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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

AMY MCFALLS, et al.	:	
	:	
Petitioners,	:	No. 4 MD 2021
v.	:	Class Action
	:	Original Jurisdiction
38 TH JUDICIAL DISTRICT, et al.	:	
	:	
Respondents.	:	

**BRIEF IN SUPPORT OF RESPONDENT CLERK OF COURTS
LORI SCHREIBER'S PRELIMINARY OBJECTIONS TO
THE PETITION FOR REVIEW**

I. MATTER BEFORE THE COURT

Respondent Clerk of Courts Lori Schreiber's Preliminary Objections to
Petitioners' Petition for Review regarding allegations of the assessment of duplicative

court costs against Petitioners and other proposed class members as part of criminal convictions and sentences in in the Court of Common Pleas of Montgomery County.

II. STATEMENT OF QUESTIONS INVOLVED

1. Should Petitioners' Petition for Review be dismissed on demurrer for legal insufficiency pursuant to Pa.R.C.P. 1028(a)(4) as no claim has been raised against Respondent Clerk of Courts Schreiber?

Suggested Answer: **YES**

2. Should Petitioners' Petition for Review be dismissed for insufficient specificity pursuant to Pa.R.C.P. 1028(a)(3) as no discernible claim has been raised against Respondent Clerk of Courts Schreiber?

Suggested Answer: **YES**

3. Should Petitioners' Petition for Review be dismissed as Petitioners failed to exercise or exhaust all remedies at law pursuant to Pa.R.C.P. 1028(a)(7) and (8)?

Suggested Answer: **YES**

III. FACTS

On or about January 8, 2021, Petitioners commenced this action by filing a Petition for Review (the "Petition") to this Court's original jurisdiction alleging violations of the United States Constitution, the Pennsylvania Constitution, and the laws of the Commonwealth by the 38th Judicial District of Pennsylvania; the Honorable Thomas M. Del Ricci, President Judge of the Court of Common Pleas of Montgomery County; the Court Administrator for the Court of Common Pleas,

Michael R. Kehs, Esquire; and the Montgomery County Clerk of Courts (collectively, the “Respondents”). Respondent Clerk of Courts Lori Schreiber (hereinafter referred to as the “Clerk of Courts”) was sued solely in her official capacity.

The Petition alleges that Respondents, collectively, assessed and collected court costs in violation of authority. Petitioners allege these court costs, characterized as duplicative, were unlawful, arbitrary, without any rational basis, and without timely and adequate notice. The 38th Judicial District, the President Judge, and the Court Administrator (collectively, the “Judicial Respondents”) filed Preliminary Objections to the Petition on or about February 4, 2021. The Clerk of Courts, incorporating Judicial Respondents’ Preliminary Objections, filed Preliminary Objections to the Petition on March 1, 2021. This brief follows.

The Petition makes no representation that the Clerk of Courts, acting in her official capacity as the clerk of courts, has discretion to determine the imposition or collection of fees. The Petition makes no representation that the Clerk of Courts is able to create policy that deviates from the orders of the Court of Common Pleas or those policies and procedures established by the Administrative Office of the Pennsylvania Courts. The Petition makes no representation that Petitioners’ exhausted their procedural or statutory remedies in contesting the imposition of costs under a sentencing order. The Petition makes no representation that the Clerk of Courts deviates from any established policy, procedure, or statute in the entrance or

collection of costs on behalf of the Court. The Clerk of Courts denies the allegations made in Petitioners' Petition along with any and all liability in this matter.

