STATE OF VERMONT
WINDSOR COUNTY, SS.

TERRY BRAGG, Plaintiff	:	WINDSOR SUPERIOR COURT
	:	DOCKET NO. S105-96 Wrc
v.	:	
DALENE WASHBURN and VERMONT CHILDREN'S AID SOCIETY, Defendants	:	

DECISION RE: DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

This case concerns the claims of Plaintiff, Terry Bragg, against two Defendants: Dalene Washburn, a licensed social worker employed by the Vermont Children's Aid Society, and the Vermont Children's Aid Society (VCAS) itself. The claims arise out of allegations of Ms. Washburn's performance of a court-ordered forensic evaluation for the Family Court. Plaintiff's complaint alleges three causes of action against each Defendant, based on (1) defamation by libel, (2) intentional infliction of emotional distress, and (3) negligence. Defendants have moved for summary judgment.

SUMMARY JUDGMENT

Summary judgment is appropriate if there is no genuine issue as to any material fact and any party is entitled to a judgment as a matter of law. V.R.C.P. 56(c)(3). The moving party has the burden of proof, and the opposing party is given the benefit of all

reasonable doubts and inferences in determining whether or not a genuine issue of material fact exists. Price v. Leland, 149 Vt. 518, 521 (1988).

FACTS

Based on the parties' submissions pursuant to V.R.C.P. 56(c)(2), and preserving the numbering used by the parties, the Court will discuss both the undisputed facts and the disputed facts of this case:

1. On November 13, 1995, the Windsor County Family Court ordered Defendant VCAS to perform a forensic evaluation of the Bragg Family, including Terry (father), Karen (mother) and Tonya (daughter, then age 6) Bragg, to determine appropriate custodial arrangements for Tonya in light of Karen and Terry's pending divorce. See Bragg v. Bragg, No. F56-2-95 WrDm (Windsor Fam. Ct.). Plaintiff asserts that there are disputed questions of fact concerning the extent to which Defendants had presented themselves as experts qualified to perform the forensic evaluation. Plaintiff further asserts that he requires additional discovery in order to fully assess the issues remaining in dispute.

2. As a result of the Court's Order, Ms. Washburn, a licensed independent clinical social worker and the District Supervisor of VCAS, performed an evaluation of the family. The evaluation included interviews of family members and acquaintances, and a review of medical, educational, and police records. Plaintiff asserts that there are material facts in dispute with respect to

the scope of Ms. Washburn's evaluation. In particular, Plaintiff questions the methodology employed, what persons were interviewed and under what circumstances, what records were made of interviews, the completeness of the investigation as reflected in her report, and the process by which portions of her investigation were omitted, reflecting a bias found by the Family Court. Plaintiff further asserts that he requires additional discovery in order to fully assess the issues remaining in dispute.

3. On January 11, 1996, based on her discoveries in the course of her evaluation, Ms. Washburn filed a Report of Suspected Child Abuse or Neglect with SRS, in which she reported Terry Bragg as the person responsible for possible abuse or neglect of Tonya Bragg. Ms. Washburn's understanding was that she was required to file the report under 33 V.S.A. § 4913(a). Plaintiff asserts that there are genuine issues of material fact as to what Ms. Washburn's discoveries were, the process by which she made her discoveries, and the standards she employed in reaching her conclusions. Plaintiff further requests additional discovery in order to fully assess the issues remaining in dispute.

4. On January 17, 1996, Ms. Washburn filed the report of her forensic evaluation with the Family Court.

5. On January 18, 1996, Ms. Washburn testified in Family Court and described various bases for her opinions. Plaintiff asserts that there are genuine issues of material fact with respect to the actual bases for Ms. Washburn's opinions, and with respect to any omissions and selectivity of the information Ms. Washburn

included in her report. Plaintiff further asserts that he requires additional discovery in order to fully assess the issues in dispute.

