

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDWARD SCHAFFREN, in his capacity : CIVIL ACTION  
as Executor of the Estate of MARY :  
BUCK, et al. :  
 :  
v. :  
 :  
PHILADELPHIA CORPORATION FOR :  
AGING, et al. : No. 92-5858

O'Neill, J. November , 1997

MEMORANDUM

*I. The Parties*

Plaintiff Mary Buck was incapable of taking care of herself from 1986, when she suffered a stroke, until the time of her death earlier this year at the age of eighty-four. On September 6, 1991 Buck was involuntarily committed to a nursing home by defendant Pennsylvania Corporation for the Aging ("PCA"). Until 1991 she lived with her son and primary caretaker, Edward Schaffren, who is an individual plaintiff and a plaintiff in his capacity as executor of Buck's estate.

The Pennsylvania Department of the Aging is the state agency responsible for administration of programs for the older adults, including the expenditure of funds granted pursuant to the Older Americans Act, 42 U.S.C. § 3001 et seq. ("OAA") and the Older Adults Protective Services Act, 35 P.S. § 10211 et seq. ("OAPSA"). Department of Aging programs are administered on the local level by fifty-two area agencies. The Secretary of the Department of Aging, defendant Richard Browdie is sued in his official capacity.

Defendant Philadelphia Corporation for Aging ("PCA") is a private non-profit Pennsylvania corporation which administers OAA and OAPSA programs under the direction of the Department

of Aging as the area agency for Philadelphia. Defendants Renee Van Keekem and Sanford Pfeffer are PCA attorneys who represented PCA in proceedings involving plaintiffs.

Defendant Senior Citizen Judicare Project (“Judicare”) is a non-profit Pennsylvania corporation which contracts with PCA to provide legal representation to persons against whom PCA file petitions for involuntary protective services under the OAPSA. Judicare represented Buck in proceedings against the PCA. Defendant Mary A. Scherf is an attorney and employee of Judicare who represented Buck in the proceedings.

## *II. Factual Allegations<sup>1</sup>*

On May 22, 1991, in response to a report that Buck had a bruise under her right eye, a PCA employee visited Buck to conduct an investigation of possible abuse and/or neglect. Buck denied that she was abused or neglected. Based on their investigation, however, PCA concluded that Schaffren was abusing and/or neglecting Buck. On May 29, 1991 PCA arranged for a psychiatrist, Dr. Kenneth Rosenstein, to interview Buck. He found no evidence of abuse and reported that Buck denied allegations of abuse and/or neglect, but concluded that her “insight and judgment appear[ed] grossly impaired.”

On August 20, 1991 Buck, who had a skin condition which caused her to bruise easily, suffered an accidental injury to her face. On August 21, 1991 Margaret McFate, a PCA protective services investigator, met with Buck at her home and photographed the injuries. Notwithstanding Schaffren’s explanation of the accidental cause of the injuries, McFate sought the permission of Buck and Schaffren to place Buck in a nursing home. Both refused. PCA then determined to seek

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<sup>1</sup> The facts are set forth as alleged in the Complaint.

a court order to place Buck in a nursing home and contacted defendant Judicare to represent Buck. Defendant Scherf was appointed to represent Buck.

Plaintiffs allege that Scherf then conspired with PCA counsel Van Keekem to deprive Buck of her liberty by securing Buck's involuntary commitment to a nursing home without due process of law and without the opportunity to retain counsel of her choosing. On August 25, 1991 Scherf met with Buck and Schaffren and advised them that PCA intended to petition for a court order to place Buck in a nursing home and that she had been assigned to represent Buck. Scherf did not advise Buck of her right to retain counsel or explain that she did not intend to oppose involuntary commitment.

On August 26, 1991 defendant Van Keekem filed a petition for an emergency court order for involuntary nursing home placement alleging that Schaffren abused and neglected Buck and averring that she might be at imminent risk of serious physical harm. The petition further alleged that Buck was mentally incompetent to care for herself or understand her condition and requested that the Court issue an Order permitting PCA to remove Buck from her residence and place her in an appropriate facility. PCA did not serve Buck or Schaffren with a copy of the petition or give either advance notice of the date, time and place of its presentation.

