estopped from litigating issues previously determined in the Family Court proceedings. Specifically, he argues that Plaintiffs now seek to relitigate issues concerning "the appointment of particular mental health professionals for evaluation and treatment of the children, orders that other mental health professionals not provide care for the

children, and orders that Gloria Johnson undergo mental health evaluations." Plaintiffs counter that they are not attempting to appeal the Family Court orders, but instead are simply alleging that the "'treatments' that they received from two of the three Defendants . . . did them harm." Pls.' Opp. at 1.

It is true, as Rafanelli asserts in his memoranda, that "[t]he proper course to appeal any adverse ruling in Family Court is by direct appeal to the Supreme Court." Def. Rafanelli's Mem. at 2. Indeed, R.I. Gen. Laws §14-1-52 states:

> From any final decree, judgment, order, decision, or verdict of the family court, except as provided in subsection (b) of this section, there shall be an appeal to the supreme court, which appeal, in all civil cases except paternity proceedings under chapter 8 of title 15, shall follow the procedure for appeal in civil actions as provided in chapter 24 of title 9.

It is also true that the doctrine of collateral estoppel can bar the relitigation of issues previously decided between certain parties in a prior judicial proceeding. As our Supreme Court has stated:

> Except where application of the doctrine would produce inequitable results, collateral estoppel operates to bar the relitigation of an issue when: (1) the party against whom collateral estoppel is sought is the same or in privity with a party in the previous proceeding; (2) the previous proceeding resulted in a final judgment on the merits; and (3) there is an identity of issues.

Cronan v. Iwon, 972 A.2d 172, 174-75 (R.I. 2009) (citations omitted).

Yet, the text of the Second Amended Complaint seems to support Plaintiffs' contention that the allegations in the complaint against Rafanelli are not barred by collateral estoppel. Count I asserts that Rafanelli perpetuated fraud on the Court and interfered with justice and further asserts that he discriminated against his opposition and owes a duty to them of candor and good faith. Second Am. Compl. ¶¶ 40-42, 45-48. These allegations include "bringing false claims to court" and "interfer[ing] with Chris[tina]'s right to choose who represents her interests." Id. ¶¶ 12, 23. These claims against Rafanelli appear, at least in part, to be separate

and distinct from any issue that was litigated during the underlying Family Court proceedings. As such, collateral estoppel does not warrant dismissal of the Second Amended Complaint against Rafanelli in its entirety under Rule 12(b)(6).

Second, Rafanelli argues that Plaintiffs' alleged violations of the Rules of Professional Conduct cannot serve as a basis for a cause of action. The Second Amended Complaint discusses cases, rules, and general principles of professional responsibility. See Second Am. Compl. ¶¶ 44-48. Specifically, Plaintiffs cite Rules 3.3 and 3.4 of the Rules of Professional Conduct. Id. ¶ 45. Rule 3.3 discusses the duty of candor owed by an attorney to the tribunal, while Rule 3.4 places certain limits on an attorney's conduct based on principles of fairness to opposing parties. Rule 3.4 states:

> A lawyer shall not:
>
> (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
>
> (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
>
> (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;
>
> (d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;
>
> (e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or
>
> (f) request a person other than a client to refrain from voluntarily giving relevant information to another party. . . .

R.I. Sup. Ct. Art. V. R. 3.4. Despite citation to these rules as well as case law from the United States Supreme Court, however, Plaintiffs do not specifically allege how Rafanelli violated these rules.

Regardless, even assuming that Plaintiffs have properly alleged a violation of some ethical rule by Rafanelli, "[t]he clear and unanimous judicial rule, as well as academic authority, is that mere violation[s] of codes of professional responsibility and conduct do not . . . establish a private cause of action for damages sounding in negligence for breach of fiduciary obligation." Vallinoto v. DiSandro, 688 A.2d 830, 837 (R.I. 1997). Thus, it is clear that, even if a violation of the Rules of Professional Conduct occurred in the underlying Family Court proceedings, these violations cannot form the basis of an independent cause of action against Rafanelli. See id.

Third, Rafanelli argues that, on its face, Plaintiffs' Second Amended Complaint fails to state facts that, even if taken as true, would show that Rafanelli owed them any legal duty or committed any act of malpractice. For a plaintiff to prevail on a legal malpractice claim, "a plaintiff must prove by a fair preponderance of the evidence not only a defendant's duty of care, but also a breach thereof and the damages actually or proximately resulting therefrom to the plaintiff." Ahmed v. Pannone, 779 A.2d 630, 632-633 (R.I. 2001) (quoting Macera Brothers of Cranston, Inc. v. Gelfuso & Lachut, Inc., 740 A.2d 1262, 1264 (R.I. 1999) (per curiam)). Here, the Second Amended Complaint does not allege what legal duty Rafanelli owed to the Plaintiffs or how it was breached. In the underlying Family Court proceedings, Rafanelli represented Gloria's husband and Jay and Christina's father, Mr. Johnson. See Def. Rafanelli's Mem. at 6; Second Am. Compl. ¶ 6. He did not at any time represent the Plaintiffs; however, the Second Amended Complaint nonetheless asserts that Rafanelli had "a duty to uphold to both the Court and his Opposition." Second Am. Compl. ¶ 40.

