

FILED
Court of Appeals
Division III
State of Washington
6/8/2020 2:04 PM

NO. 369854

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

Roy D. Cheesman; Ruth F. Conde Cheesman,

Petitioners,

v.

Christopher Herion, Special Assistant Attorney General,

Respondent.

RESPONSE BRIEF

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TABLE OF CONTENTS

I. INTRODUCTION.....1

II. COUNTERSTATEMENT OF ISSUES ON APPEAL2

III. COUNTERSTATEMENT OF THE CASE3

 A. Facts3

 1. Law Enforcement Takes Children into Protective Custody.....3

 2. Dependency Petitions Filed in Kittitas County Superior Court5

 3. Christopher Herion’s Role in the Cheesman Dependency Petition.....7

 B. Procedural History8

IV. ARGUMENT9

 A. The Cheesmans Continue to Rely on Unsupported Allegations.9

 B. Standard of Review.....11

 C. The Cheesmans’ Assertions of Claims under Criminal/Professional Misconduct Statutes Did Not State a Claim upon Which Relief Could Be Granted.12

 D. The Denial of the Cheesmans’ Motion for a Discovery Conference and the Trial Court’s Finding That Mr. Cheesman Is A Vexatious Litigant Are Not Properly Before This Court.14

 E. The Cheesmans’ Claims under 42 U.S.C. § 1983 Fail as a Matter of Law.16

F.	Defendant/Respondent Herion Was Entitled to Dismissal of the Claims Against Him Because the Cheesmans Failed to Create a Genuine Issue of Material Fact.....	18
G.	Defendant/Respondent Herion Was Entitled to Immunity from the Claims Brought Against Him.....	20
1.	Mr. Herion is Entitled to Absolute Immunity in His Quasi-Prosecutorial Role.....	20
2.	SAAG Herion is Entitled to Qualified Immunity on the Cheesmans' § 1983 Claims	23
V.	CONCLUSION	26

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Babcock v. State</i> , 116 Wn.2d 596, 809 P.2d 143 (1991).....	22
<i>Barriga Figueroa v. Prieto Mariscal</i> , 3 Wn. App. 139, 414 P.3d 590.....	14
<i>Bravo v. Dolsen Companies</i> , 125 Wn.2d 745, 888 P.2d 147 (1995).....	11
<i>Butz v. Economou</i> , 438 U.S. 478, 98 S. Ct. 2894, 57 L. Ed. 2d 895 (1978).....	20
<i>Carrillo v. Cty. of Los Angeles</i> , 798 F.3d 1210 (9th Cir. 2015)	23, 25
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).....	19
<i>City & Cty. of San Francisco, Calif. v. Sheehan</i> , 575 U.S. 600, 135 S. Ct. 1765, 191 L. Ed. 2d 856 (2015).....	24
<i>City of Sequim v. Malkasian</i> , 157 Wn.2d 251, 138 P.3d 943 (2006).....	11
<i>Eaglesmith v. Ward</i> , 73 F.3d 857 (9th Cir. 1995)	17
<i>Ford Motor Co. v. Dept. of Treasury</i> , 323 U.S. 459 (1945).....	18
<i>Greenhalgh v. Dep't of Corr.</i> , 160 Wn. App. 706, 248 P.3d 150 (2011).....	20

<i>Gustafson v. City of W. Richland</i> , 2011 WL 5507201 (E.D. Wash. Nov. 7, 2011)	12
<i>Harlow v. Fitzgerald</i> , 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982).....	23
<i>Holder v. City of Vancouver</i> , 136 Wn. App. 104, 147 P.3d 641 (2006).....	14, 15, 16
<i>Imbler v. Pachtman</i> , 424 U.S. 409, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976).....	20
<i>In re Kelly & Moesslang</i> , 170 Wn. App. 722, 287 P.3d 12 (2012).....	20
<i>In re Marriage of Olson</i> , 69 Wn. App. 621, 850 P.2d 527 (1993).....	10
<i>Jackson v. Quality Loan Serv. Corp.</i> , 186 Wn. App. 838, 347 P.3d 487 (2015).....	11
<i>Janaszak v. State</i> , 173 Wn. App. 703, 297 P.3d 723 (2013).....	21
<i>LaPlante v. State</i> , 85 Wn.2d 154, 531 P.2d 299 (1975).....	18
<i>Locke v. City of Seattle</i> , 162 Wn.2d 474, 172 P.3d 705 (2007).....	11
<i>Meyers v. Contra Costa Cty. Dep't of Soc. Servs.</i> , 812 F.2d 1154 (9th Cir. 1987)	21, 22
<i>Moran v. State of Wash.</i> , 147 F.3d 839 (9th Cir. 1998)	24
<i>Pearson v. Callahan</i> , 555 U.S. 223, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009).....	23
<i>Port Susan Chapel of the Woods v. Port Susan Camping Club</i> , 50 Wn. App. 176, 746 P.2d 816 (1987).....	10