The petition was immediately taken before Court of Common Pleas Judge Albert W. Sheppard. At the time the petition was presented, Scherf represented to the court that she, as counsel to Buck, agreed to the entry of the Order. Both Van Keekem and Scherf knew at this time that Buck had not authorized the entry of the order against her, and they knew that their actions would result in Buck's involuntary commitment. On August 26, 1991 Judge Sheppard signed an emergency involuntary intervention order as an uncontested matter in reliance on the representations in the

petition and of Scherf and pursuant to § 10 of the Older Adults Protective Services Act, 35 P.S. § 10220.<sup>2</sup> Because Scherf did not contest entry of the order, Judge Sheppard did not make a factual finding by clear and convincing evidence that Buck was at imminent risk of death or serious physical harm as required by § 10.<sup>3</sup>

The Order authorized entry into the Buck residence and nursing home placement of Buck, appointed Judicare as counsel, and permitted appointed counsel access to Buck's medical and financial records. The Order also set a hearing date of September 27, 1991, but did not contain any durational limit. Plaintiffs allege that Scherf and Van Keekem knowingly and intentionally failed to comply with 6 Pa. Code § 15.72(d) because they failed to "request an emergency order of a specific duration which may not exceed 72 hours."<sup>4</sup>

After the Court entered the Order, Scherf contacted Schaffren and informed him that Buck would be removed from his care and placed in a nursing home. Schaffren then contacted Buck's attorney, Constance W. Maier, to represent Buck, and Maier advised Schaffren that he should retain his own counsel. Maier then contacted Scherf to advise her that she (Maier) represented Buck, but

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<sup>2</sup> The Act was amended in 1996 and the sections renumbered. The Act is now numbered 35 P.S. § 10225.101-103 and § 10225.301-310. When the Court refers to the Act in this Order the Court will be referring to the pre-amended Act and the pre-amended section numbers because those are the sections in effect during the relevant time period.

<sup>3</sup> The Order stated that Buck was at imminent risk of serious physical harm, but during a hearing on May 25, 1991 Judge Sheppard stated that he never made such a finding, and he entered the Order because counsel represented that there was no dispute that Buck was at imminent risk.

<sup>4</sup> 6 Pa. Code § 15.72(d) reads:

Emergency order duration. In the petition, the agency shall request an emergency order of a specific duration which may not exceed 72 hours from the time the order is granted. The agency shall request the court of common pleas to hold a hearing when the initial emergency order expires to review the need for an additional emergency order is not evidence of the competency or incompetency of the older adults.

Scherf insisted that Maier had no standing to represent Buck because she (Scherf) was her court appointed counsel.

On September 6, 1991 representatives of PCA, Scherf and police officers appeared at Buck's home and removed her from her home despite her protests. Scherf knew at this time that the emergency order should have expired before September 6, 1991 pursuant to 6 Pa. Code § 15.72(d) but made no effort to prevent Buck's removal. PCA placed Buck in Ambler Rest Home and refused to inform her family where it placed her.

On September 11, 1991 Maier filed a motion for reconsideration of the August 26, 1991 Order contending that the proceedings violated Buck's Constitutional rights. Also on September 11, 1991 Judge Sheppard presided over a conference where Van Keekem and Scherf opposed the recognition of Maier as Buck's counsel. Also during this conference Scherf and Van Keekem refused to disclose the location of Buck to the family until Judge Sheppard ordered them to do so.

On September 18, 1991 Judge Sheppard held a hearing on the motion for reconsideration where he refused to acknowledge Maier as Buck's attorney but permitted James Dunleavy to participate as counsel for the family. Because Maier was not permitted to represent Buck, Judge Sheppard never heard or decided Buck's Constitutional challenge. During this hearing Schaffren testified that he never intentionally injured his mother, but he acknowledged that she may have been accidentally injured. After September 18, 1991 Judge Sheppard held a number of evidentiary hearings and conferences in which medical reports and medical testimony were presented which provided conflicting opinions of Buck's mental competence. No evidence was presented that Schaffren ever intentionally injured his mother or that the conditions at home presented an imminent risk of death or serious physical injury. Although Judge Sheppard never entered an order after

August 26, 1991, PCA continued Buck's placement at Ambler Rest Home.

Plaintiffs allege that in the subsequent hearings defendant Sanford Pfeffer, who represented PCA, acted in concert with Scherf and Van Keekem to intentionally delay and extend the proceedings by contending that he had additional evidence of abuse and neglect. No such evidence was ever produced. During this same period Scherf continued to advocate for the continued placement of Buck at Ambler Nursing Home.

As part of these subsequent hearings Schaffren agreed to an examination by a psychiatrist, Dr. Waxman, who found no mental infirmity but recommended counseling to assist him in dealing with the pressures of caring for an incapacitated older adult. Schaffren joined a caretaker support group and went into counseling.

During a hearing on May 25, 1991 Judge Sheppard stated that he never made a finding of abuse but based his decision to enter the emergency order on the representations of Van Keekem and Scherf. Scherf concurred with this statement on the record. Following the May 25, 1991 hearing, counsel for the parties met to attempt to arrive at mutually acceptable conditions for Buck's release. These discussions reached an impasse when Pfeffer insisted that any voluntary resolution of the matter include Buck's commitment to pay the bill for the nursing home care.