Generally, "there is no duty and liability of an attorney as to an adversary third party with whom the attorney has been engaged, in litigation, etc., on behalf of a client." 4 Stuart M. Speiser et al., The American Law of Torts § 15:107 (1987). "Some courts have squarely held

that an attorney owes a duty to his client only and that in the absence of fraud, collusion, or acts of negligence dangerous to the lives of others, a third party, non-client cannot maintain an action against an attorney for negligence." Id. In Rhode Island, liability to non-clients for legal malpractice has been extended to cases where either "(1) the non-client is a third-party beneficiary of the attorney-client relationship, or (2) where the non-client reasonably relies upon the attorney-client relationship as including any companion claims of the non-client." Debra A. Saunders & Richard S. Humphrey, *The Thickening Briar Patch of Legal Malpractice*, 46 R.I. B.J. 9, 9 (April 1998). In addition, "[f]raud is a well-settled exception to the privity requirement that historically bars non-client recovery for attorney malpractice." Credit Union Cent. Falls v. Groff, 966 A.2d 1262, 1271 (R.I. 2009) (citing Nisenzon v. Sadowski, 689 A.2d 1037, 1046 n.12 (R.I. 1997)).

Thus, the fact that Plaintiffs were not clients of Rafanelli in the underlying Family Court proceedings is fatal to Plaintiffs' claims against him to the extent that those claims are based on an alleged violation of the Rules of Professional Conduct or negligence. This case is not one where the non-client Plaintiffs allege that they are third-party beneficiaries of Rafanelli's attorney-client relationship with Mr. Johnson or that they reasonably relied on that attorney-client relationship as including their claims.

The only remaining question, therefore, is whether Plaintiffs' allegations of fraud against Rafanelli in the Second Amended Complaint are sufficient for their claims against him to survive the historic bar to non-client claims of attorney malpractice. Rafanelli argues that, although Plaintiffs use the word "fraud" throughout the Second Amended Complaint, there are no facts alleged to support a claim for fraud. "To establish a prima facie damages claim in a fraud case, the plaintiff must prove that the defendant "made a false representation intending thereby to

induce plaintiff to rely thereon" and that the plaintiff justifiably relied thereon to his or her damage." Travers v. Spidell, 682 A.2d 471, 472-73 (R.I. 1996) (citing Cliftex Clothing Co. v. DiSanto, 88 R.I. 338, 344, 148 A.2d 273, 275 (1959)). Rule 9(b) requires that, if the pleader is alleging fraud, "the circumstances constituting fraud . . . [must] be stated with particularity" in the pleading. R.I. Super. R. Civ. P. 9(b). "What constitutes sufficient particularity necessarily depends upon the nature of the case and should always be determined in the light of the purpose of the rule to give fair notice to the adverse party and to enable him [or her] to prepare his responsive pleading." Id., Comm. § 9:2.

Here, Plaintiffs' initial Complaint was insufficient with regards to pleading fraud with specificity, thus requiring Lubiner to file a Motion for More Definite Statement. However, this defect has carried over into the Second Amended Complaint. Plaintiffs assert that Rafanelli is not allowed to perpetuate frauds upon the Court or interfere with jurisprudence. Second Am. Compl. ¶¶ 41-42. They also claim that Rafanelli brought false claims to the Court through discovery. Id. ¶ 12. While Plaintiffs thus make allegations of fraud in the Second Amended Complaint, that pleading does not contain a description of the "circumstances constituting fraud . . . with particularity." The pleading, therefore, is insufficient with regard to its claims of fraud.

As Plaintiffs have failed to allege fraud against Rafanelli with specificity, and as any other claims against him are barred by the absence of any attorney-client relationship between Plaintiffs and Rafanelli, they are unable to state a claim for legal malpractice against him. Moreover, even if Rafanelli were ultimately found to have violated the Rules of Professional Conduct in the underlying Family Court proceedings, "mere violation[s] of codes of professional responsibility and conduct do not . . . establish a private cause of action for damages sounding in negligence." Vallinoto, 688 A.2d at 837. For each of these reasons, Plaintiffs have failed to

state any claims against Rafanelli upon which relief could be granted. Accordingly, Defendant Rafanelli's Motion to Dismiss pursuant to Rule 12(b)(6) is granted.

