

NO. A12-0216

State of Minnesota
In Court of Appeals

Mark A. VanGelder,

Appellant,

vs.

June M. Johnson,

Respondent.

APPELLANT'S REPLY BRIEF

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INTRODUCTION

This Brief is submitted in Reply to the Response Brief submitted by the Respondent. For the reasons stated in Appellant's principal Brief, the district court erred in granting summary judgment to Respondent. Specifically, the District Court erred in granting quasi-judicial immunity to Respondent and in determining that Respondent's scope of authority was defined by the earlier Judgment and Decree to which she was not a party. Respondent's Response Brief ignores established legal principles regarding the application of quasi-judicial immunity as well as fundamental principles of contract law. The undisputed facts of this case, applied to controlling legal precedent, mandate a reversal of the District Court's decision.

STATEMENT OF THE FACTS

The facts are as set forth in Appellant's principal Brief and need not be repeated in their entirety. It is prudent to note, however, the following undisputed facts which are dispositive of the legal arguments on appeal:

1. Respondent was never appointed by any order of the Court to act as a parenting consultant for Appellant and Ms. Clifford. (App 43)
2. The only contract between Respondent, Appellant and Ms. Clifford is the Parenting Consultant Agreement. (App 51)
3. The Parenting Consultant Agreement makes no reference to, nor incorporates, the Judgment and Decree. (App 44)

LEGAL ARGUMENT

I. **CONTROLLING LEGAL PRECEDENT REQUIRES A REVERSAL OF THE DISTRICT COURT'S GRANT OF QUASI-JUDICIAL IMMUNITY TO RESPONDENT.**

The District Court erred in its application of controlling legal precedent to the undisputed facts presented by this case. The legal standard for a grant of quasi-judicial immunity requires court appointment. Zagaros v. Erickson, 558 N.W.2d 516, 523 (Minn. Ct. App. 1997)(“the doctrine of judicial immunity protects those who are **appointed by the court** to perform judicial or quasi-judicial functions”)(emphasis added). In fact, the two cases that Respondent identifies as “most analogous” and “most nearly analogous” to the present case both recognized the court appointment requirement. (Resp. Brief, p. 9, 11) Peterka v. Dennis, 744 N.W.2d 28, 31 (Minn. Ct. App. 2008)(“Despite language in *Dziubak* that an agreement of the parties may be sufficient to extend judicial immunity, to date, case law appears to condition a grant of quasi-judicial immunity on the presence of both court appointment and the exercise of authority of a judicial nature), *rev'd on other grounds* at 764 N.W.2d 829, 833 (Minn. 2009); Tinsdell v. Rogosheske, 428 N.W.2d 386, 387 (Minn. 1988)(“[Respondent] was appointed by the district court as guardian ad litem”).

Of all the cases discussing quasi-judicial immunity, the case which is truly most analogous to this one is Zagaros, 558 N.W.2d 516. Zagaros involved a custody evaluator in a dissolution action. Id. at 519. Similar to the custody evaluator in Zagaros, Respondent is also a professional used in the resolution of family court disputes. The role of a custody evaluator, in many instances, is similar to that of a parenting consultant.

A custody evaluator, for example, investigates and makes recommendations regarding custody and parenting time. (App 87) That is precisely the work that Respondent was supposed to do in this action. The custody evaluator in Zagaros asked the court for the same relief that Respondent is requesting here: that the court extend the doctrine of quasi-judicial immunity to professionals involved in family court disputes without the need for court appointment. 558 N.W.2d at 523. Zagaros clearly denied this request: “[w]e decline to formally extend judicial immunity to custody evaluators **without court appointment.**” Id. (emphasis added). As Respondent was not court appointed, the same result is required here.