On August 16, 1992 Buck retained current counsel, Sharon K. Wallis, to represent her in this federal civil rights action. Plaintiffs allege that after Wallis notified Scherf and Pfeffer of her intent to file suit, Pfeffer filed a petition on October 9, 1992 with the Orphan's Court seeking to have Buck declared totally incapacitated and appointment of a plenary guardian for her. Plaintiffs allege that the petition was filed in bad faith and in the attempt to delay the proceedings before Judge Sheppard and this civil rights action.

### *III. Procedural History*

This action was filed on November 16, 1992. The Court placed it in suspense pending resolution of the competency proceeding and denied motions to dismiss without prejudice subject to renewal on the existing papers when the action was removed from the civil suspense list.

In the competency proceeding, the parties presented considerable expert and fact testimony. On November 2, 1994, Judge O'Brien entered a decree and opinion, finding that Buck was totally incapacitated and appointing Thomas J. Posatko as her guardian. Appeal of this ruling was dismissed on April 26, 1995.

On February 1, 1995, in response to an inquiry from this Court's Deputy Clerk, counsel for PCA filed a status report advising the Court of the state court finding. By letter dated February 28, 1995 counsel for the other defendants reported to the Court the state court's appointment of Posatko as plaintiff's guardian. By letter dated October 15, 1996 this Court's Deputy clerk requested a second status report. On October 24, 1996, counsel for defendants advised the Court that the competency proceeding was final and the appeal had been dismissed.

By Order dated October, 31, 1996 this Court transferred this action from civil suspense to the current docket and dismissed the case without prejudice pursuant to counsel's representation and the Court's belief that plaintiffs had abandoned their claims. Plaintiffs, however, moved for reconsideration of the October 31, 1996 Order indicating a desire to continue the action and further moved for substitution of Posatko for Buck. By Order dated March 24, 1997 the Court granted the motion for reconsideration and the motion for substitution. Defendants then filed an amended motion to dismiss the complaint.

Posatko's appointment as guardian pursuant to the state court order conferred on him the

authority to determine where Buck would reside, and he decided that Buck's best interests would be served by permitting her to live in her residence with Schaffren and a resident caretaker. Consequently, the request for injunction relief (Count I) was moot and it was withdrawn.

During the pendency of this case Buck passed away and the Court granted plaintiffs' unopposed motion to substitute Schaffren, in his capacity as executor of her estate, for Buck. Also during the pendency of this case, Buck's other son William, originally a plaintiff in this action, died. The Counts concerning him, Counts IX and XV, were withdrawn. Count XII, which pleads a claim for fraud against the PCA and Judicare Defendants was also withdrawn.

#### *IV. The Remaining Claims*

Counts II and III assert claims against PCA and the Secretary of Aging in his official capacity challenging the constitutionality of § 10 of the OAPSA, 35 P.S. § 10220, and related sections on their face and as applied. OAPSA § 10 authorizes court ordered involuntary protective services including committing older adults to nursing homes against their will. Count IV alleges that the practice of the Secretary of Aging in administering and funding involuntary protective services through the Area Agencies on Aging violates the OAA. Counts V through VII plead claims for compensatory and punitive damages for violations of the Constitution arising out of the involuntary commitment of Buck pursuant to §§ 1983 and 1985(3) against PCA and its employees, Pfeffer and Keekem, ("PCA Defendants"), and against Judicare and its employee, Scherf ("Judicare Defendants").

The Amended Complaint also pleads the following causes of action under Pennsylvania common law: Count X, against the PCA Defendants for unlawful restraint; Count XI against the

Judicare Defendants for breach of fiduciary duty and legal malpractice; Count XIII, against the PCA and Judicare Defendants for malicious abuse of process; and Counts XIV and XV against the PCA and Judicare Defendants for intentional infliction of emotional injury.

#### *V. Standing*

Defendants contend that neither Schaffren nor Buck's estate (the only remaining plaintiffs) have standing to pursue their declaratory and injunctive relief claims after Buck's death. Count II of plaintiffs' complaint seeks declaratory relief determining that the OAPSA is unconstitutional on its face and asks the Court to restrain the Secretary of the Aging and PCA from acting under the authority of the OAPSA. Count III seeks the same relief on behalf of Schaffren. Count IV asserts a claim on behalf of both plaintiffs for injunctive relief restraining the Secretary of Aging from administering or funding involuntary protective services through the area agencies on the grounds that this conduct contravenes the OAA.

Under Article III, § 2 of the Constitution, the federal courts have jurisdiction over a dispute only if it a "case" or "controversy." One element of the case or controversy requirement is that plaintiffs must establish standing to sue. "To meet the standing requirements of Article III, '[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.'" Raines v. Byrd, 117 S.Ct. 2312, 2317 (1997) (quoting Allen v. Wright, 468 U.S. 737, 751 (1984)). Plaintiffs have not met their burden of establishing how the requested declaratory and injunctive relief sought in Counts II, III and IV will redress the injuries alleged by Schaffren or Buck's estate. Neither Schaffren nor Buck's estate are presently subject to the Act or threatened with a reoccurrence of their alleged injuries and neither

plaintiff would benefit from declaratory or injunctive relief. Counts II, III and IV are therefore dismissed because plaintiffs lack standing.