<i>Protect the Peninsula’s Future v. City of Port Angeles</i> , 175 Wn. App. 201, 304 P.3d 914 (2013).....	12
<i>Rodriguez v. Loudeye Corp.</i> , 144 Wn. App. 709, 189 P.3d 168 (2008).....	11, 12
<i>SentinelC3, Inc. v. Hunt</i> , 181 Wn.2d 127, 331 P.3d 40 (2014).....	20
<i>State v. Sisouvanh</i> , 175 Wn.2d 607, 290 P.3d 942 (2012).....	10
<i>State v. Wade</i> , 138 Wn.2d 460, 979 P.2d 850 (1999).....	10
<i>State v. Wood</i> , 89 Wn.2d 97, 569 P.2d 1148 (1977).....	14
<i>Talps v. Arreola</i> , 83 Wn.2d 655, 521 P.2d 206 (1974).....	14
<i>Town of Castle Rock v. Gonzales</i> , 545 U.S. 748, 125 S. Ct. 2796, 162 L. Ed. 2d 658 (2005).....	17
<i>U.S. v. Wolf Child</i> , 699 F.3d 1082 (9th Cir.2012)	24, 25
<i>Westberg v. All-Purpose Structures Inc.</i> , 86 Wn. App. 405, 936 P.2d 1175 (1997).....	10
<i>Will v. Michigan Dep’t of State Police</i> , 491 U.S. 58, 109 S. Ct. 2304, 105 L. Ed. 2d 45(1998).....	17
<i>Williams v. Wisconsin</i> , 336 F.3d 576 (7th Cir. 2003)	17
<i>Young v. Key Pharmaceuticals, Inc.</i> , 112 Wn.2d 216, 770 P.2d 182 (1989).....	19
Statutes	
18 U.S.C. § 241.....	12

18 U.S.C. § 242.....	12
42 U.S.C. § 1983.....	16, 20
RCW 18.235.130	13
RCW 33.36.060	12, 13
RCW 42.20.040	13
RCW 9A.72.150.....	12, 13
RCW 9A.36.120.....	13
RCW 9.62	12
RCW 9A 76.175.....	13
Rules	
CR 26(f)	15
CR 56(c).....	11, 18
RAP 10.3.....	9
RAP 10.3(5).....	10
RAP 10.3(6)	10
RAP 12.1(a)	14, 15, 16

I. INTRODUCTION

The trial court dismissed each of Appellants Roy and Ruth Ann Conde Cheesmans' claims because the claims were not supported by the law or because the Cheesmans failed to offer competent evidence to support them. Their appeal suffers from the same flaw.

The Cheesmans have initiated a series of lawsuits against agencies, school districts, and individuals stemming from a dependency petition filed by the Washington State Department of Social and Health Services after the Cheesmans' children showed signs of physical abuse. Christopher Herion, the Respondent in this case, was the Special Assistant Attorney General that prosecuted the dependency petition. All of these lawsuits, in both state and federal court, have been dismissed. Mr. Cheesman is now required to obtain judicial approval before filing another lawsuit in state court regarding the dependency petition.

There are three matters for which the Cheesmans filed notices of appeal: (1) the grant of Defendant/Respondent Christopher Herion's CR 12 Motion dismissing criminal and professional misconduct charges against him in his capacity as a Special Assistant Attorney General¹; (2)

¹ CP 225-26 (Order Granting in Part Defendant's CR 12 Motion to Dismiss), CP 222-24 (Notice of Appeal)

denial of Mr. Cheesman's motion for a discovery conference²; and (3) the grant of the Mr. Herion's motion for summary judgment on the remaining claims³.

The denial of the motion for a discovery conference is not, however, before this Court as it has been abandoned in the Cheesmans' briefing. Similarly, the trial court's finding that Roy Cheesman is a vexatious litigant is not before this Court.⁴

As to the matters before this Court, the trial court correctly dismissed claims brought by the Cheesmans under federal and state criminal/professional misconduct statutes against Christopher Herion because they do not provide a private cause of action. The trial court's grant of summary judgment as to the remaining claims was proper because the Cheesmans failed to create a genuine question of material fact. Accordingly, this Court should affirm the decisions of the trial court below.

II. COUNTERSTATEMENT OF ISSUES ON APPEAL

1. Was dismissal of ten of the Cheesmans' claims against Special Assistant Attorney General Herion pursuant to CR

² CP 231 (Order Re: Contempt and Discovery Conference), CP 227-30 (Notice of Appeal)

³ CP 831-32(Order Granting Defendant's Motion for Summary Judgment), CP 833-36 (Notice of Appeal)

⁴ Although the Cheesmans tangentially mentioned the finding in one of their three notices of appeal (CP 834), they have abandoned it in their briefing.

12 proper when claims arising under criminal/professional misconduct statutes do not provide a private cause of action?