6. On January 31, 1996, Tonya Bragg and her mother met with Ms. Washburn, at Tonya's request. Tonya made new statements and that led Ms. Washburn to file a second Report of Suspected Abuse or Neglect with SRS that same day. Plaintiff asserts that there are genuine issues of material fact as to why Tonya Bragg came to see Ms. Washburn on January 31, 1996, as to what new evidence Tonya disclosed and under what circumstances, and what standards of inquiry were employed by Ms. Washburn. Plaintiff further asserts that he requires additional discovery in order to fully assess the issues remaining in dispute.

7. Later on January 31, 1996, Ms. Washburn received notice that the Family Court had ruled that it would not terminate visitation between Terry and Tonya Bragg. In the Findings and Order of the Family Court issued January 31, 1996, the Court stated that it gave Ms. Washburn's opinions little value because of mistakes, serious omissions and selectivity. Bragg v. Bragg, F56-2-95-WrDm, Findings and Order, January 31, 1996, at 4 (Windsor Fam. Ct.).

8. On February 6, 1996, based on a Motion for Reconsideration of Findings and Order and Motion to Reopen Evidence, and a Motion to Suspend Parent Child Contact filed by Karen Bragg, all based on the new information on which the second abuse or neglect report was filed with SRS, the Court suspended Terry Bragg's visitation rights

with Tonya Bragg. Plaintiff asserts that there are genuine issues of material fact as to the bases on which the Court's order was granted. Plaintiff further asserts that he requires additional discovery in order to fully assess these issues remaining in dispute.

9. On April 15, 1996, Ms. Washburn received a letter from the Department of Social and Rehabilitation Services stating that it had determined that the second Report of Suspected Abuse or Neglect was supported. Plaintiff asserts that there are genuine issues of material fact as to the basis on which SRS made its determination. Plaintiff states that SRS determined as of June 3, 1996, upon further review, that the report of abuse was unsubstantiated. Plaintiff asserts that Defendants' omission of this additional fact provides an example of Ms. Washburn's selectivity in making reports, as well as an example of her failure to use professional standards in conducting her investigation. Plaintiff again asserts that he requires additional discovery in order to fully assess the issues remaining in dispute.

DISCUSSION

Claims

Plaintiff, Terry Bragg, alleges three causes of action against each Defendant: (1) defamation by libel, (2) intentional infliction of emotional distress, and (3) negligence. The claims arise out of Ms. Washburn's work in performing her professional evaluation and testifying. Plaintiff claims that he was harmed as

a result. Plaintiff asserts that Ms. Washburn's breach of her professional duties led to false reports and to inaccurate testimony, and further, that these inaccuracies caused him to suffer emotional distress and to lose visitation and contact with his daughter for six months. For the most part, Plaintiff proceeds against VCAS on a theory of respondeat superior. In addition, he alleges that VCAS was negligent in its supervision of Ms. Washburn.

Defendants assert three privileges in support of their motion for summary judgment. In their written motion they asserted the privilege for reporting suspected abuse and neglect to SRS under 33 V.S.A. § 4913(c); and they also asserted a common law privilege for a witness to publish defamatory matter as part of a judicial proceeding in which that witness was testifying, as that privilege was described in the Restatement (Second) of Torts § 588. They argue that the policy behind this testimonial privilege supports their claim to immunity from any civil liability arising out of their work on a court-appointed evaluation.

In their oral argument, Defendants asserted a third basis: judicial immunity based on the proposition that in conducting a court-appointed forensic evaluation, Defendants were performing a quasi-judicial function. Defendants contend that they are protected by these privileges and immunities because Plaintiff's only allegations of wrongful conduct concern either: (a) Ms. Washburn's reports of suspected abuse to SRS; or (b) her court-appointed forensic report and related testimony in the Bragg divorce case.

Discovery

Plaintiff argues that he requires additional discovery in order to fully assess the issues remaining in dispute. To some extent, a litigant has a right to develop a case through discovery. See, e.g., Gendreau v. Gorczyk, 161 Vt. 595, 597 (1993) (context of claim under public records act). However, the rules require "that a litigant have a good faith, and reasonably supported, belief that his or her claim has merit. . . . [T]he purpose of discovery is not to fish through every potential theory of recovery to determine if there is any factual support for the theory." Chrysler Corp. v. Makovec, 157 Vt. 84, 90 (1991) (emphasis in original) (citations omitted). In other words, a plaintiff should be able to plead a prima facie case in good faith in order to be entitled to pursue discovery at all.