IV. ARGUMENT

A. The Petition Should Be Dismissed On Demurrer For Legal Insufficiency Pursuant To Pa.R.C.P. 1028(a)(4) As No Claim Has Been Raised Against the Clerk of Courts

- 1. Petitioners request for relief is beyond the scope of the powers granted to the clerk of courts and therefore improper as the clerk of courts may not exercise any authority beyond that authority conferred by or derived from either statute or rule of court.**

In County of Allegheny v. Commonwealth, 490 A.2d 402, 408 (Pa. 1985), the Pennsylvania Supreme Court set forth the proper scope of review to a challenge to the sustaining of a preliminary objection in the nature of a demurrer and stated:

A demurrer can only be sustained where the complaint is clearly insufficient to establish the pleader's right to relief. Firing v. Kephart, 353 A.2d 833 (Pa. 1976). For the purpose of testing the legal sufficiency of the challenged pleading a preliminary objection in the nature of a demurrer admits as true all well-pleaded, material, relevant facts, Savitz v. Weinstein, 149 A.2d 110 (Pa. 1959); March v. Banus, 151 A.2d 612 (Pa. 1959), and every inference fairly deducible from those facts, Hoffman v. Misericordia Hospital of Philadelphia, 267 A.2d 867 (Pa. 1970); Troop v. Franklin Savings Trust, 139 A. 492 (Pa. 1927). The pleader's conclusions or averments of law are not considered to be admitted as true by a demurrer. Savitz v. Weinstein, supra.

Since the sustaining of a demurrer results in a denial of the pleader's claim or a dismissal of his suit, a preliminary objection in the nature of a demurrer should be sustained only in cases that clearly and without a doubt fail to state a claim for which relief may be granted. Schott v.

Westinghouse Electric Corp., 259 A.2d 443 (Pa. 1969); Botwinick v. Credit Exchange, Inc., 213 A.2d 349 (Pa. 1965); Savitz v. Weinstein, supra; London v. Kingsley, 81 A.2d 870 (Pa. 1951); Waldman v. Shoemaker, 80 A.2d 776 (Pa. 1951). If the facts as pleaded state a claim for which relief may be granted under any theory of law then there is sufficient doubt to require the preliminary objection in the nature of a demurrer to be rejected. Packler v. State Employment Retirement Board, 368 A.2d 673, 675 (Pa. 1977); see also Schott v. Westinghouse Electric Corp., supra, 259 A.2d at 449.

The Petition fails to identify a single cause of action, let alone a cause of action against the Clerk of Courts. Here, the Petition “clearly and without a doubt” fails to state a claim for relief against the Clerk of Courts.

The office of clerk of courts derives its constitutional authority from Article V, § 15 of the Pennsylvania Constitution. In re Administrative Order No. 1-MD-2003, 936 A.2d 1, 9 (Pa. 2007). Section 15 empowers the clerk of courts to “perform the duties of the office and to maintain and be responsible for the records, books and dockets” of the Court. Pa. Const. Art. V, § 15.

Furthermore, the clerk of courts powers and duties are defined by statute as:

The office of the clerk of courts shall have the power and duty to:

- 1) Administer oaths and affirmations and take acknowledgments pursuant to section 327 (relating to oaths and acknowledgments), but shall not be compelled to do so in any matter not pertaining to the proper business of the office.
- 2) Affix and attest the seal of the court or courts to all the process thereof and to the certifications and exemplifications of all documents and records pertaining to the office of the clerk of the courts and

- the business of the court or courts of which it is the clerk of the courts.
- 3) Enter all criminal judgments and judgments entered by confession.
 - 4) Exercise the authority of the clerk of the courts as an officer of the court.
 - 5) Exercise such other powers and perform such other duties as may now or hereafter be vested in or imposed upon the office by law, home rule charter, order or rule of court, or ordinance of a county governed by a home rule charter or optional plan of government.