2. Was dismissal of the Cheesmans' claims proper when they did not present any evidence to support their claims or create a genuine issue of material fact?
3. Does the Cheesmans' claim under 42 U.S.C. § 1983 fail as a matter of law because Mr. Herion was sued in his official capacity?
4. Is Mr. Herion entitled to absolute immunity in his quasi-prosecutorial role as a Special Assistant Attorney General prosecuting child dependency cases?
5. Is Mr. Herion entitled to qualified immunity when the Cheesmans failed to offer any evidence that his conduct violated a clearly established statutory or constitutional rights of which a reasonable person would have known?

III. COUNTERSTATEMENT OF THE CASE

A. Facts

1. Law Enforcement Takes Children into Protective Custody

Roy and Ruth Ann Cheesman, have three children, L.C., I.C., and

V.C. On December 7, 2016, a school official discovered that one of the children, L.C., had bruising on her face that caused a black eye. CP 334. The child's teacher was concerned by the injury and the child's statements, and the teacher sent the child to the school nurse for the black eye. *Id.* Based upon previous interactions with L.C.'s father, Roy Cheesman, school officials contacted law enforcement out of fear for L.C.'s safety. *Id.* Given Mr. Cheesman's history of yelling at staff and being quick to escalate conflict, law enforcement did not feel that it was safe to speak to L.C. with Mr. Cheesman present to pick her up from school. *Id.*

On December 8, Detective Jennifer Margheim of the Ellensburg Police Department and Tabitha Snyder, an investigator for CPS, conducted a forensic interview of L.C. at the school. CP 334. Based upon L.C.'s inconsistent statements and a statement that she was afraid of her father, law enforcement took L.C. into protective custody. *Id.* The Ellensburg Police Department and CPS interviewed the other two children, I.C. and V.C., and learned of possible physical abuse. CP 335. Law enforcement requested that Ms. Snyder take the children for immediate medical exams, and Ms. Snyder took the children to Kittitas Valley Healthcare Hospital. *Id.* Law enforcement also took I.C. and V.C. into protective custody. *Id.*

2. Dependency Petitions Filed in Kittitas County Superior Court

After exploring voluntary options for the Cheesmans to obtain recommended treatment to create a safe home environment for the children, the Department of Social and Health Services (DSHS) filed dependency petitions in Kittitas County Superior Court concerning the three children. After a contested shelter care hearing where both parents were represented by counsel, the court ordered that all three children remain in out of home placement CP 269, 286-312.

On February 14, 2017, the Kittitas County Superior Court granted DSHS's motion to suspend Mr. Cheesman's visitation with the three children based upon Mr. Cheesman's increased confrontational and irrational behavior, his inappropriate conversations with his children, and his pending criminal charges. CP 270.

On January 25, 2017, Mrs. Cheesman's attorney submitted written discovery requests to DSHS. CP 269. On February 7, 2017, DSHS provided responsive documents to the discovery requests, including medical records from the December 8, 2016 medical exam of L.C. CP 269 -70. By February 12, 2017, there could be no doubt that the Cheesmans had received the medical records. CP 270. For instance, Mrs. Cheesman referenced the medical records in her administrative appeal of

the CPS findings. *Id.*

After a contested dependency fact-finding hearing, the court dismissed the dependency petition on August 17, 2017. CP 255. While the court found the State had proved that Mr. Cheesman was not a capable parent, the court did not find that the State proved that Mr. Cheesman abused or neglected his daughters. CP 256. Consequently, the court found that the State's case against Ruth Ann Cheesman as an incapable parent could not be sustained because it was premised upon allegations that she enabled and supported her husband over the safety and welfare of her children. CP 256. However, the court did find that DSHS had established the legal requirements for proceeding towards dependency and that there was sufficient evidence to warrant placing the children out of home. *Id.*

After the court dismissed the dependency petition, the Cheesmans individually filed multiple lawsuits against various parties related to the dependency petition. CP 262. Mr. Cheesman has filed at least six lawsuits in Washington state courts relating to the Department's dependency petition. *Id.*

3. Christopher Herion's Role in the Cheesman Dependency Petition

Mr. Herion was, and still is, employed as a Special Assistant Attorney General ("SAAG") for the Washington State Attorney General's Office. CP 252. In his role as a SAAG, Mr. Herion represents DSHS in child dependency actions. CP 253. When there are concerns that a child has been abused, neglected, or abandoned, DSHS files a dependency petition to have the State assume temporary custody of the child. *Id.* This process is vitally important to provide for the safety and welfare of children throughout Washington. Mr. Herion served as a SAAG in the Cheesman dependency petition. CP 252.

Mr. Herion has 19 years of experience as an attorney, of which he has served 3 ½ as a SAAG representing DSHS. CP 252 – 53. Mr. Herion's role is to prosecute dependency actions to find the option that is in the best interest of each child. CP 253. In this role, he is often called upon to make quick litigation decisions, sometimes based upon incomplete or contradictory information, to prevent further abuse or serious harm to children. *Id.*

Dependency petitions are initiated upon the recommendation of the CPS investigator or DSHS caseworker that is assigned to each individual case. CP 254. Mr. Herion's role in this case began when the dependency

petition was filed in Kittitas County Superior Court. *Id.*

In his role as the SAAG in the Cheesman case, Mr. Herion followed all applicable laws, rules, policies, and procedures relating to the dependency petition. CP 257. He promptly produced all responsive documents from the Cheesmans' discovery requests, and he never withheld, suppressed, or altered evidence. CP 254, 257. At all times, he used his best professional judgment based upon the available evidence to prosecute the dependency action in order to ensure that each of the Cheesmans' children would remain safe and healthy. CP 257.