#### *VI. Subject Matter Jurisdiction*

Defendants next contend that the Court lacks subject matter jurisdiction over this matter and they move to dismiss pursuant to Fed.R.Civ.P. 12(b)(1). They argue that plaintiffs are collaterally estopped from asserting the Constitutional and common law tort claims, and that the Court lacks jurisdiction pursuant to the Rooker-Feldman doctrine. They also contend that the Younger abstention doctrine requires dismissal of the complaint pending resolution of state court proceedings, and that the Pullman abstention doctrine requires dismissal of the complaint pending resolution of unsettled questions of state law.

When a motion under Rule 12 is based on more than one ground, the Court must first consider the Rule 12(b)(1) challenge, In Re Corestates Trust Fee Litigation, 837 F. Supp. 104, 105 (E.D. Pa. 1993), aff'd, 39 F.3d 61 (3d Cir. 1994), and plaintiffs bear the burden of persuasion. NMC Homecare, Inc. v. Shalala, 970 F. Supp 377, 382 (M.D. Pa. 1997). Unlike under Rule 12(b)(6), when there is a factual question about whether a court has jurisdiction, the Court may examine facts outside the pleadings.<sup>5</sup> Robinson v. Dalton, 107 F.3d 1018, 1021 (3d Cir. 1997). The Court is free to weigh the evidence to ensure that it has the power to hear the case and “no presumptive truthfulness attaches to plaintiff[s’] allegations.” Id. (quoting Mortensen v. First Fed. Sav. & Loan Ass’n, 549 F.2d 884, 891 (3d Cir. 1977)).

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<sup>5</sup> In addition to plaintiffs’ complaint and attachments the Court reviewed the related state court orders and various other attachments to the parties’ filings in deciding defendants’ motion to dismiss pursuant to Rule 12(b)(1).

#### A. Issue Preclusion and the Rooker-Feldman Doctrine

Because “the Rooker-Feldman doctrine has a close affinity to the principles embodied in the legal concept[] of issue . . . preclusion,” FOCUS v. Allegheny Court of Common Pleas, 75 F.3d 834, 842 (3d Cir. 1996) (citing Valenti v. Mitchell, 962 F.2d 288, 297 (3d Cir. 1992)), the Court will address defendants’ arguments under these two legal principles together. The Rooker-Feldman doctrine is based on the statutory provision that grants the Supreme Court jurisdiction to review the decisions of the highest state courts for compliance with the Constitution. Ernst v. Child and Youth Services of Chester County, 108 F.3d 486, 491 (3d Cir. 1997). The doctrine prohibits lower federal courts from exercising “subject matter jurisdiction to . . . evaluate constitutional claims that are inextricably intertwined with the state court’s [decision] in a judicial proceeding.” FOCUS, 75 F.3d at 840 (quoting Blake v. Papadakos, 953 F.2d 68, 71 (3d Cir. 1992)).

Defendants contend that the Rooker-Feldman doctrine precludes this Court from hearing plaintiffs’ § 1983 claims because to do so would require the Court to determine whether the state courts correctly found that Buck was incapacitated and ordered her removal from her home. As interpreted by the Court of Appeals, however, the Rooker-Feldman doctrine only bars the federal proceeding “when in order to grant the relief sought, the federal court must determine that the state court judgment was erroneously entered or must take action that would render that judgment ineffectual.” Ernst, 108 F.3d at 491; FOCUS, 75 F.3d at 840.

In Ernst a grandmother who was the sole guardian of her granddaughter brought a § 1983 action against a child welfare department and various other individuals arising from the taking and retaining custody of her granddaughter through dependency proceedings. The suit was brought after the state courts ordered the granddaughter returned to the grandmother’s custody and sought

damages only. The grandmother alleged that the defendants violated her right to substantive due process by making recommendations to the state court out of malice or personal bias. The Court held that the Rooker-Feldman doctrine did not preclude the district court from deciding those claims because a ruling in plaintiff's favor "would not have required the court to find that the state court judgments made on the basis of those recommendation were erroneous," and because "Ernst's substantive due process claims were never decided by the state court." Ernst, 108 F.3d 491-92.

Similarly, in FOCUS a citizen's advocacy group brought a § 1983 action against the Pennsylvania Court of Common Pleas to challenge the constitutionality of gag orders issued in a state custody proceeding. The Court of Appeals reversed the district court's holding that it lacked subject matter jurisdiction because of the Rooker-Feldman doctrine. The state court refused to hear FOCUS' constitutional challenge and therefore never determined whether its gag order was constitutional. Thus, the district court was not required to decide whether the state court decision was wrong and the Rooker-Feldman doctrine did not apply. FOCUS, 75 F.3d at 841.