42 Pa.C.S.A. § 2757.

The authority of the clerk of courts has been interpreted as limited and administrative. “It is ‘well settled’ in the intermediate appellate courts of this Commonwealth that the role of the prothonotary¹ of the court of common pleas, while vitally important, is purely ministerial.” Order No. 1-MD-2003, 936 A.2d at 9.² “As a simply ministerial office, any authority exercised by the prothonotary must derive from either statute or rule of court.” Id.³ “Further, as ‘[t]he prothonotary is merely the clerk of the court of Common Pleas[,]’[h]e has no judicial powers, nor does

¹ “It is important for the analysis...to note that the clerk of courts and the prothonotary are parallel offices, the former administering the criminal division of the court of common pleas and the latter the civil division. Both offices derive their constitutional authority from Article V, § 15. Further 42 Pa.C.S. § 2737 provides the prothonotary with the same roles over the civil division as the clerk of courts has under § 2757. The only difference is the prothonotary’s added power to ‘enter all satisfactions of civil judgments.’ 42 Pa.C.S. § 2737(4).” Order No. 1-MD-2003, 936 A.2d at 9.

² *Citing* Gotwalt v. Dellinger, 577 A.2d 623 (Pa. Super Ct. 1990) (*citing* Chamberlain v. Altoona Hosp., 567 A.2d 1067, 1068 (Pa. Super Ct. 1989); Irwill Knitwear Corp. v. Wexler, 323 A.2d 23, 24 (Pa. Super. Ct. 1974).

³ *Citing* Gotwalt at 625 (*citing* Newsome v. Braswell, 406 A.2d 347, 349 (Pa. Super. Ct. 1979).

he have power to act as attorney for other by virtue of his office.'" Id.⁴ Most essentially, the Supreme Court states: "The prothonotary is not 'an administrative officer who as discretion to interpret statutes.'" Id.⁵ "Thus, while playing an essential role in our court system, the prothonotary's powers do not include the judicial role of statutory interpretation." Id.

The Supreme Court of Pennsylvania goes on to summarize the authority of the clerk of courts and the ability of the clerk of courts to interpret and/or challenge the orders of the Court of Common Pleas.

The powers granted to the clerk of courts by 42 Pa.C.S. § 2757 are clearly ministerial in nature. Nothing in this grant of authority suggests the power to interpret statutes and to challenge actions of the court that the clerk perceives to be in opposition to a certain law. Thus, the clerk of courts, as a purely ministerial office, has no discretion to interpret rules and statutes. Thompson, supra. **As such, it is not the function of the clerk of courts to interpret the administrative orders of the court of common pleas to determine whether they comply with the law.**

Id. (Emphasis added.)⁶

⁴ *Citing* Gotwalt at 625 (*citing* Smith v. Safeguard Mutual Ins. Co., 239 A.2d 824, 826 9Pa. Super. Ct. 1968).

⁵ *Citing* Thompson v. Cortese, 398 A.2d 1097, 1081 (Pa. Commw. Ct. 1979) (*quoting* Warner v. Cortese, 288 A.2d 550, 552 (Pa. Commw. Ct. 1972).

⁶ *See also* Commonwealth Dept. of Health v. Hanes, 78 A.3d 676, where the Commonwealth Court held the Montgomery County Register of Wills, in acting in his official capacity as Clerk of the Orphans' Court of Montgomery County, could not interpret the provisions of the Marriage Law while discharging the duties of the office. (*See also* In re Coats, 849 A.2d 254, 258 (Pa. Super. Ct. 2004), "[T]he orphans' court clerk simply performs its ministerial duty in accordance with the statutory mandate that requires applicants to appear in person.... The office of the clerk of the orphans' court is not *sui juris* but is dependent on county and legislative provisions to implement its function...") The same is applicable to the clerk of courts of the Court of Common Pleas.

Petitioners' requested relief is inapplicable to the Clerk of Courts as in her official capacity as clerk of courts, the Clerk of Courts fulfills a ministerial function and has no discretion as to the imposition of costs as part of Petitioners' sentences. The Clerk of Courts is obliged to follow the orders of the Judges of Court of Common Pleas and assess and collect fees as calculated by the Administrative Office of Pennsylvania Courts system for criminal cases (the Common Pleas Case Management System, commonly referred to as "CPCMS"). Petitioners request for relief is beyond the scope of the powers granted to the clerk of courts and therefore improper as the clerk of courts may not exercise any authority beyond that authority conferred by or derived from either statute or rule of court.