B. Procedural History

On January 25, 2019, Roy Cheesman filed a complaint in Kittitas County Superior Court against Christopher Herion, Special Assistant Attorney General for the Washington State Attorney General's Office. CP 7 – 10. On March 20, 2019, Mr. Herion filed a motion to dismiss pursuant to CR 12 to dismiss all of Mr. Cheesman's claims. CP 19 – 30. On July 2, 2019, the trial court granted the motion in part and dismissed all of Mr. Cheesman's claims that stated criminal/professional misconduct causes of action under state and federal criminal/professional misconduct statutes, but the court denied the motion with respect to the Cheesmans' claims arising under 42 U.S.C. § 1983. CP 163 – 67.

The Cheesmans then filed a motion to require a discovery conference, but the trial court denied this motion because the Cheesmans had not served any written discovery requests upon Mr. Herion. CP 193 – 200. On July 24, 2019, Mr. Herion then filed a motion for summary judgment on the Cheesmans’ remaining claims and requested that the trial court declare Mr. Cheesman a vexatious litigant due to his repeated abuses of the judicial system. CP 234 – 51. On October 11, 2019, the court granted the motion, dismissed the remaining claims with prejudice, and found that Mr. Cheesman was a vexatious litigant. CP 831 – 32. This appeal followed.

IV. ARGUMENT

Both CR 12 and 56 operate to ensure that only those cases where a plaintiff has stated a claim upon which relief can be granted and that present a genuine question of material fact proceed to trial. The Cheesmans’ claims were not supported by the law or facts and were properly dismissed.

A. The Cheesmans Continue to Rely on Unsupported Allegations.

The Cheesmans have continued to offer unsupported allegations; in this instance, providing this Court briefing entirely devoid of citations to the record. RAP 10.3 requires that a party’s brief contain a “fair statement of the facts and procedure relevant to the issues presented for review,

without argument. Reference to the record must be included for each factual statement.” RAP 10.3(5). Further, a party’s legal argument must include citations “to relevant parts of the record.” RAP 10.3(6). *Pro se* litigants are bound by the same rules of procedure and substantive law as an attorney. *In re Marriage of Olson*, 69 Wn. App. 621, 626, 850 P.2d 527 (1993); *Westberg v. All-Purpose Structures Inc.*, 86 Wn. App. 405, 411, 936 P.2d 1175 (1997), *as amended* (June 13, 1997). The “party presenting an issue for review has the burden of providing an adequate record to establish such error.” *State v. Sisouvanh*, 175 Wn.2d 607, 619, 290 P.3d 942 (2012). Further, “[a]n appellate court may decline to address a claimed error when faced with a material omission in the record.” *State v. Wade*, 138 Wn.2d 460, 465, 979 P.2d 850 (1999).

Here, the Cheesmans have not cited to the record at any point in their briefing. The same scenario was presented to the trial court where the Cheesmans failed to offer a single affidavit, declaration, or other admissible evidence in response to Mr. Herion’s motions. “It is not the responsibility of this Court to attempt to discern what it is appellant may have intended to assert that might somehow have merit.” *Port Susan Chapel of the Woods v. Port Susan Camping Club*, 50 Wn. App. 176, 188, 746 P.2d 816 (1987). Simply put, as appellants, the Cheesmans have failed to offer this Court anything to review aside from their bare allegations and

unsupported arguments. Accordingly, this Court should decline to consider their appeal.

B. Standard of Review

If the Court, in the absence of citations to the record, were to entertain this appeal, there are only two issues before this Court: the trial court's granting in part Respondent Herion's CR 12 motion (CP 225-26) and his summary judgment motion (831-32). Both orders are reviewed de novo. *See Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 717–18, 189 P.3d 168 (2008) (CR 12 motion to dismiss); *City of Sequim v. Malkasian*, 157 Wn.2d 251, 261, 138 P.3d 943 (2006) (summary judgment).

“Dismissal under CR 12(b)(6) is appropriate in those cases where the plaintiff cannot prove any set of facts consistent with the complaint that would entitle the plaintiff to relief.” *Jackson v. Quality Loan Serv. Corp.*, 186 Wn. App. 838, 843, 347 P.3d 487 (2015) (citing *Bravo v. Dolsen Companies*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995)). Similarly, CR 56(c) provides that summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. *See also Locke v. City of Seattle*, 162 Wn.2d 474, 483, 172 P.3d 705 (2007).

C. The Cheesmans' Assertions of Claims under Criminal/Professional Misconduct Statutes Did Not State a Claim upon Which Relief Could Be Granted.

