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COURT OF APPEALS NO. 70336-6-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

AZITA SHIRKHANLOO
Appellant,

v.

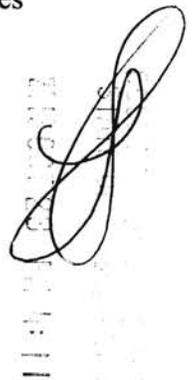
LAURIE OLSON GAINES and EDWARD SCHAU,
Respondents.

BRIEF OF RESPONDENT LAURIE OLSON GAINES

King County Cause No. 12-2-18444-5 SEA

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ORIGINAL

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I. INTRODUCTION

On August 3, 2009 respondent Gaines, a licensed social worker, was appointed by the Court as a parenting plan evaluator. (CP 838-841.) That appointment was consented to by Appellant Shir Khanloo. *Id.* Ms. Gaines' duties, reporting obligations and access to records and information were specifically set forth by the Court in her appointment order. *Id.*

On November 30, 2009 Ms. Gaines submitted her interim report (CP 399-412), which was reviewed and considered by the trial court, followed by her final report submitted on September 9, 2010. (CP 436-471.) All of Ms. Gaines' work and her reports were ordered by the court.

Ms. Gaines also provided testimony regarding her work and was subject to both cross-examination and inquiry by the trial judge (CP 24). As both a court-appointed expert, serving as an arm of the Court, and as an expert witness, Ms. Gaines provided information for the Court's use but she had no decision-making authority over any issues in the Shir Khanloo/Smith family court proceeding.

Appellant asserts, with no factual basis or supporting authority, that WAC 246-924-445 (an administrative provision governing psychologists who perform parenting evaluations) applies to Ms. Gaines, a licensed social worker; that Ms. Gaines allegedly failed to adhere to the "standards" set forth in that administrative code provision; that she should

be considered akin to a health care provider under RCW 7.70, although she did not administer health care at any time in the matter put at issue and does not meet the definition of a health care provider under RCW 7.70.020; that her alleged failure to adhere to standards that do not apply to her licensure should be considered a violation of the standard of care and that if true, such an alleged violation should deprive her of her right to immunity. Appellant contends that it is a matter of first impression as to whether a court-appointed expert's alleged negligence can negate an absolute right to immunity.

Appellant is wrong on all of her assertions. Appellant's arguments are not legally sound; and are not a matter of first impression but instead have been rejected by this State's appellate courts, as well as the U.S. Supreme Court. The trial court's Order Granting Summary Judgment dismissal of the Appellant's claims (CP 826-828) should be affirmed.

II. COUNTERSTATEMENT OF ASSIGNMENT OF ERROR

1. Did the trial court properly enter an Order of summary judgment dismissal in favor of defendant Gaines based upon the uncontested facts that Gaines was court-appointed to serve as a parenting evaluator and when all of the acts complained of by Appellant were acts of Gaines done in her role as a court-appointed evaluator and the testimony and reports of Gaines were given in her capacity as an expert witness who

was court-appointed to serve as an arm of the Court, at the court's request?

Short answer: Yes, *Reddy v. Karr*, 102 Wn.App. 742, 749 (2000); *Bruce v. Byrnes-Stevens*, 113 Wn.2d citing *Myers v. Morris*, 810 F.2d 1437, 1466 (8th Cir) cert. denied ___ US ___, 108 S. Ct. 97, 98 L.Ed.2d 58 (1987).

2. Does the grant of absolute immunity for a court-appointed expert witness remain intact and impenetrable to challenge even if the expert is accused of wrongdoing, conspiracy or intentional misconduct?

Yes. *Bruce v. Byrnes-Stevens*, 113 Wn.2d 123, 125 (1989); *Reddy v. Karr*, 102 Wn.App. 742, 749 (2000); *Gilliam v. DSHS*, 89 Wn.App. 569, 572 (1998); *Briscoe v. LaHue*, 460 U.S. 325, 335, 103 S.Ct. 1108, 1113-14; 75 L.Ed.2d 96 (1983).

III. STATEMENT OF THE CASE

Laurie Olson Gaines, a licensed social worker, was at all times material a court-appointed expert serving as a parenting plan evaluator solely at the request of the trial court and with the consent of the parties. (CP 838-841.) At all times material Ms. Gaines performed her work, provided her reports and gave testimony pursuant to the scope of her court appointment.