The Rooker-Feldman doctrine does not apply to plaintiffs' claims for the same reasons that it did not apply in Ernst and FOCUS. The plaintiffs' only remaining claims seek monetary damages. Therefore, any ruling in plaintiffs' favor will not interfere with any state court order or require a ruling that the state court judgment was in error. Also, just as in Ernst, the state court here never ruled on the constitutionality of the defendants' actions.

For similar reasons issue preclusion also does not bar plaintiffs' case. The doctrine of issue preclusion mandates that "once a court decides an issue of fact or law that is necessary to its judgment, that decision precludes relitigation of the same issue in a different cause of action between the same parties." Kremer v. Chemical Construction Corp., 456 U.S. 461, 467 n.6 (1982).

Defendants contend that plaintiffs' constitutional and common law tort claims are foreclosed because they present factual and legal issues resolved by Judge Sheppard in the protective services proceeding. Specifically, defendants contend that Judge Sheppard found by clear and convincing evidence that Buck was in imminent risk of harm and that the defendants' actions were constitutional.

“[A] prior determination of a legal issue is conclusive in a subsequent action between the parties . . . when (1) the issue is actually litigated; (2) the issue was determined by a valid and final judgment; and (3) the determination was essential to the judgment.” O’Leary v. Liberty Mut. Life Ins. Co., 923 F.2d 1062, 1065-66 (3d Cir. 1991). The constitutionality of defendants' actions was not “litigated” for the purposes of issue preclusion because the state court never decided whether defendants' actions complied with plaintiffs' constitutional rights. In addition, Judge Sheppard stated during the May 25, 1991 hearing that he never made a determination by clear and convincing evidence that Buck was in imminent danger of harm. Accordingly, this Court is not precluded from hearing plaintiffs' § 1983 claims. See Ernst, 108 F.3d at 492 n.4 (the state court which denied plaintiff custody of her granddaughter never decided whether defendants' actions violated plaintiff's substantive due process rights and therefore the district court was not precluded from entertaining plaintiff's § 1983 claim).

#### B. Younger Abstention Doctrine

Defendants next contend that this Court lacks jurisdiction because proceeding with this action would interfere with ongoing state judicial proceedings which afford plaintiffs an adequate opportunity to raise federal claims. See Younger v. Harris, 401 U.S. 37 (1971). Under Younger, a

federal court may not adjudicate a constitutional claim until after exhaustion of state appellate remedies when a three-prong test for abstention is met: (1) there are ongoing judicial state proceedings involving plaintiffs; (2) the state proceedings implicate important state interests; and (3) the state proceedings afford an adequate opportunity to raise federal claims. Schall v. Joyce, 885 F.2d 101, 106, 110 (3d Cir. 1989) (citations omitted). The first requirement of Younger abstention is not met here because the death of Buck arrested any ongoing state proceedings other than collateral matters such as who is responsible for paying nursing home services rendered to Buck , Maier’s claim for attorney fees and Posatko’s claim for guardian commissions. This federal action will not interfere with these collateral matters and therefore abstention is improper.

### C. Pullman Abstention Doctrine

Under the Pullman abstention doctrine, a federal court must abstain from deciding a question of federal constitutional law when there is an unsettled question of state law, the resolution of which may obviate the need to decide a constitutional issue. As a matter of law, Pullman abstention requires the following circumstances:

- (1) uncertain issues of state law underlying the federal constitutional claim; (2) state law issues subject to state court interpretation that could obviate the need the need to adjudicate or substantially narrow the scope of the federal constitutional claim; and
- (3) an erroneous construction of state law by the federal court would disrupt important state policies.

Presbytery of New Jersey v. Whitman, 99 F.3d 101, 106 (3d Cir. 1996). Defendants contend that this case presents a “classic” situation for Pullman abstention because what constitutes “clear and convincing evidence” under the OAPSA’s emergency involuntary intervention procedure is unsettled. Plaintiffs argue convincingly that the state issue is not unsettled and defendants do not adequately explain how resolution of the state law issue would substantially narrow the scope of

plaintiffs' claims. The Court need not reach these issues, however, because even if defendants met their burden of establishing the other elements of the Pullman abstention doctrine, the Court would not use its discretion to abstain because of the delay that would result. See Presbytery of New Jersey, 99 F.3d at 106 (If elements of Pullman abstention are met court should make discretionary determination as to whether abstention is appropriate). The Court therefore concludes that this is an inappropriate case for a Pullman abstention, and that it has subject matter jurisdiction over plaintiffs' remaining claims.