2. Sovereign immunity precludes the stated claims that seek to compel the Clerk of Courts to take action.⁷

⁷ Petitioners have made a Preliminary Objection that sovereign immunity is an affirmative defense that must be pled in by New Matter. However, Pennsylvania law provides that sovereign immunity may be raised by preliminary objection where sovereign immunity is evident on the face of the complaint. "Immunity is an affirmative defense that ordinarily must be pled as a new matter. Pa.R.C.P. 1030. **An exception to this rule exists where it is apparent from the face of the complaint that immunity acts as a bar to the cause or causes of action.**" Paluch v. Penna. Dept. of Corrections, 175 A.3d 433, n. 5 (Pa. Commw. Ct. 2017) (emphasis added). It is clear on the face of the Petition that Petitioners raise a claim against a Commonwealth official only in her official capacity for actions taken in the execution of her official duties. There is no clearer application of sovereign immunity. The Petitioners' own presentation of the Petition only concerns actions by the Clerk of Courts that are subject to sovereign immunity. "...Pennsylvania courts have long recognized a limited exception to this rule and have allowed parties to plead the affirmative defense of immunity as a preliminary objection where the defense is clearly applicable on the face of the complaint." Feldman v. Hoffman, 107 A.3d 821, 829 (Pa. Commw. Ct. 2014). As the applicability of sovereign immunity is clear, the defense is appropriately raised through preliminary objections. This Court has also rejected the notion that should an objection be raised to a preliminary objection of sovereign immunity, the exception does not apply. *See* Feldman at 830. "...[N]o purpose would be served by a delay in ruling on the matter and it would expedite disposition of the case." Id. at

An action against an official of the Commonwealth is barred by both the state's doctrine and statutes related to sovereign immunity as well as the Eleventh Amendment to the United States Constitution. "An action against Commonwealth officials sued in their official capacities is barred by the Eleventh Amendment for the reason that any damages would have to be paid out of state funds." Jimenez v. Lakelands Racing Ass'n, Inc., 567 F.Supp. 1298, 1303 (W.D.Pa. 1983). The Commonwealth has declared the continuation of sovereign immunity for its officers under 1 Pa.C.S.A. § 2310.⁸ This section enables provisions for exceptions to the grant of sovereign immunity for judicial officers under 42 Pa.C.S.A. § 8521, et seq. These statutes grant blanket sovereign immunity to Commonwealth officials unless such claim falls within an exception enumerated in 42 Pa.C.S.A. § 8522.⁹ "Official immunity from civil suits applies to government officials...when said government officials act within the course and scope of their duties." Rouse v. Williams, 2017 WL 3687749 (Pa. Commw. Ct. 2017), citing Heicklen v. Hoffman, 761 A.2d 207, 209 (Pa.

831. As the defense is properly raised by preliminary objection due to the clear presentation of the defense in the Petition and it is against the interest of judicial economy to reject the objection, the portion of the Clerk of Courts' Preliminary Objection related to sovereign immunity is properly pled.

⁸ The Commonwealth has a long-standing history of sovereign immunity for its officers. The provisions of 1 Pa.C.S.A. § 2310 affirms the sovereign immunity of Commonwealth officers long enjoyed and specifically provides for any waivers or exceptions to sovereign immunity for members of the judiciary.

⁹ 42 Pa.C.S.A. § 8522(b) provides the following exceptions to sovereign immunity: (1) Vehicle liability; (2) Medical-professional liability; (3) Care, custody or control of personal property; (4) Commonwealth real estate, highways and sidewalks; (5) Potholes and other dangerous conditions; (6) Care, custody or control of animals; (7) Liquor store sales; (8) National Guard activities; (9) Toxoids and vaccines; and (10) sexual abuse. None of these exceptions are applicable in this matter.