In the instant case, Plaintiff has had adequate time to make a prima facie showing of the elements essential to his claims. Poplaski v. Lamphere, 152 Vt. 251, 254-55 (1989) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)). The Court will not permit discovery on claims where no prima facie showing of the elements has been made.

Summary judgment is appropriate if either party is entitled to judgment as a matter of law, but in some cases, a ruling on a summary judgment motion would be premature if further discovery is necessary to develop the facts necessary to a such a ruling. See State v. Heritage Realty of Vermont, 137 Vt. 425, 430 (1979). In other cases, an issue may be ripe for ruling even before the

completion of discovery if further discovery would not change the analysis of the legal issues. See Bushey v. Allstate Ins. Co., 164 Vt. 399, 405 (1995). Some of the claims in this case fall into the latter category, since Defendants are seeking judgment as a matter of law on the basis of privileges and immunities that defeat the claims altogether if they apply, even if there is evidence to support the elements of the claims.

Privileges and Immunities

The first privilege or immunity asserted by Defendants is prescribed by statute as follows:

> (c) Any person enumerated in subsections (a) or (b) of this section, other than a person suspected of child abuse, who in good faith makes a report to the department of social and rehabilitation services shall be immune from any civil or criminal liability which might otherwise be incurred or imposed as a result of making a report.

33 V.S.A. § 4913(c). Plaintiff does not dispute that Ms. Washburn is an enumerated person. Under the terms of the statute, if she filed her reports to SRS "in good faith," then she and VCAS are immune from any civil liability that might otherwise be incurred as a result.

The second privilege asserted by Defendants is a common law privilege for a witness to publish defamatory matter as part of judicial proceedings in which the witness is testifying. The Vermont Supreme Court provided the following description of this privilege in 1838:

> [I]t does seem to be an admitted principle of the law of libel and slander, that no action lies for any

> thing said, or written, or published, in the ordinary course of judicial proceedings, and which comes within the ordinary scope of the forms and process therein, however groundless or malicious the suit may be, even if the process of the court is sought, as the mere cloak of malice and slander.

Torrey v. Field, 10 Vt. 353, 414 (1838) (citations omitted). The Restatement (Second) of Torts describes the privilege as follows:

> A witness is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding or as part of a judicial proceeding in which he [or she] is testifying, if it has some relation to the proceeding.

Restatement (Second) of Torts, § 588 (Witnesses in Judicial Proceedings). The purpose of this policy is to encourage witnesses to express the truth freely, without fear of liability claims based on the content of their testimony. The essential question is whether or not the statements were made in connection with the judicial proceedings. See LaPlaca v. Lowery, 134 Vt. 56, 58 (1975).

The immunity may also apply to a related tort such as "injurious falsehood." General Elec. Co. v. Sargent & Lundy, 916 F.2d 1119, 1126 (6th Cir. 1990), aff'd 954 F.2d 724 (6th Cir. 1992). In this case, Defendants ask the Court to apply the principle more broadly by extending it to provide immunity for the act of conducting a court-ordered evaluation. Thus Defendants seek to have the immunity encompass conduct beyond that of making oral or written statements while testifying in a court proceeding.

The third privilege, or immunity, asserted by Defendants is that of judicial immunity. "A judicial officer, acting within [the officer's] jurisdiction and in a judicial capacity, is not liable in a private action for his [or her] judicial acts." Banister v.

Wakeman, 64 Vt. 203, 207 (1891). The policy underlying judicial immunity is well-described in the following passage from Justice Powers' often-quoted dissent in Vaughn v. Congdon, 56 Vt. 111, 128 (1883) (Powers, J., dissenting) (emphasis in original):

> Immunity from liability in favor of judges rests upon the broad ground of public policy, which declares that a judge, for acts done by him in his judicial capacity, is absolutely privileged from action. It is an official privilege, which, though it covers a multitude of sins, is still absolutely essential to the due administration of justice. It is a privilege not primarily designed for the protection of the judge, but for the protection of the public, by making the judges free, independent, and fearless in the discharge of their duties. No judge could act independently if conscious that he was exposed to an action by every disappointed suitor in his court.