B

Defendant Kosseff's Motion to Dismiss

On October 12, 2011, Defendant Kosseff filed a Motion to Dismiss Plaintiffs' Second Amended Complaint, pursuant to Rule 12(b)(6), for failure to state a claim upon which relief could be granted. In his memorandum in support of that motion, Kosseff argues that: "(1) the plaintiffs have failed to state plausible claims upon which relief may be granted; (2) Dr. Kosseff is immune from suit as a court-appointed psychologist; and (3) regardless, the plaintiffs' allegations . . . are time-barred by the applicable limitations period found in [R.I. Gen. Laws] § 9-1-14(b)." Def. Kosseff's Mem. at 1.

First, Kosseff argues that the Second Amended Complaint fails to state a plausible claim for relief in that its allegations are vague and fail to give him notice of the nature of the cause of action against him. Furthermore, he argues that the statutes and the asserted violations of the American Psychological Association Ethics Code listed by the Plaintiffs cannot form the basis for any viable causes of action against him. Plaintiffs respond that the claim against Kosseff is not vague and that it lies in Kosseff's failure to follow typical procedures, which ultimately led to harm. Further, they assert that Kosseff billed Mr. Johnson's insurance company for the treatment he rendered, but used a fraudulent billing code. Although Plaintiffs do not contest the validity of any evaluations of the family conducted by Kosseff, they do challenge the treatment they received as "questionable practices."

More specifically, Plaintiffs assert that Kosseff was negligent and violated sections 5-37, 3-4, 5-44, 8-10-7, and 8-10-8 of the Rhode Island General Laws.[19] Second Am. Compl. ¶¶ 30, 51. Although certain provisions within §§ 5-37-1 et seq., §§ 3-4-1 et seq., and §§ 5-44-1 et seq. provide for the filing of complaints with a board or reviewing committee, none of the statutes relied on by Plaintiffs create an independent cause of action for violation of their provisions. Plaintiffs also allege that Kosseff violated certain provisions of the Code of Conduct of the American Psychological Association. As this Court previously discussed in finding that Plaintiffs failed to state a claim for violations of the Rules of Professional Conduct applicable to attorneys, violations of medical codes of conduct or professional responsibility do not give rise to a private cause of action. See Vallinoto, 688 A.2d at 837. Additionally, Plaintiffs have failed to allege or establish any legal duty that Kosseff owed to Plaintiffs or how he breached that duty.

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[19] The Plaintiffs are not specific as to their claims under these statutes. R.I. Gen. Laws §§ 5-37-1 et seq. deals with the Board of Medical Licensure and Discipline. Title 3, Chapter 4 of the Rhode Island General Laws deals with the Transportation of Beverages under the regulations concerning alcoholic beverages. R.I. Gen. Laws §§ 5-44-1 et seq. regulates psychologists. R.I. Gen. Laws § 8-10-7 states, in pertinent part:

> Within the family court there shall be a family counseling service, consisting of such personnel as the court shall deem necessary to assist the court in advising and counseling the parties and whose qualifications shall be established by the court. The justices of the family court or a majority of them shall be the appointing authority of the family counseling personnel. The court is specifically authorized to make use of existing private and public family and other service agencies in the functioning of the family counseling service. The family counseling service shall, where desirable, possible, and practicable, make use of the counsel and advice of a member of the clergy of the faith of each or all of the parties and shall, where desirable, possible, and practicable, consult the clergy of the parish or congregation of each of the respective parties.

R.I. Gen. Laws § 8-10-8 states, in pertinent part:

> The department of human services shall provide for the family court the services of such physicians, psychiatrists, experts, and consultants approved by the court as shall be necessary to accomplish the purposes for which the court is established.

Second, Kosseff argues that this Court should extend immunity from suit to court-appointed psychologists such as himself. Plaintiffs counter that they are allowed to maintain a private suit against a public entity (such as the State) pursuant to the ADAAA.[20] Here, Kosseff's actions during the underlying Family Court proceedings were conducted within the scope of his employment as a court-appointed psychologist. Plaintiffs do not dispute that their allegations against him arise from such conduct. They do not even contest the validity of his evaluations.