Commw. Ct. 2000). “Official immunity is limited to statements and actions which are ‘closely related’ to the performance of those duties.” Id. The entirety of the unified judicial system “is entitled to sovereign immunity of the Commonwealth.” Renner v. Ct. of Common Pleas of Lehigh Cnty., 195 A.3d 1070 (Pa. Commw. Ct. 2018), quoting Russo v. Allegheny Cnty., 125 A.3d 113, 117 (Pa. Commw. Ct. 2015).

The Clerk of Courts has been sued by Petitioners in her official capacity as the clerk of courts of Montgomery County for official acts within the course and scope of her duties. There is not a more clear-cut instance where a Commonwealth officer is protected by the Commonwealth’s grant of sovereign immunity. The Clerk of Courts has exercised no discretion in the execution of the ministerial functions of her office and, in completing the actions alleged by Petitioners, has only acted within the course and scope of the official duties of the clerk of courts, without deviation. The Clerk of Courts, protected by both the Commonwealth’s sovereign immunity and the Eleventh Amendment to the United States Constitution, cannot be liable for any claim brought against her in the execution of the duties of her office.

In Robinson v. Musmanno, this Court states that “[j]udges are absolutely immune from liability for damages when performing judicial acts, even if their actions are in error or performed with malice...” 2010 WL 9516526 (Pa. Commw. Ct. 2010), citing Beam v. Daihl, 767 A.2d 585, 586 (Pa. Super Ct. 2001). The Superior Court expands on this reasoning, stating: “[i]f magistrates are to be free to exercise their discretion and apply their understanding of the law to the facts before them, they

must be granted such a measure of independence that they are not compelled to respond in damages for mistakes honestly made, provided they have not acted beyond the pale of their authority.” Feingold v. Hill, 521 A.2d 33, 36 (Pa. Super. Ct. 1987). The Clerk of Courts asserts no allowance for discretion or interpretation, as is afforded the judicial officials of the Commonwealth. The Clerk of Courts, however, is afforded the same protection under the Commonwealth’s sovereign immunity as she has only acted within the “pale of [her] authority” in administering the functions of the Clerk of Courts. Accordingly, all claims raised against the Clerk of Courts, as have been raised only in her official capacity as clerk of courts, are precluded by the Commonwealth’s sovereign immunity.

3. Petitioners request for relief is prohibited in part by the doctrine of Heck v. Humphrey, 512 U.S. 477 (1994).

Any claims under 42 U.S.C. § 1983 against the Clerk of Courts are prohibited under Heck v. Humphrey, 512 U.S. 477(1994) as Petitioners have not shown that the underlying convictions or sentences are invalid. “We[, the Supreme Court of the United States,] hold that, in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court’s issuance of a writ of habeas corpus, 28 U.S.C.

§ 2254.” Heck at 486-7. Where the Petitioner has or had other remedies to seek redress of the claim, Heck bars a § 1983 action against the state. See Defining the Reach of Heck v. Humphrey: Should the Favorable Termination Rule Apply to Individuals Who Lack Access to Habeas Corpus?, 121 Harv. L. Rev. 868 (2008).

Petitioners make no claim that their underlying convictions or sentences were inappropriately imposed nor can nor do Petitioners claim that the underlying convictions and sentences have been invalidated in an appropriate venue. Petitioners are unable to meet the threshold test under Heck for bringing a § 1983 claim against the Clerk of Courts. Furthermore, Petitioners, as discussed below, have not exercised nor exhausted the proper remedies to address their alleged grievances. Having not pursued redress properly, a § 1983 claim is not ripe and is prohibited by the Supreme Court (U.S.) holding in Heck.