Judicial immunity from civil liability is properly limited to the performance of acts that are judicial in nature, which involve "an inquiry of fact and the exercise of judgment and discretion upon the case presented." Nadeau v. Marchessault, 112 Vt. 309, 311 (1942). Defendants have submitted one case from another jurisdiction that extends judicial immunity to cover acts of a court-appointed expert. See Seibel v. Kemble, 631 P.2d 173 (Hawaii 1981) (immunity from civil liability that otherwise might result from negligent examination and diagnosis by court-appointed psychiatrist).

Judicial immunity as a label is sometimes applied broadly to include immunity from liability for defamation by others who are not judges who have occasion to make statements while acting in an official capacity in relation to the administration of justice. The Vermont Supreme Court described the general applicability of

this immunity and the reasons for it in Torrey v. Field, 10 Vt. at 414-15:

> This privilege, or immunity, for words spoken, extends equally to parliamentary proceedings, proceedings in the state legislatures, and in congress; to parties, witnesses, jurors, judges and counsel, in courts of justice; in short, to any one, who, in the course of the discharge of public duty, or in pursuit of private rights, is compelled to participate in the administration of justice, or in legislation. The rule is made thus broad, in relation to public functionaries, that they may feel under no constraint, or embarrassment, inconsistent with the faithful and fearless discharge of their difficult and important duties. Perhaps the reason and the necessity of the rule, in relation to public officers, is sufficiently obvious; i.e. to secure independence and impartiality.

The policy has been applied more recently to statements of a State's Attorney. See Polidor v. Mahady, 130 Vt. 173, 175 (1972) (immunity for acts of a prosecutor).

Although this use of the term "judicial immunity" covers a broad range of public officials, the immunity protects words spoken or written. In this case, Defendants ask this Court to apply the privilege beyond the spoken or written word to provide immunity for negligence in the conduct of an investigation. Defendants also seek to have a court-appointed expert included in the group of persons protected by this immunity.

Following is an analysis of the applicability of the pertinent legal principles set forth above to Plaintiff's claims and the state of the evidence.

Count I: Defamation

Count I of Plaintiff's Complaint sets forth a claim based on defamation by libel. The undisputed facts show that all of the

alleged statements or publications were made either as part of Ms. Washburn's reports to SRS, or in connection with her role as a witness in judicial proceedings.

Plaintiff argues that the circumstances suggest that Ms. Washburn's reports to SRS were made in bad faith, so that the immunity for mandated reporters does not apply. However, the alleged inaccuracy of Ms. Washburn's report does not suffice to support Plaintiff's assertion of a claim based on bad faith. For example, Plaintiff has not presented evidence to show that Ms. Washburn deliberately ignored countervailing evidence, or that she ever urged another party not to disclose countervailing evidence to SRS, or that she handled the information in any way other than as she was required to do as a mandated reporter. Cf. Wilkinson v. Balsam, 885 F.Supp. 651, 658 (D.Vt. 1995) (given evidence of bad faith, defendant was not entitled to the protection of § 4913(c)).

Without some stronger showing of bad faith, Plaintiff is not entitled to discovery to go on a "fishing expedition" to look for bad faith. Defendants are, therefore, immune from any civil liability that might otherwise result from Ms. Washburn's reports to SRS. Plaintiff has not pleaded a prima facie case of bad faith reporting of abuse, and therefore, the statutory immunity applies. As such, VCAS cannot be held liable on a theory of respondeat superior.

Without a prima facie case of bad faith reporting of abuse, all of the statements (testimony) and publications (evaluation report) made by Ms. Washburn arising out of the Court-ordered

evaluation were made in connection with judicial proceedings. Therefore, Ms. Washburn is immune from civil liability for libel or slander that might otherwise result from the statements or publications. Given Ms. Washburn's immunity from civil liability based on defamation, VCAS cannot be held liable on a theory of respondeat superior. Both Defendants are entitled to judgment as a matter of law with respect to Count I of the Complaint.