Although our Supreme Court has not yet addressed this issue, many jurisdictions have extended immunity to court-appointed psychologists acting within the scope of their appointment. See Politi v. Tyler, 751 A.2d 788, 795 (Vt. 2000) (Morse, J., dissenting) (collecting cases which have extended immunity to court-appointed psychologists); Parker v. Dodgion, 971 P.2d 496, 498 (Utah 1998); Lythgoe v. Guinn, 884 P.2d 1085, 1093 (Alaska 1994). Such an extension of immunity is strongly supported by public policy considerations: "[i]n extending absolute judicial immunity to quasi-judicial officers such as court-appointed psychotherapists, most courts have relied in particular on the fear that '[e]xposure to liability could deter their acceptance of court appointments or color their recommendations.'" Lythgoe, 884 P.2d at 1089 (quoting Lavit v. Superior Court, 839 P.2d 1141, 1144 (Ariz. App. 1992)).

In this Court's view, Kosseff's arguments regarding the inability of Plaintiffs to state a proper claim as well as the importance of extending quasi-judicial immunity to court-appointed psychologists call for all of the claims against him to be dismissed. Importantly, allowing the

[20] The provision of the ADAAA cited by Plaintiffs states, in pertinent part, that "[a] State shall not be immune under the eleventh amendment of the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter." 42 U.S.C. § 12202. However, as stated by our Supreme Court, "the ADA's statutory abrogation of state sovereign immunity did not repeal common-law quasi-judicial immunity for . . . officers acting in their official . . . capacity." Richardson v. R.I. Dept. of Educ., 947 A.2d 253, 259 (R.I. 2008).

claims against Kosseff to proceed at this time could "could deter [psychologists'] acceptance of court appointments" and thus interfere with the Family Court's ability to provide families with effective counseling and mental health services. Lythgoe, 884 P.2d at 1089 (quoting Lavit, 839 P.2d at 1144 (internal quotations omitted)). For each of these reasons, this Court finds that Plaintiffs have failed to state any claims for relief against Kosseff upon which relief could be granted. Accordingly, Kosseff's Motion to Dismiss pursuant to Rule 12(b)(6) is granted.[21]

IV

Conclusion

For all of these reasons, the Rule 12(b)(6) motions to dismiss Plaintiffs' Second Amended Complaint filed by both Defendant Kerry Rafanelli and Defendant Peter Kosseff are granted.

[21] While Kosseff also moves to dismiss Plaintiffs' Second Amended Complaint on statute of limitation grounds, this Court does not accept that as a proper basis for dismissal of all of the claims against him. Kosseff argues that Plaintiffs' claims are untimely because they accrued prior to the three-year mark of June 6, 2008 and should not be tolled under the discovery-rule exception pursuant to § 9-1-14.1 because he is not a medical doctor. In response, Plaintiffs argue that the most recent claim they have filed against Kosseff dates to 2010, and because they pled insurance malpractice and fraud in their complaint, they are within the statute of limitation. Plaintiffs also assert that psychological treatment is included within the definition of medical malpractice.

As previously stated, in ruling on a Rule 12(b)(6) motion to dismiss, this Court must look to the allegations in the Complaint in the light most favorable to the plaintiff and assume them to be true. Palazzo, 944 A.2d at 149 (citing Ellis, 586 A.2d at 1057). In doing so, the Court must "resolve any doubts in a plaintiff's favor." Rhode Island Affiliate, ACLU, Inc., 557 A.2d at 1232. Using this standard of review, this Court finds that there are sufficient allegations in the Second Amended Complaint to show that Plaintiffs have alleged claims against Kosseff that span to 2010. When assuming those allegations are true and resolving any doubts in the Plaintiffs' favor, this Court finds that the statute of limitation found in § 9-1-14.1 does not bar the present action against Kosseff in its entirety. This Court need not reach the issue of whether each separate allegation of malpractice against Kosseff is barred by the statute of limitation, as it relies on the doctrine of quasi-judicial immunity in reaching its final decision as to his motion to dismiss in this case.

Counsel for Defendants Rafanelli and Kosseff, as prevailing parties, are each directed to submit to this Court forthwith for entry an Order and Final Judgment that conforms to this Decision. This Court expressly finds that Final Judgment may enter in favor of Defendant Rafanelli and Defendant Kosseff pursuant to Rule 54(b), even assuming that these judgments pertain to fewer than all claims or parties in this action, as there is no just reason for delay.

Plaintiff Gloria Johnson's Administrative Request for Substitution of Deceased Defendant's Estate, Administrative Motion for Hearing and Declaratory Judgment of Public Official Roles and Bonds, and Administrative Motion for Hearing and Declaratory Judgment on Rules & Procedures, as well as Defendant Lubiner's Objections thereto, are continued for hearing to the next regularly scheduled Motion Calendar in Washington County Superior Court on January 22, 2013 at 9:30 a.m. The previously assigned hearing date of January 15, 2013 for these motions is vacated.