#### *VII. Sections 1983 and 1985 Damages Claims*

Plaintiffs seek both compensatory and punitive damages under §§ 1983 and 1985. Defendants move to dismiss these Counts pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state a claim on which relief can be granted. In deciding defendants' motion to dismiss the Court accepts as true all well-pleaded allegations in the complaint and construes them in the light most favorable to plaintiffs. The Court may grant defendants' motion only if it concludes that no relief could be granted under any set of facts that could be proved consistent with the allegations. Jordan v. Fox, Rothchild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994).

#### A. Color of State Law

To maintain a claim under § 1983, plaintiffs must allege a deprivation of some constitutional right or federal statutory right by persons acting under color of state law. 42 U.S.C. § 1983. Defendants contend that plaintiffs' § 1983 claims must be dismissed because they acted as private actors and not under color of state law.

The Court of Appeals recently admonished against attempting to “navigate ‘the legal morass of the ever evolving state action doctrine,’” on a motion to dismiss because the inadequacy of “undeveloped record makes application of . . . the case law difficult.” Lake v. Arnold, 112 F.3d 682, 689 (3d Cir. 1997) (quoting Eaton v. Grubbs, 329 F.2d 710 (4th Cir. 1964)). While it appears that plaintiffs may have difficulty establishing the color of state law element of their § 1983 action, especially as to the Judicare defendants, dismissal on this ground at this stage of the litigation is inappropriate.

## B. Immunity

Both the PCA and the Judicare defendants next contend that they are immune from plaintiffs’ claims under both federal and state law.

### 1. Absolute Immunity - PCA Individual Defendants

Relying on the Court of Appeals’ decision in Ernst v. Child and Youth Services of Chester County, 108 F.3d 486, 491 (3d Cir. 1997), the PCA individual defendants, Pfeffer and Van Keekem, contend that they are absolutely immune from a suit for damages. They argue that their situation is analogous to that of prosecutors, who enjoy absolute immunity. In Ernst, as discussed above, a grandmother who was the guardian of her granddaughter sued the child welfare department, department caseworkers, and a department attorney pursuant to § 1983, contending that the department’s assertion of custody of her granddaughter violated her and her granddaughter’s constitutional rights. Analogizing to prosecutorial immunity, the Court of Appeals held that the caseworkers and the attorney for the child welfare department were absolutely immune from a suit

for damages. Ernst, 108 F.3d at 498, 504.

The caseworkers and the attorney who prosecuted the dependency proceeding in Ernst investigated accusations of abuse, filed a petition seeking placement of the granddaughter in a psychiatric institution for evaluation, represented the department at a dependency hearing, and waged an intense legal battle over the dependency status and custody of the granddaughter. The caseworkers and the attorney also sought and obtained restrictions on the grandmother's visits with her granddaughter and argued against placement of the granddaughter in the grandmother's custody. Looking to the functions of prosecutors and the rationale for providing immunity, the Court found that the child welfare department and the department attorney were absolutely immune because:

(1) the functions performed by the [child welfare department caseworkers and the department attorney] in dependency hearings [were] closely analogous to the functions performed by prosecutors in criminal proceedings; (2) the public policy considerations that countenance immunity for prosecutors are applicable to child welfare workers performing these functions; and (3) dependency proceedings incorporate important safeguards that protect citizens from unconstitutional actions by child welfare workers.

Id. At 495.

In this case, plaintiffs allege that Pfeffer and Van Keekem represented PCA in petitioning for the involuntary commitment of Buck, filed a petition for emergency nursing home placement of Buck, opposed Buck' motion for reconsideration of the order committing Buck to a nursing home, and represented the PCA in a number of other evidentiary hearings and conferences. It is evident from the above comparison of these functions to those performed by the caseworkers and the department attorney in Ernst that the factions are virtually identical. If Pfeffer and Van Keekem were employees of a government agency, as were the caseworkers and the attorney in Ernst, the Court would have no difficulty concluding that they were entitled to absolute immunity.