Count II: Intentional Infliction of Emotional Distress

Count II of Plaintiff's Complaint sets forth a claim based on intentional infliction of emotional distress. To establish this claim, Plaintiff must show "'outrageous conduct, done intentionally or with reckless disregard of the probability of causing emotional distress, resulting in the suffering of extreme emotional distress, actually or proximately caused by the outrageous conduct.'" Baldwin v. Upper Valley Services, Inc., 162 Vt. 51, 55 (1994) (citations omitted). "The standard for establishing outrageous conduct is a high one: the conduct must be so outrageous in character and so extreme in degree as to go beyond all possible bounds of decent and tolerable conduct in a civilized community." Farnum v. Brattleboro Retreat, Inc., 164 Vt. 488, 497 (1995) (citation omitted).

To a great extent, Count II derives from Count I. Cf. Murray v. St. Michael's College, 164 Vt. 205, 212 (1995) (claim of intentional infliction of emotional distress derivative of plaintiff's discrimination claim). The alleged "outrageous

conduct" essentially consists of Ms. Washburn's publication of her report to the Family Court and her reports of suspected abuse to SRS. The alleged "severe emotional distress" results from the defamatory nature of the reports. However, this Court has concluded above, that Defendants are immune from any civil liability resulting from Ms. Washburn's reports to SRS, and also that Defendants are immune from civil liability based on defamation as a result of publications in connection with judicial proceedings.

Plaintiff alleges malice on the part of Ms. Washburn. If there were a factual basis for a claim of malice, Defendants would not have immunity for reporting abuse to SRS, and Plaintiff would then be entitled to additional discovery. Cf. Wilkinson v. Balsam, 885 F.Supp. 651, 660 (D.Vt. 1995) (claim of intentional infliction of emotional distress survived summary judgment where psychologist continued to validate claims of abuse in face of evident maternal coaching and third-party complaint that mother had abused children). Plaintiff provides no evidence of circumstances that would support this allegation other than the fact that the second abuse report to SRS was found to be unsubstantiated upon review. As stated above, the fact that a report is not substantiated during follow-up processes does not, by itself, suffice to show any lack of good faith in the initial reporting. Similarly, it does not, in and of itself, show malice. Plaintiff has not alleged any additional factual basis for malice or outrageous conduct.

This Court concludes that Plaintiff has failed to present

prima facie evidence of "outrageous conduct" sufficient to support his claim for intentional infliction of emotional distress. He is therefore, not entitled to discovery to seek a basis for such a claim. Defendants are entitled to judgment as a matter of law with respect to Count II.

Count III: Negligence

Count III alleges more than defamatory publication. It sets forth a claim that Ms. Washburn was negligent in performing her professional duties. This claim against Ms. Washburn bears some resemblance to a claim of attorney malpractice, which focuses on a breach of professional duty in the conduct of a case. Plaintiff also sets forth a claim that VCAS was negligent in its supervision of Ms. Washburn.

Here, Defendants' Motion for Summary Judgment does not focus on challenging whether Plaintiff can prove the elements of negligence, and for the purposes of addressing this motion the Court assumes that Plaintiff has pleaded facts sufficient for a prima facie case.[1]

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[1]The elements of common law negligence are: 1) the existence of a duty; 2) breach of that duty; 3) causation; and 4) the existence of actual damages. See Langle v. Kurkul, 146 Vt. 513, 517 (1986). There are sufficient facts in the statement of undisputed facts to support a prima facie case. The Court assumes that any professional conducting an evaluation has a duty to meet the standard of care of professionals performing such a task. Plaintiff has alleged that Defendant Washburn failed to interview the mother's live-in boyfriend in doing a forensic family evaluation, and because of the importance to the Court of a child's relationship with significant other household members, 15 V.S.A. § 665(b)(7), the Court accepts this is a prima facie case of failure to meet the professional standards of care. Also supporting this element is the fact that the Court was openly critical of Ms. Washburn's report on the basis of its selectivity, mistakes, and serious omissions. Causation is satisfied by the factual allegation that Ms. Washburn's second reporting of abuse led to a Court Order in which Plaintiff's contact with his child was suspended. Injury is shown.