Appellant does not contest Ms. Gaines was court appointed to serve as a parenting evaluator or that her reports and testimony were

provided pursuant to that appointment. Appellant also does not contest that the current Washington case authority affords court-appointed experts, such as Ms. Gaines, absolute, quasi-judicial immunity. Instead, Appellant asserts Ms. Gaines should lose her absolute immunity if, as Appellant alleges, she performed her services for the court in a negligent manner. Appellant also asserts this to be a matter of first impression.

Respondent asserts that the absolute immunity afforded to her as a court-appointed expert and as an expert witness is in fact ABSOLUTE and is not challengeable by claims of negligence, intentional acts or wrongdoing.

Respondent further asserts this is not a matter of first impression but instead that the issue of whether one can lose one's absolute immunity if accused of negligence or wrongdoing has not only been considered by the appellate courts, but soundly rejected in favor of maintaining absolute immunity for those experts, such as Ms. Gaines, who serve under Court order as an arm of the Court.

IV. ARGUMENT

A. Laurie Gaines is Entitled to Absolute Immunity from Civil Claims.

All of Appellant's claims in this matter relate to Laurie Gaines' involvement as a court- appointed expert in the prior family court matter and

hearings. Both quasi-judicial immunity and witness immunity shield individuals who are court-appointed to investigate or offer recommendations in the context of judicial or quasi-judicial proceedings, from subsequent civil liability. The United States Supreme Court has noted that “the common law provided absolute immunity from subsequent damages liability for all persons – governmental or otherwise – who were integral parts of the judicial process.” *Briscoe v. LaHue*, 460 U.S. 325, 335, 103 S.Ct. 1108, 1113-14, 75 L.Ed.2d 96 (1983). Washington courts follow this broad and long-standing doctrine, routinely holding that witnesses in judicial proceedings are absolutely immune from suit based on their testimony. *Bruce v. Byrne-Stevens & Assoc.*, 113 Wn.2d 123, 125, 776 P.2d 666 (1989). This immunity applies not only to all manner of claims based on witness testimony or reports, but also to claims allegedly arising from the investigation or preparation for such testimony.

1. Scope of Absolute Immunity Is Expansive.

Under Washington law, the scope of absolute immunity for witnesses in a judicial or quasi-judicial proceeding is very broad. It extends to all witnesses including retained experts, guardians, therapists and attorneys who submit reports to family court. *Bruce v. Byrne-Stevens & Associates*, 113 Wn.2d at 126-127 (citing *Myers v. Morris*, 810 F.2d 1437, 1466 (8th Cir.), *cert denied* __ U.S. __, 108 S.Ct. 97, 98 L.Ed. 2d 58 (1987)).

Quasi-judicial immunity is afforded to court-appointed parenting evaluators who act as an arm of the Court as they assist the court, at the court's request, in the court's determination of the best interests of a child. *Reddy v. Karr*, 102 Wn.App. 742, 749, 9 P.3d 927 (2000). As a court-appointed evaluator, the evaluating professional does not have independent decision-making authority over the parties; rather, the evaluator is tasked with investigating and reporting to the Court to assist in the Court's ultimate determination. *See, Reddy v. Karr*, at 749-750.

The purpose of affording this broad-based immunity has also been explained by Courts at all levels. Witness immunity is absolute, rather than qualified, in order to permit performance without fear of litigation. In the *Briscoe v. LaHue*, *supra*, Justice Stevens noted the purpose of providing immunity and the implications of imposing liability upon witnesses for their testimony:

A witness' apprehension of subsequent damages liability might induce two forms of self-censorship. First, a witness might be reluctant to come forward to testify. And once the witness is on the stand, his testimony might be distorted by the fear of subsequent liability.