The Cheesmans allege violations of federal and state criminal/professional misconduct statutes that do not provide a private cause of action and were properly dismissed.

CR 12(b)(6) provides for dismissal of a complaint if it fails to state a claim upon which relief can be granted. Dismissal is warranted only if the court concludes, beyond a reasonable doubt, the plaintiff cannot prove any set of facts which would justify recovery. All facts alleged in the plaintiff's complaint are presumed true. But the court is not required to accept the complaint's legal conclusions as true.

Rodriguez, 144 Wn. App. at 717–18 (internal citations omitted). It is well established that criminal statutes do not provide a private cause of action. See e.g., *Protect the Peninsula's Future v. City of Port Angeles*, 175 Wn. App. 201, 209, 304 P.3d 914 (2013); *Gustafson v. City of W. Richland*, 2011 WL 5507201, at *4 (E.D. Wash. Nov. 7, 2011), *aff'd*, 559 Fed. Appx. 644 (9th Cir. 2014) (“[H]owever, sections 241 and 242 do not provide a private cause of action that may be pursued by individuals.”).

Mr. Cheesman brought claims against Mr. Herion, in his capacity as a Special Assistant Attorney General for the following: Conspiracy Against Rights, 18 U.S.C. § 241; Deprivation of Rights, 18 U.S.C. § 242; Malicious Prosecution-Abuse of Process, RCW 9.62; Tampering with Physical Evidence, RCW 9A.72.150; Spoliation of Evidence, RCW

33.36.060; Assault of a Child, RCW 9A.36.120; False and Misleading Statements to a Public Servant, RCW 9A 76.175; False Reports, RCW 42.20.040; Suppressing, Secreting, or Destroying Evidence or Records, RCW 33.36.060; and Unprofessional Conduct, RCW 18.235.130. CP 7-10.⁵

Defendant/Respondent Herion brought a Motion to Dismiss pursuant to CR 12(b)(6) arguing that those statutes do not provide a private cause of action. CP 19-30. Mr. Cheesman responded by accusing counsel of “practicing corruptions” and accusing the court of “criminal favor of dismissing the civil complaint against the special assistant Attorney General Christopher Herion.” CP 145.

The trial court granted in part Mr. Herion’s motion to dismiss. It dismissed the claims brought under 18 U.S.C. §§ 241, 242; RCW 9.62; RCW 9A.72.150; RCW 33.36.060; RCW 9A.36.120; RCW 9A 76.175; RCW 42.20.040; and RCW 18.235.130, but allowed the remaining 42 U.S.C. § 1983 claims to proceed. CP 225-26.

⁵ Mr. Cheesman also filed a grievance with the Washington State Bar Association (WSBA) regarding Mr. Herion and the dependency proceedings. CP 371-72. The WSBA dismissed the grievance noting, “We reviewed your grievance and it appears you are concerned with conduct by a lawyer for the opposing party in a dispute. Under our adversary system, a lawyer's primary duty is to protect the rights and interests of his or her client. While there are professional limits upon what lawyers may do, the available information does not indicate that these limits were exceeded.” CP 370.

Dismissal was proper of the ten criminal/professional misconduct actions in the Complaint in that they failed to state a claim upon which relief could be granted.⁶ Accordingly, this Court should affirm the trial court's Order Granting in Part Defendant's CR 12 Motion to Dismiss.

D. The Denial of the Cheesmans' Motion for a Discovery Conference and the Trial Court's Finding That Mr. Cheesman Is A Vexatious Litigant Are Not Properly Before This Court.

The Cheesmans abandoned the issues of the trial court's denial of a discovery conference and the trial court's finding that Mr. Cheesman is a vexatious litigant by failing to raise them in their briefing. RAP 12.1(a) provides, "[T]he appellate court will decide a case only on the basis of issues set forth by the parties in their briefs." The requirement that an appellant address all issues appealed applies equally to pro se litigants. *Holder v. City of Vancouver*, 136 Wn. App. 104, 106, 147 P.3d 641 (2006).

In *Holder*, the pro se litigant referred to an issue only in his petition for review. "On appeal, Holder did not brief, address, or argue" it in his briefing. *Holder*, 136 Wn. App. at 106. The court held it was thus abandoned. *Id.* at 107 (citing *State v. Wood*, 89 Wn.2d 97, 99, 569 P.2d 1148 (1977); *Talps v. Arreola*, 83 Wn.2d 655, 657, 521 P.2d 206 (1974)). See also *Barriga Figueroa v. Prieto Mariscal*, 3 Wn. App. 139, 151, 414

⁶ The substantive allegations are addressed in more detail below.

P.3d 590, *review granted sub nom. Figueroa v. Mariscal*, 191 Wn.2d 1004, 424 P.3d 1214 (2018), *and aff'd*, 193 Wn.2d 404, 441 P.3d 818 (2019) (dissenting opinion) (“Our case law is rife with examples of appellate courts applying that principle and recognizing that an issue is not properly before the court.”)