Instead, Defendants argue that common law immunities bar all tort claims that might otherwise arise from Ms. Washburn's performance of her duties. Defendants cite a Massachusetts case for the proposition that "[a] privilege which protected an individual from liability for defamation would be of little value if the individual were subject to liability under a different theory of tort." Correllas v. Viveiros, 572 N.E.2d 7, 13 (Mass. 1991) (affirming summary judgment for defendant against claim for intentional infliction of emotional distress based on statements to police accusing plaintiff of criminal acts).

The Family Court appointed Ms. Washburn and VCAS to perform a forensic evaluation of the Bragg family in connection with the pending divorce action under the authority of V.R.F.P. 5, which specifically authorizes the Court to order evaluations by independent persons with professional or practical experience.[2] It is reasonable to assume, therefore, that the appointment was made because of an expectation that Ms. Washburn's expertise was suitable to the task, and that she would perform her duties competently and professionally.

At oral argument, Defendants' attorney claimed that both Defendants should be cloaked with the same type of immunity conferred upon judicial officers because of the fact that VCAS was

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by the allegation that Plaintiff lost his relationship with his daughter for six months.

[2]By rule, both parties have the opportunity to submit names so the Court has the opportunity to review the qualifications prior to the appointment. V.R.F.P. 5(a). Qualifications are pertinent. See id. Reporter's Notes.

appointed by the Court. It is important to remember, however, that Ms. Washburn and VCAS were to serve the role of an expert witness, and not to act as a judicial decision maker.

The Reporter's Notes to V.R.F.P. 5 signify that the status of the evaluator is as a witness, and not a Master or Acting Judge.[3] Her duties were not "of a judicial nature" because the Court was free to accept or reject the information she provided and rely instead on other evidence, including other experts.[4] This is different from the appointment of a Special Master pursuant to V.R.C.P. 53 to perform the judicial function of fact-finding. In that situation, the judge has delegated the authority to hear evidence and make findings of fact. In that case, the standard of review requires the court to accept the findings unless they are clearly erroneous. See Hansen v. Town of Charleston, 157 Vt. 329, 334 (1991); V.R.C.P. 53(e)(2)(ii).

By contrast, when an expert witness is appointed, the court does not give that expert's findings or opinions any greater or less weight than it would give to another expert on the same subject called by a party. The appointment is simply to assure the court that at least one witness with knowledge and experience in the field will be providing testimony. It is similar to the

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[3]"The person who performs the home study will be subject to discovery procedures and must be available for cross-examination. See V.R.E. 706. . . ." V.R.F.P. 5 Reporter's Notes. The reference is to the Rule of Evidence on Court Appointed Experts. The Reporter's Notes also cross reference V.R.E. 702, which is the rule on Expert Testimony.

[4]"**Parties' experts of own selection.** Nothing in this rule limits the parties in calling expert witnesses of their own selection." V.R.E. 706(d). This provision is referenced in the Reporter's Notes to V.R.F.P. 5.

appointment of a psychiatrist to perform an evaluation for a competency hearing in connection with a criminal case. There, the court appoints an expert, but both sides may call their own experts and the court makes its determination after listening to all the evidence. 13 V.S.A. § 4816(e).

In the Bragg divorce, each party was free to offer expert testimony from other witnesses to assist the Court in its fact finding. V.R.E. 702. There was nothing about the conclusions of Ms. Washburn that elevated her opinions above those of any other expert, or for that matter, any other witness, and indeed the Court specifically rejected her opinions as not being of value in assisting the trier of fact.[5] While an expert witness may have expertise, she or he is not delegated judicial authority.[6] Thus, Ms. Washburn, as an ordinary expert witness, with respect to the conduct of her evaluation, is not entitled to judicial immunity for judges, nor to immunity that protects public officials acting in the administration of justice.

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[5]Bragg v. Bragg, F56-3-95-WrDm, Findings and Order, January 31, 1996, at 4 (Windsor Fam. Ct.).