The alleged “most analogous” cases provided by Respondent include a guardian ad litem and a neutral business evaluator and both recognize the need for court appointment. (Resp. Brief pgs. 9, 11) The court appointed guardian ad litem in Tinsdell was provided quasi-judicial immunity. Tinsdell, 428 N.W.2d at 387. The neutral business evaluator in Peterka was not granted quasi-judicial immunity. Peterka, 744 N.W.2d at 32. The Court of Appeals in Peterka held that there was a question of fact as to whether the neutral business evaluator was appointed by the court. Id. at 31. The Court of Appeals went on to hold that even if there was a factual issue on court appointment, the neutral business evaluator did not serve a judicial function and therefore was not entitled to quasi-judicial immunity. Id. at 32. Peterka was later overruled, and the Supreme Court held that the neutral evaluator was entitled to immunity based upon Rule 706, a basis that Respondent in this action has not alleged and is inapplicable to the facts of this case. Peterka v. Dennis, 764 N.W.2d 829, 836 (Minn. 2009). Both cases

cited by Respondent recognize the requirement that the professional seeking quasi-judicial immunity must be appointed by the court.

Respondent seeks to avoid the requirement of court appointment by alleging that Appellant's prior attorney "denied" her request to be court appointed. (Resp. Brief p. 10) The accurate deposition testimony cited states: "Ms. Yergen said in this case there was already a complete appointment within the MTA. If the parties were in agreement with my contract, there would be no need." (App 42, p. 44, line 19-23) First, there is nothing in the statement that "denied" Respondent the right to seek court appointment. Respondent is a profession in her field. As such, it is her responsibility to know the requirements for obtaining immunity and to pursue those requirements, if she felt it was necessary. Respondent was free to seek court appointment if she so desired. Moreover, Respondent has recognized that Ms. Yergen was not her attorney, but was Appellant's attorney at the time. Therefore, Ms. Yergen would not be giving legal advice to Respondent. Finally, there is no suggestion that this discussion dealt with immunity. Respondent has had notice since the Zagaros case in 1997 that immunity is only available through court appointment. Zagaros, 558 N.W.2d at 523. Respondent's own materials acknowledged this requirement. (App 98) Accordingly, there is no merit to the argument that Respondent was somehow "denied" the opportunity to seek court appointment and therefore should be permitted to evade controlling precedent as to the application of quasi-judicial immunity.

The undisputed facts of this case establish that Respondent was never appointed by the Court. (App 43) Given this undisputed fact, Respondent cannot escape the inevitable conclusion that she is not entitled to quasi-judicial immunity.

Additionally, Respondent's public policy arguments for granting quasi-judicial immunity in this action are similarly unavailing. Respondent argues that a grant of quasi-judicial immunity to individuals such as Respondent is necessary in order to support individuals willing to serve in such a capacity and to provide assistance to the court in light of growing caseloads. However, what Respondent does not adequately recognize is that these individuals are already entitled to quasi-judicial immunity, they simply have to follow the correct procedure. Zagaros is not a new decision. It was decided in 1997. Since that time, professionals have been on notice that quasi-judicial immunity requires court-appointment. Indeed, the materials submitted by Respondent herself even recognize the need for a formal court appointment in order to be entitled to quasi-judicial immunity. (App 98) This is simply not a case where immunity needs to be granted in order to serve a greater public policy. The public policy need has already been addressed, and immunity is already available if the appropriate steps are taken. Respondent failed to be appointed by the court as required for quasi-judicial immunity. Therefore, the District Court's grant of quasi-judicial immunity in the absence of court appointment is clearly in error and should be reversed.