In the instant case, the Cheesmans have abandoned two matters: the denial of the request for a discovery conference and the trial court’s finding that Mr. Cheesman is a vexatious litigant.

Mr. Cheesman filed a mistitled “Joint Proposed Discovery Plan and Status Conference.” CP 194-200 (It was not an agreed/joint plan.). Mr. Herion filed a response asking the trial court to strike the motion noting, “no discovery requests have been served upon the Defendant.” CP 189. Further, the motion did not comply with the requirements of CR 26(f). *Id.* The trial court denied Mr. Cheesman’s motion (CP 231) and he filed a notice of appeal (CP 227-30). However, Mr. Cheesman has failed to raise the issue in his briefing to this Court, and thus has abandoned it. *See* RAP 12.1(a); *Holder*, 136 Wn. App. 104.

Whether the vexatious litigant finding is properly before this Court is even more attenuated. Respondent/Defendant, Mr. Herion, in conjunction with his motion for summary judgment, moved the trial court to declare Mr. Cheesman a vexatious litigant. CP 234-51. Mr. Cheesman

filed a Motion to Oppose Defendant [sic] Motion for Summary Judgment (CP 405-10) and an Amended Motion to Oppose Defendant [sic] Motion for Summary Judgment (CP 411-17). In neither pleading did he respond to the motion to declare him a vexatious litigant.

The trial court found Mr. Cheesman to be a vexatious litigant (CP 832 ¶ 2) and ordered that he “obtain judicial approval before filing any new complaint against any party relating to the dependency petitions filed by [DSHS] on January 9, 2017 regarding Mr. Cheesman's children.” *Id.* ¶ The Cheesmans reference the trial court’s finding in a Notice of Appeal (CP 834), but fail to offer any argument or briefing on the issue. The issue is thus abandoned and not properly before this Court. *See* RAP 12.1(a); *Holder*, 136 Wn. App. 104. Accordingly, this Court should not consider the denial of the request for a discovery conference or the trial court’s finding that Mr. Cheesman is a vexatious litigant.

E. The Cheesmans’ Claims under 42 U.S.C. § 1983 Fail as a Matter of Law.

The Cheesmans’ claims arising under 42 U.S.C. § 1983 were properly dismissed on summary judgment because 42 U.S.C. § 1983 does not apply to Mr. Herion who was acting in and sued in his official capacity as a Special Assistant Attorney General. In enacting 42 U.S.C. § 1983, Congress created a federal cause of action for the deprivation of any rights, privileges, or immunities secured by the United States Constitution

and federal law. *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 755, 125 S. Ct. 2796, 2802-03, 162 L. Ed. 2d 658 (2005). However, the state, its agencies, and employees in their official capacities cannot be sued under § 1983. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 64, 109 S. Ct. 2304, 2038, 105 L. Ed. 2d 45(1998).

“[A] suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official’s office. As such, it is no different from a suit against the State itself . . . We hold that neither a State nor its officials acting in their official capacities are ‘persons’ under § 1983.” *Will*, 491 U.S. at 71. (internal citations omitted). Consequently, the statute does not apply to Washington, its agencies, or its employees acting within their official capacities. *See Williams v. Wisconsin*, 336 F.3d 576, 580 (7th Cir. 2003).

Because 42 U.S.C. § 1983 does not apply to Washington, its agencies, or its employees acting in their official capacities, the Cheesmans’ 42 U.S.C. § 1983 claims fail as a matter of law. It is clear from the Cheesmans’ complaint that Mr. Herion is being sued for alleged actions that are arising in the context of his official capacities. *See Eaglesmith v. Ward*, 73 F.3d 857, 859 (9th Cir. 1995), *as amended* (Jan. 23, 1996) (“In determining whether a suit is an individual- or official-capacity suit, the court must consider the ‘essential nature’ of the

proceeding.” (citing *Ford Motor Co. v. Dept. of Treasury*, 323 U.S. 459, 464 (1945)). All of the alleged actions of Mr. Herion described in the Complaint occurred in the course of his official duties prosecuting the dependency petition, and the Cheesmans repeatedly and exclusively refer to Mr. Herion in his official position as a Special Assistant Attorney General. CP 7-10. In his motion for summary judgment, Mr. Herion argued that neither Washington nor state officials acting in their official capacities are “persons” within the meaning of § 1983 (CP 241-42). The trial court’s dismissal of the Cheesmans’ §1983 claims was proper and should be affirmed by this Court.

F. Defendant/Respondent Herion Was Entitled to Dismissal of the Claims Against Him Because the Cheesmans Failed to Create a Genuine Issue of Material Fact.

The Cheesmans have failed to offer any admissible evidence that Mr. Herion concealed or altered any evidence in the Cheesman dependency action, engaged in malicious prosecution, or otherwise conspired with others to maliciously prosecute the Cheesmans.