[6]The Barre Family Court Project was a focused effort to develop court programs and processes for effective nonadversarial resolution of family cases. See Barre Family Court Project Final Report, Sept. 9, 1997 (Wash. Cty. Fam. Ct.) A variety of options were developed to make use of professionals in different capacities, including evaluations and home studies. None of these involved delegation of judicial authority. Some were for evidentiary purposes (Evaluations, Home Studies, appointment of attorneys for children, advancement of attorney's fees), and some were for educational purposes (Children's Panel, Conciliation/Evaluation, and Neutral Evaluation). In the only option that involved delegation of judicial authority, Visitation Masters, only licensed attorneys are qualified, and the delegation authority is by a specific Order of Reference authorized by a specific Administrative Order establishing rules for the Barre Project. See A.O. 36; Final Report, at Sec. III, pp. 15-20. No such Order of Reference was made for Ms. Washburn, who was appointed to develop evidence for the case pursuant to V.R.F.P. 5, and not as a Master.

The remaining issue is whether Defendant Washburn, while not cloaked with judicial immunity, should be immune from negligence in the conduct of a forensic evaluation based on her status as a court-appointed expert. Plaintiff alleges that Ms. Washburn performed her duties in a negligent manner, and that her negligence resulted in harm to his relationship with his child. He stresses the foreseeability of harm to the parties as a result of negligent performance by a court-appointed expert.

This claim differs from a claim of professional malpractice against an expert witness hired by a party, because there was no direct contractual relationship between Defendants in this case and the parties to the divorce case. Plaintiff has no claim based on breach of contract. Plaintiff's claim of negligence also differs from a claim of defamation, because he alleges that her misconduct extends beyond her written or spoken testimony in the judicial proceedings to the manner in which she conducted her investigation and selected facts for inclusion in her report. Because of these differences, it is difficult to find any case law on point. This Court is not aware of any case directly holding that a court-appointed expert is immune from civil liability for negligence in the performance of his or her duties on the basis of witness immunity for testimony or statements made in preparation for judicial proceedings.

Nevertheless, the policies underlying the doctrine of witness immunity for libel or defamation apply with full force to the circumstances of this case. The overriding concern is to assure

the independence and truthfulness of the witness in order to encourage complete and accurate testimony in court for use in judicial fact finding and decisionmaking. The knowledge that a court-appointed expert could be sued by a dissatisfied litigant might well color the expert's testimony, and therefore, even influence the manner in which a judge responds to the expert's testimony. Moreover, the risk of encountering harassing litigation would probably produce a "chilling effect," discouraging experts from accepting a court appointment and depriving the court of the desired expertise. This effect would be contrary to the goal of making effective use of professionals in Family Court

Without immunity, social workers may be unwilling to conduct evaluations or home studies out of a fear of alienating a party and subjecting themselves to personal civil liability. Professionals who are willing to work for the court to enhance the effectiveness of the judicial process should not have to subject themselves to this risk. Without such immunity, the likelihood that professionals will agree to court appointed work in divorce cases is extremely low.

It is especially important to consider the context of Family Court in Vermont and the reality of the risk to which professionals would expose themselves, if they did not have immunity for court-appointed evaluations. In Vermont, there are no attorneys in 60 percent of all divorces, and in another 20 percent of cases, there is only one attorney. See Report of the Vermont Bar Assoc. Family Court Review Comm., at 23 (Sept. 18, 1997). Pro se parties often

do a poor job of presenting relevant and complete evidence. Parents, whether pro se or represented, are generally focused on their own roles and interests, and no one is typically presenting evidence from the perspective of the best interests of the children.[7]

Judges are called upon to make important and difficult custody and visitation decisions which have significant and permanent impact on the development of children.

To do a good job for children in such an environment, it is useful for a judge to be able to appoint a professional to conduct an investigation, and V.R.F.P. 5 specifically authorizes such a procedure. Disappointed litigants are highly likely to focus their displeasure on the expert who seems to them to be responsible for the outcome of their case, and bring the type of lawsuit Plaintiff has filed in this case, whether or not it has a valid basis.