The issue which arises in this case and did not arise in Ernst, however, is whether employees of a private entity, rather than a government entity, performing similar functions to a prosecutor are entitled to absolute immunity. The case law suggests that emphasis should be on the function of the employee rather than the employing entity in determining whether to apply absolute immunity. For example, absolute judicial immunity has been “extended not only to public officials, but also private citizens (in particular arbitrators and jurors); the touchstone for its applicability was performance of the function of resolving disputes.” Antione v. Byers & Anderson, Inc., 508 U.S. 426, 434 (1993) (citation omitted). See also Gardner v. Parson, 875 F.2d 131, 146 (3d Cir. 1989) (granting absolute immunity to guardian ad litem); Simons v. Bellinger, 643 F.2d 774 (D.C. Cir. 1980) (court-appointed committee that monitored unauthorized practice of law afforded absolute immunity); Schinner v. Strathmann, 711 F. Supp. 1143 (D.D.C. 1989) (psychiatrist appointed to determine defendant’s competency to stand trial afforded absolute immunity). Absolute immunity also has been granted to employees of private entities performing prosecutorial duties, such as members of bar association disciplinary committees, Slavin v. Curry, 574 F.2d 779 (5th Cir. 1979), and disciplinary officers of the National Association of Securities Dealers, Austin Mun. Securities, Inc. v. NASD, 757 F.2d 676, 688 (5th Cir. 1985). The Court therefore concludes that Pfeffer and Van Keekem’s employment with a private entity does not preclude application of absolute immunity, and that the two PCA attorneys are entitled to absolute immunity. See Thomason v. SCAN Volunteer Servs., Inc., 85 F.3d 1365, 1373 (8th Cir. 1996) (holding that attorney for not-for-profit corporation authorized under Arkansas law to investigate allegations of suspected child abuse and to seek protective custody was entitled to absolute immunity).

Affording the PCA attorneys absolute immunity does not end the inquiry because the scope

of the absolute immunity is limited to those acts that are “in connection with the formulation and presentation of recommendations to the state court regarding dependency status and disposition.” Ernst, 108 F.3d at 497. The majority of plaintiffs’ allegations against the PCA attorneys concern their dealings with the state courts and their alleged conspiracy with Scherf. These allegations are clearly within the scope of the absolute immunity and are dismissed. Plaintiffs, however, contend that the immunity would not include defendants’ role in retaining custody of Buck after the emergency order should have expired. See 6 Pa. Code 15.72(d) (limiting duration of petition for emergency order to no more than 72 hours). The complaint, however, does not include any allegations that the PCA attorneys performed any duties other than petitioning the court for involuntary intervention and advocating on behalf of the PCA. These acts alleged in the complaint were well within the scope of their immunity because they are “analogous to a prosecutor’s preparation for and initiation and presentation of a criminal prosecution.” Ernst, 108 F.2d at 497. Counts V, VI and VIII are therefore dismissed as Van Keekem and Pfeffer.

## 2. Immunity of Mary A. Scherf

Defendant Scherf contends that she is entitled to quasi-judicial immunity because she was appointed by the Court. In support of her position Scherf cites Gardner v. Parson, 874 F.2d 131 (3d Cir. 1989) where the Court of Appeals granted absolute immunity to a guardian ad litem when acting as an integral part of the judicial process such as “testifying in court, prosecuting custody or neglect petitions and making reports and recommendations to the court.” 874 F.2d at 146. Scherf, however, was not acting as a guardian for Buck. The court appointed her to represent Buck’s interests in the custody and competency proceedings, and while she did make recommendations to the court, she

did not testify or prosecute the custody proceeding.

Rather, Scherf's role was similar to that of appointed defense counsel in criminal cases; in both situations the state appoints and pay attorneys to represent clients in proceedings brought by the state. In Tower v. Glover, 467 U.S. 914 (1984), the Supreme Court held that state public defenders were not immune from a § 1983 suit alleging a conspiracy with the state to violate the plaintiff's constitutional rights. 467 U.S. at 922-23. In view of this holding and the similarity of Scherf's position to that of the public defender in Tower, the Court cannot agree with Scherf's contention that she is immune at this stage of the litigation.

### 3. Immunity of PCA and Judicare

PCA and Judicare contend that as entities they are immune from suit under the same theories of prosecutorial and quasi-judicial immunity sought by their employees. These immunities, however, are personal affirmative defenses available to individuals sued in their individual capacities and are not available to employing entities. Kentucky v. Graham, 473 U.S. 159, 166-67 (1985) (“[A]n official in a personal-capacity action, may, depending on his position, be able to assert personal immunity defenses . . . . The only immunities that can be claimed in an official-capacity action are forms of sovereign immunity.” ) Defendants neither contend that they are entitled to sovereign immunity, nor refer the Court to a case applying immunity to an organization or agency. The Court's own research reveals no instance where a court has granted any immunity, other than sovereign immunity, to an employing entity. The Court therefore concludes that Judicare and PCA are not entitled to immunity.

#### 4. Immunity from State Law Claims

The PCA and Judicare defendants contend that the OAPSA immunity provisions require the dismissal of plaintiffs' state law claims. Section § 10218 provides that:

In the absence of willful misconduct or gross negligence, the agency, the director, employees of the agency, protective service workers or employees of the department shall not be civilly or criminally liable for any decision or action or resulting consequence of decisions or action when acting under and according to the provisions of this chapter.

The PCA defendants also contend that the Pennsylvania Tort Claims Act, 42 Pa. C.S.A. § 8541 et. seq., provides immunity to PCA and its employees acting within the scope of their duties.