II. RESPONDENT'S SCOPE OF AUTHORITY IS LIMITED TO THE CONTRACTUALLY DEFINED SCOPE IN THE PARENTING CONSULTANT AGREEMENT.

The District Court erred in defining the scope of Respondent's authority by reference to the Judgment and Decree, instead of by the clearly defined scope agreed upon by the contracting parties. "By the most common definition, a contract is a promise or set of promises for the breach of which the law gives a remedy or the performance of which the law recognizes as a duty." Cederstrand v. Lutheran Brotherhood, 117 N.W.2d 213, 219 (Minn. 1962). Unambiguous contract language must be given its plain and ordinary meaning, and shall be enforced by courts even if the result is harsh. Minneapolis Pub. Hous. Auth. v. Lor, 591 N.W.2d 700, 704 (Minn. 1999). A contract must be read to give effect to all of its provisions. Brookfield Trade Center, Inc. v. Ramsey Co., 584 N.W.2d 390, 394 (Minn. 1998). The meaning of a contract is to be ascertained from the writing alone, if possible, the duty of the court being to declare the meaning of what is written in the instrument, not what was intended to be written." Carl Bolander & Sons, Inc. v. United Stockyards Corp., 215 N.W.2d 473, 476 (Minn. 1974). The Court shall not add term to a parties' contract. Telex Corp. v. Data Products Corp., 135 N.W.2d 681, 687 (Minn. 1965). (It is not the role of the court to add language to a contract or to re-write, modify or set aside contract provisions fully considered and agreed upon between the parties).

The Parenting Consultant Agreement clearly identifies the defined scope of Respondent's Authority. It was error for the District Court to disregard this contractually agreed-upon scope and substitute it with the scope provided in the Judgment and Decree,

to which Respondent was not a party. The only contract between Respondent, Appellant and Ms. Clifford is the Parenting Consultant Agreement. The Parenting Consultant Agreement makes no mention of or reference to the Judgment and Decree. The Parenting Consultant Agreement is the sole source for Respondent's authority as a parenting consultant for Appellant and Ms. Clifford. Respondent was not named in the Judgment and Decree and was not a party to that Order. Accordingly, the defined scope in the Parenting Consultant Agreement governs Respondent's conduct and it was error for the District Court to re-write the scope of the parties' contract.

III. THERE ARE GENUINE ISSUES OF FACT AS TO WHETHER OR NOT RESPONDENT EXCEEDED HER LIMITED SCOPE UNDER THE PARENTING CONSULTANT AGREEMENT.

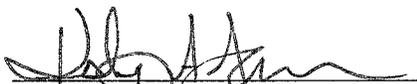
The Parenting Consultant Agreement limits the scope of Respondent's authority to those areas specifically delineated in the agreement. (App 28) Respondent's arguments as to whether Respondent exceeded her scope assert that the Judgment and Decree was broadly drafted and Appellant agreed to it at the time it was entered. Respondent does not address the narrow question of whether or not Respondent exceeded the limited scope in the Parenting Consultant Agreement. The comparison between Respondent's actions and the limited scope of authority granted by the Parenting Consultant Agreement is addressed in Appellant's principle brief, and is referenced herein. When viewed in comparison with the proper scope of authority, as defined by the Parenting Consultant Agreement, there has been clear evidence presented that Respondent exceeded her limited authority, and the District Court's grant of summary judgment was therefore in error.

CONCLUSION

Respondent has failed to identify any facts or legal authority that would require any result other than that held by this court in Zagaros v. Erickson. It is undisputed that Respondent was not court appointed, and therefore she is not entitled to quasi-judicial immunity. Since immunity was available, had Respondent followed the proper measures, public policy does not support an aberration from precedent to grant immunity in this action. Respondent has also failed to present any compelling law or arguments as to why this Court should set aside the clearly agreed upon scope of her authority as delineated in the parties Parenting Consultant Agreement. The District Court erred in its grant of summary judgment to Respondent. Accordingly, based on the forgoing, the records as a whole, and the arguments of counsel, Appellant respectfully requests that this Court reverse the District Court's grant of summary judgment and that the matter be remanded to the District Court for further findings.

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Dated: April 20, 2012



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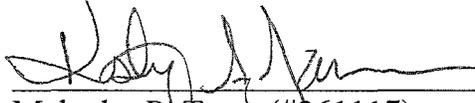
CERTIFICATE OF COMPLIANCE

This brief complies with the requirements of Rule 132.01 of the Minnesota Rules of Civil Appellate Procedure as to word count. This brief contains 1,967 words, excluding the parts of the brief exempted by Rule 131.01, subd. 5(d)(7)(C), and the brief meets the type face requirements of Rule 131.01, subd. 5(d)(7)(C).

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