Because of such a risk, professionals will not want to accept court appointments. While it is true that professionals hired by a party are accountable to their clients to meet professional standards of care, and may be sued by their clients for negligence, the chances that a party hiring an expert will submit to court an adverse professional opinion are slim, whereas the chances that a court-appointed expert will disappoint a parent/party are probably fifty percent.

Despite the important policy of encouraging professionals to

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[7]Guardians ad litem are volunteers, not professionals, and do not have authority to present evidence. V.R.F.P. 7(d).

perform evaluations for the court, one might reasonably question why a professional who fails to meet professional standards in conducting a court-ordered evaluation should be exempt from accountability to those harmed. The answer is two fold. First, the professional who performs a negligent evaluation can be cross examined in court, and the work rejected. That is what happened in this case. Such a witness may not be appointed by the court again. These factors should operate as a deterrence to negligent performance of evaluations. Second, as in the case of witness immunity for statements, it is reasonable as a matter of policy to accept the risk that an occasional negligent evaluation will be presented to the Court as a trade-off for the larger benefit of encouraging more professionals to be willing to use their expertise to develop pertinent evidence so that judges will be able to make sound decisions in the interests of children.[8]

In Seibel v. Kemble, 631 P.2d 173 (Hawaii 1981), the Supreme Court of Hawaii granted absolute judicial immunity to a court-appointed psychiatrist, reasoning that the doctor was an integral part of the judicial process, and that he was acting in a quasi-judicial capacity. This Court does not accept the theory that the expert in the instant case acted in a judicial capacity. Ms.

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[8]The Barre Project model of home studies uses a protocol whereby the evaluator develops factual evidence but does not express an opinion about parental rights and responsibilities. This was done in part to emphasize the role of the evaluator as a person using professional expertise to develop a solid body of evidence for use by the judge, and to dispel any notion that the social worker is a person upon whom the court will rely without exercising independent judgment. One reason was the social workers' unwillingness to involve themselves with parents dissatisfied with their opinions. See Final Report, [illegible] Section III, pg. 23.

Washburn's duties were not judicial in nature because she had no decision-making authority. To some extent the Court relied upon her ability to investigate the circumstances of the case, and to provide the Court with pertinent information. However, the Court was free to accept or reject her opinions, in the same way that the Court is free to accept or reject the testimony of any witness. Therefore, Plaintiff's claims are not barred by "judicial immunity."

Nonetheless, this Court agrees with the Hawaii Court that "[t]he reasons underlying judicial immunity, especially the freedom and independence to act without apprehension of possible adverse consequences, apply equally to court-appointed officials." Id. at 178. This is sound policy even if it results in an occasional evaluation that is conducted in a negligent manner. It is a reasonable extension of classical witness immunity to the current circumstances of Family Court. Quality judicial decisionmaking would be hampered without the ability to appoint professionals to do evaluations and home studies under V.R.F.P. 5; yet these professionals will not be available without immunity, and such immunity should apply not just for spoken or written words, but for the performance of evaluations. Such professionals would, of course, not be immune for reports done in bad faith, or for intentional infliction of emotional distress based on outrageous conduct. These remedies remain available to plaintiffs in the circumstances to which they apply.

Therefore, this Court concludes that the doctrine of witness

immunity, as articulated by the Vermont Supreme Court in Torrey v. Field, 10 Vt. 353 (1838), and by the American Law Institute in the Restatement (Second) of Torts § 588, should be extended to encompass conduct of court-ordered evaluations to bar Plaintiff's negligence claims in this case. The policies discussed apply equally to both of the negligence claims, including the one against Ms. Washburn and the one against her employer VCAS. Both Defendants are entitled to judgment as a matter of law as to Count III.

ORDER

For the foregoing reasons, Defendants' Motion for Summary Judgment is GRANTED as to all counts.

Dated this 27th day of February, 1998.

Mary Miles Teachout
Hon. Mary Miles Teachout,
Presiding Superior Court Judge

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GAIL P. BRADY
WINDSOR COUNTY CLERK