Plaintiffs' allege that the defendants' action amounted to willful misconduct and defendants concede that both the OAPSA and the Tort Claims Act provide no immunity for such misconduct. The defendants, however, contend that to survive a motion to dismiss plaintiffs must allege facts describing explicit manifestations of malicious intent. In support of this proposition defendants cite Fanning v. Montgomery Cty. Children and Youth Servs., 702 F. Supp. 1184 (E.D. Pa. 1988). The Fanning Court, however, held that bare allegations that a social worker acted maliciously in refusing to allow the child to contact her parents after a social services agency removed the child from the parents' custody and thereby deprived parents of substantive due process were sufficient to survive a motion to dismiss. 801 F. Supp. at 1191. Defendants do not explain how this holding furthers their position that plaintiffs inadequately pleaded malicious intent, and this Court interprets the holding to support plaintiffs' contention that their allegations of willful misconduct preclude application of immunity. Defendants do not refer the Court to any other cases in support of their position, and the Court's research reveals none. The Court therefore concludes that the immunity provision of the OAPSA does not provide a basis for dismissal.

C. Liability Pursuant to 42 U.S.C. § 1985(3)

In Count VI, plaintiffs allege that the PCA and Judicare Defendants violated 42 U.S.C. § 1983 by conspiring to deprive Buck of her constitutionally protected rights on the basis of her status as a functionally dependent adult. To state a claim pursuant to § 1985(3) plaintiff must allege:

(1) a conspiracy; (2) motivated by a racial or class based discriminatory animus designed to deprive, directly or indirectly, any person or class of persons the equal protection of the laws; (3) an act in furtherance of the conspiracy; and (4) an injury to person or property or the deprivation of any right or privilege of a citizen of the United States.

Lake v. Arnold, 112 F.2d 682, 685 (3d Cir. 1997) (citation omitted). Defendants contend that I should dismiss this count because Buck is not a member of a protected class.

In support of their contention that “functionally dependent older adults” are a protected class under § 1985(3), plaintiffs’ cite Lake v. Arnold, 112 F.2d 682 (3d Cir. 1997) where the Court of Appeals held that individuals with mental retardation are a class entitled to § 1985(3) protection. The Court stated that “the scope of section 1985(3) is not fixed as of any given point of time, but must be subject to reinterpretation as times and circumstances require.” Id. At 687. While the Court noted that no precise parameters define the boundaries of a class protected by § 1985(3), it relied on a Congressional finding in enacting the Americans With Disabilities Act that:

[I]ndividuals with disabilities are discrete and insular minorities who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness.

Id. at 687-88 (quoting 42 U.S.C. § 12101(a)(7)). The Court then held that “we cannot conclude, in light of these statements by Congress and research compiled by academicians, that [people with] mental[] retard[ation] are excluded from section 1985(3) protection.” Id. At 688.

Plaintiffs do not allege that Buck was mentally retarded. Rather, they allege that she has been

unable to care for herself after she suffered a stroke in 1986 that caused paralysis of her right side and a loss of short term memory, and contend that the Court of Appeals' analysis applies with equal force to functionally impaired older adults like Buck. The Court does not agree. The underpinning of the Court of Appeals' decision in Lake was a congressional finding that individuals with disabilities were "subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness." No such finding exists for individuals who, later in life, suffer strokes resulting in partial paralysis and some mental impairment, and the Court declines to create such a substantial new class of individuals protected by § 1985(3) absent such authoritative evidence as the Court of Appeals relied on in Lake. Count VI is therefore dismissed.

#### *VIII. State Law Causes of Action*

Plaintiffs asserts The following state law causes of action against the defendants for unlawful restraint, for breach of fiduciary duty and legal malpractice, for malicious abuse of process, and for intentional infliction of emotional injury. Defendants seek dismissal of all of these claims. After review of parties' filings and the relevant state law, however, the Court concludes that the bases for dismissal argued by defendants are unavailing and that dismissal is improper at this stage.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDWARD SCHAFFREN, in his capacity : CIVIL ACTION  
as Executor of the Estate of MARY :  
BUCK, et al. :  
 :  
v. :  
 :  
PHILADELPHIA CORPORATION FOR :  
AGING, et al. : No. 92-5858

ORDER

AND NOW this day of November, 1997 upon consideration of defendants' motions to dismiss and the parties' filings related thereto, it is hereby ORDERED that:

1. Defendants' motions to dismiss Counts I, II, III, IV, VI, VII, IX and XII are GRANTED and those counts are DISMISSED;
2. Count XV is DISMISSED as to plaintiff William Schaffren;
3. Counts V and VIII are DISMISSED as to defendants Van Keekem and Pfeffer; and
4. Defendants' motions to dismiss the remaining Counts are DENIED.

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THOMAS N. O'NEILL, JR. J.