B. The Petition Should Be Dismissed For Insufficient Specificity Pursuant To Pa.R.C.P. 1028(a)(3) As No Discernible Claim Has Been Raised Against Respondent Schreiber

An action initiating filing, such as a complaint or petition for review, must provide sufficient specificity for the responding party or parties to present a defense. “The pertinent question under Rule 1028(a)(3) is whether the complaint is sufficiently clear to enable the defendant to prepare his defense,’ or ‘whether the plaintiff’s complaint informs the defendant with accuracy and completeness of the specific basis on which recovery is sought so that he may know without question upon what grounds to make his defense.’ Ammlung v. City of Chester, 302 A.2d 491, 498 n. 36

(Pa. Super. Ct. 1973) (quoting 1 Goodrich-Amram § 1017(b)-9).” Rambo v. Greene, 906 A.2d 1232, 1236 (Pa. Super. Ct. 2006).

Petitioners make a general assertion that the actions of Respondents are in violation of rights guaranteed by the Pennsylvania and United States Constitutions. While the Petition lists various counts related to the supposed Constitutional claims, no discernible claim is contained in the allegations of the Petition. Furthermore, Petitioners prayer for relief does not address the violation of any Constitutionally-afforded rights, but addresses only process issues related to the Court’s administration of costs. This lack of specificity in the Petition leaves Respondents without direction as to how to respond to the supposed Constitutional claims.

C. The Petition Should Be Dismissed As Petitioners Failed To Exercise Or Exhaust All Remedies At Law Pursuant To Pa.R.C.P. 1028(a)(7) And (8)

Any challenge to the assessment of court costs “is properly brought in the sentencing court.” Commonwealth v. Williams, 909 A.2d 419, 421 (Pa. Commw. Ct. 2006).¹⁰ The imposition of costs must take place during sentencing and is modifiable during the statutory appeal period under 42 Pa.C.S.A. § 5505. See Commonwealth v. LeBar, 860 A.2d 1105 (Pa. Super. Ct. 2004) (where judge failed to impose court costs during original sentencing and was subsequently barred from imposing costs after expiration of 30-day period). While court costs are not intended to be punitive in

¹⁰ See Commonwealth v. Cutillo, 440 A.2d 607 (Pa. Super. Ct. 1982); Commonwealth v. Gill, 432 A.2d 1001 (Pa. Super. Ct. 1981).

nature and are incidental to judgment, see Commonwealth v. Rivera, 95 A.3d 913, 916-7 (Pa. Super Ct. 2014), the mechanism for imposing and contesting the imposition of court costs is during the § 5505 appeal period. See LeBar, supra.

Petitioners each individually had the opportunity to appeal the imposition of any costs during the § 5505 period. Failure to raise this issue to the sentencing court waives the right to now contest the imposition of those costs during the sentencing process. By failing to pursue an appeal of these costs at the appropriate time, the Petitioners failed to exercise or exhaust the remedies available to them. Therefore, this appeal is too late and not ripe, at the same time, to assert these the imposed costs. Accordingly, the Petitioners claims should be dismissed.

V. RELIEF

WHEREFORE, for reasons set forth above, Respondent Clerk of Courts Lori Schreiber, hereby requests that this Honorable Court sustain Respondent Clerk of Courts Schreiber's Preliminary Objections and dismiss Petitioners' claims against Respondent Clerk of Courts Schreiber with prejudice.

Respectfully submitted,

/s/ Gregory R. Heleniak

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 :

CERTIFICATE OF SERVICE

The undersigned certifies that on the **9th day of April, 2021**, he caused a copy of the foregoing **BRIEF IN SUPPORT OF PRELIMINARY OBJECTIONS** to be served via PACfile on counsel of record.

/s/ Gregory R. Heleniak
Gregory R. Heleniak, Esquire

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

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ORDER

AND NOW, this _____ day of _____, 2021, upon consideration of Respondent Clerk of Courts Lori Schreiber's Preliminary Objections to the Petition for Review, and Petitioners' response, it is **ORDERED** that the Preliminary Objections are **SUSTAINED**.

The claims against Respondent Clerk of Courts Lori Schreiber are **DISMISSED** with prejudice.

J.