Pursuant to CR 56(c), summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. In a summary judgment motion, the moving party bears the initial burden of showing the absence of an issue of material fact. *LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299

(1975). A defendant moving for summary judgment may meet this “initial showing” by pointing out that there is an absence of evidence to support the nonmoving party’s case. *Young v. Key Pharmaceuticals, Inc*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). “If, at this point, the plaintiff fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial, then the trial court should grant the motion.” *Young*, 112 Wn.2d 216

In making this responsive showing, the nonmoving party cannot rely on the allegations made in its pleadings. Defendants moving for summary judgment on the basis of an absence of evidence are not required to submit supporting affidavits or declarations. *Id.* at 226. And, a plaintiff’s “bare assertions that a genuine material issue exists” do not constitute facts sufficient to defeat a motion for summary judgment. Instead, an affidavit opposing summary judgment must (1) be made on the affiant's personal knowledge, (2) be supported by facts admissible in evidence, and (3) show that the affiant is competent to testify to the matters therein. “[T]o defeat a motion for summary judgment, a party must present more than [u]ltimate facts or conclusory statements.”

SentinelC3, Inc. v. Hunt, 181 Wn.2d 127, 140–41, 331 P.3d 40 (2014) (en banc) (internal citations and quotations omitted).

Mr. Herion brought a motion for summary judgment to dismiss the remaining claims against him. CP 234-51. In support, he filed a declaration outlining his role in the dependency proceedings of the Cheesman children. CP 252-60. *See also* CP 261-400 (Decl. of Jacob Brooks). In response, the Cheesmans failed to offer any evidence. *See* CP 411-17. The Cheesmans “cannot create genuine issues of material fact by ‘[m]ere allegations, argumentative assertions, conclusory statements, and speculation.’” *In re Kelly & Moesslang*, 170 Wn. App. 722, 738, 287 P.3d 12 (2012) (quoting *Greenhalgh v. Dep't of Corr.*, 160 Wn. App. 706, 714, 248 P.3d 150 (2011)). This Court should affirm the grant of summary judgment and dismissal of the Cheesmans’ unsupported claims.

G. Defendant/Respondent Herion Was Entitled to Immunity from the Claims Brought Against Him.

1. Mr. Herion is Entitled to Absolute Immunity in His Quasi-Prosecutorial Role.

Mr. Herion has immunity in this lawsuit due to his function as an attorney prosecuting a child dependency case. Quasi-prosecutorial immunity is a complete defense to a claim brought under 42 U.S.C. § 1983. *Butz v. Economou*, 438 U.S. 478, 513, 98 S. Ct. 2894, 2914, 57 L. Ed. 2d 895 (1978). *See also Imbler v. Pachtman*, 424 U.S. 409, 427-28, 96

S. Ct. 984, 993-94, 47 L. Ed. 2d 128 (1976) (absolute immunity for prosecutor). “This immunity is not provided to protect the individual official but for the protection of the public and to insure active and independent action of the officers charged with the prosecution of crime, for the protection of life and property. The Washington Supreme Court has concluded that this same public policy requires that this immunity be extended to the State and the entity employing the prosecutor.” *Janaszak v. State*, 173 Wn. App. 703, 718 – 19, 297 P.3d 723 (2013).

Courts have recognized that social workers and the attorneys representing the child welfare agencies act in a very similar role to prosecutors and, therefore, are entitled to quasi-prosecutorial immunity in § 1983 cases.

Although child services workers do not initiate criminal proceedings, their responsibility for bringing dependency proceedings, and their responsibility to exercise independent judgment in determining when to bring such proceedings, is not very different from the responsibility of a criminal prosecutor. The social worker must make a quick decision based on perhaps incomplete information as to whether to commence investigations and initiate proceedings against parents who may have abused their children. The social worker’s independence, like that of a prosecutor, would be compromised were the social worker constantly in fear that a mistake could result in a time-consuming and financially devastating civil suit. We therefore hold that social workers are entitled to absolute immunity in performing quasi-prosecutorial functions connected with the initiation and pursuit of child dependency proceedings.

Meyers v. Contra Costa Cty. Dep’t of Soc. Servs., 812 F.2d 1154, 1157

(9th Cir. 1987). *See also Babcock v. State*, 116 Wn.2d 596, 615, 809 P.2d 143 (1991) (discussing *Meyers* and federal courts' grant of absolute immunity to caseworkers related to the prosecution of dependency cases in part due to "the presence of safeguards built into the judicial process")

It is undisputed that Mr. Herion was acting in a quasi-prosecutorial role and, therefore, is entitled to absolute immunity. Mr. Herion was not working in an investigatory capacity; he was working in a purely prosecutorial function in representing the Department during the Cheesmans' dependency action. CP 252-57 (Decl. of Christopher Herion). Much like a prosecutor, he had to make judgment calls during the course of litigation, and he should be able to make those quick decisions without the fear that "a mistake could result in time-consuming and financially devastating civil suit." *Meyers*, 812 F.2d at 1157; CP 253 ¶ 16. Mr. Herion, in his role as a SAAG, is entitled to absolute immunity for the prosecution of the dependency petitions related to the Cheesmans' children.

2. SAAG Herion is Entitled to Qualified Immunity on the Cheesmans' § 1983 Claims

Even if this Court were to find that Mr. Herion's quasi-prosecutorial role did not afford absolute immunity to all of Mr. Herion's actions in this case, he is entitled to qualified immunity. "The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)).

To determine whether an official is entitled to qualified immunity, courts generally apply a two-part inquiry: "First, do the facts the plaintiff alleges show a violation of a constitutional right? Second, was the right 'clearly established' at the time of the alleged misconduct." *Carrillo v. Cty. of Los Angeles*, 798 F.3d 1210, 1218 (9th Cir. 2015) (internal citations omitted). A state employee "cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in his shoes would have understood that he was violating it, meaning that existing precedent placed the statutory or constitutional question beyond debate." *Carrillo*, 798 F.3d at

1218 (quoting *City & Cty. of San Francisco, Calif. v. Sheehan*, 575 U.S. 600, 135 S. Ct. 1765, 1774, 191 L. Ed. 2d 856 (2015)). The plaintiff bears the burden of proving that the constitutional right claimed to have been violated was clearly established at the time of the alleged violation. *Moran v. State of Wash.*, 147 F.3d 839, 844 (9th Cir. 1998).

First, this case does not implicate any constitutional rights. While parents certainly have a liberty interest in familial relationships, this liberty interest does not include a constitutional right to be free from child abuse investigation, as the state has a strong interest in protecting the safety and welfare of minor children. These competing interests require the court to balance the interests of the state and the children against the interests of the parent in determining whether a constitutional violation has occurred. *U.S. v. Wolf Child*, 699 F.3d 1082 (9th Cir.2012).

Here, law enforcement had probable cause to remove the children due to signs of physical abuse, statements expressing fear of their parent, and inconsistent statements that are indicative of abuse. After a contested hearing where the Cheesmans were represented by counsel, the court found as to each child,

The risk of imminent harm to the child as assessed by petitioner establishes reasonable cause for the continued out-of-home placement of the child pending the fact finding hearing; and/or [s]pecific services offered or provided to the parent(s) have been unable to remedy the unsafe

conditions in the home and make it possible for the child to return home; and/or [r]eturning the child to the home would seriously endanger the child's health, safety, and welfare.

CP 288, 297, 306.

Additionally, the court found,

It is currently contrary to the welfare of the child to remain in or return home. The child is in need of shelter care because there is reasonable cause to believe: The child has no parent, guardian, or legal custodian to provide supervision or care for such child; and/or [t]he release of the child would present a serious threat of substantial harm to the child

Id.

Mr. Herion engaged in the standard process for DSHS dependency petitions regarding child abuse cases, with the only goal being to ensure that the children were placed in a safe home environment. CP 253. The Cheesmans refused many of the Department's proffered services and continued to exhibit behavior that indicated the home environment was not yet safe for the children throughout the dependency action. CP 254. The State's interest in protecting the safety and welfare of the children clearly outweighs the parents' claimed liberty interest in this case. *See Wolf Child*, 699 F.3d 1082.

Second, there is no clearly established law that would put any reasonable official on notice that his actions were illegal. *Carrillo*, 798 F.3d at 1218. Mr. Herion not only followed all DSHS policies and

procedures, he also followed all ethical rules of conduct for attorneys throughout the entire dependency process. At no point did he fabricate or withhold evidence, as the Cheesmans allege⁷. CP 254-55. Under the facts of this case, no reasonable officer would believe that he was violating a clearly established constitutional right. It is well-established that the State has a strong interest in protecting children from abuse, and the Department had legitimate reasons to be concerned for the safety of the children if they were placed back in their home with their parents. In particular, the trial court made rulings maintaining out of home placement for the children and suspending the visitation rights of Mr. Cheesman. CP 255-58. *See also* CP 266-329 (Decl. of Mayra Cuenca).

The Cheesmans failed to meet their burden to satisfy either step of the two-step inquiry for qualified immunity. Accordingly, Mr. Herion is entitled to qualified immunity and the grant of summary judgment was appropriate and should be affirmed.

V. CONCLUSION

The claims against Special Assistant Attorney General Christopher Herion were dismissed pursuant to CR 12 and 56, both which operate to ensure that only those cases where a plaintiff has stated a claim upon which relief can be granted and that present a genuine question of material

⁷ It bears noting that the Cheesmans offered no admissible evidence to support their allegations. *See* CP 411-17.

fact proceed to trial. The Cheesmans' claims were not supported by the law or facts and this Court should affirm the trial court's dismissal of all of the Cheesmans' claims.

RESPECTFULLY SUBMITTED this 8th day of June, 2020.

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 8th day of June 2020, at Spokane, Washington.



JENNIFER KLEVEN

WASHINGTON ATTORNEY GENERAL SPOKANE TORTS

June 08, 2020 - 2:04 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
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Appellate Court Case Title: Roy D. Cheesman v. Special Asst. AG Christopher Herion
Superior Court Case Number: 19-2-00023-9

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