Briscoe v. LaHue, 460 U.S. at 333. Washington Courts agree that absolute witness immunity preserves the integrity of the judicial process by encouraging full and frank testimony. *See, Bruce v. Byrne-Stevens & Assoc.*,

113 Wn.2d at 126; *Deatherage v. State Examining Bd. Of Psychology*, 134 Wn.2d 1331, 137, 948 P.2d 828 (1997).

The effect of immunity, “spare[s] a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit.” *Siegert v. Gilley*, 500 U.S. 226, 232, 111 S.Ct. 1789, 1793, 114 L.Ed. 2d 277 (1991). Therefore, immunity is not just a defense to liability, rather it protects a witness from having to defend against the lawsuit at all. As a court-appointed witness who was asked by the court to serve and report in a family law proceeding, Ms. Gaines is afforded both expert witness and quasi-judicial immunity.

2. Immunity Applies to Court-Appointed Witnesses.

The Washington State Court of Appeals has specifically analyzed the immunity afforded to evaluating professionals who are court appointed to evaluate litigants. In *Tobis v. State*, 52 Wn.App. 150, 758 P.2d 534 (1988) the plaintiff sued several state mental health professionals for their role in recommending to the court the release of a person committed to Western State Hospital as criminally insane. Following his release, he shot and killed two people.

The Court of Appeals affirmed the trial court's dismissal of the plaintiffs' claims, holding that the mental health professionals were entitled to immunity. The decision in *Tobis* drew upon the reasoning

developed in *Bader v. State*, 43 Wn.App. 223, 716 P.2d 925 (1986) which also involved a claim of negligence against State employees who recommended to the court that an individual in the state psychiatric hospital be released. That individual subsequently murdered a neighbor. The *Bader* court extended judicial immunity to the State employees:

When psychiatrists or mental health providers are appointed by the court and render an advisory opinion to the court on a criminal defendant's mental condition, they are acting as an arm of the court and are protected from suit by absolute judicial immunity. [Emphasis added.]

Bader, 43 Wn.App. at 226.

Both *Bader* and *Tobis* recognize the need to immunize from civil liability, those who provide the court with information and recommendations so the court can make informed decisions. The mental health professionals in *Bader* and *Tobis* performed duties entirely analogous to Ms. Gaines' work in the instant matter as a court-appointed expert. Ms. Gaines, like the professionals in *Bader* and *Tobis*, acted at the direction of the court, as an arm of the court, gathering information and offering professional recommendations which the court found would provide assistance in rendering rulings in the family law matter.

Walker v. State, 60 Wn.App. 624 (1991), is also instructive. In *Walker*, the court specifically found that a *mental health professional who*

assisted the court by means of an evaluation and "acts related to that participation" was entitled to immunity. On appeal, the court held absolute judicial immunity insulated the evaluating professionals from liability:

We hold that judicial immunity insulates Western State from liability for the first two of its alleged negligent acts . . . *the doctrine of judicial immunity protects individuals who participate in judicial proceedings from civil liability for acts related to that participation.* [Cites omitted.] This doctrine has been *extended to state and mental health professionals acting in association with the judicial function . . .* [Emphasis added.]

Walker, 60 Wn.App. at 627.

The court went on to state:

When the trial court takes the evaluation of the mental health professional under advisement but retains the ultimate decision-making authority over the patient's release, judicial immunity protects the psychiatrist from liability. See *Tobis v. State*, 52 Wn.App. at 159. Here, the Judge retained the ultimate decision-making power over Westmark's release; therefore *Peterson* is not controlling and the doctrine of judicial immunity applies. [Emphasis supplied.]

Walker, 60 Wn.App. at 628-629.

Here, there is no dispute that the trial court had the ultimate decision-making power over the family law matter involving the Smith-

Shirkhanloo family. As a court-appointed expert, Ms. Gaines acted as an information source for the court. Her role was to identify and provide information regarding parenting arrangements for the child. Based upon these facts, Ms. Gaines, in addition to witness immunity, is also entitled to absolute quasi-judicial immunity from suit.

Implicit in this analysis is the critical need of the courts to have experts willingly agree to act at the Court's request. If experts decline to assist the Court out of fear of civil litigation and potential personal liability, courts will be deprived of a valuable judicial tool. For this reason, the quasi-judicial immunity afforded court-appointed experts benefits the courts as much as the expert witnesses.

3. Immunity Protects Against All Claims Brought by Appellant and is Not Impaired by Allegations of Negligence.

Absolute immunity protects witnesses against all manner of claims that could potentially arise from their testimony or reports, including, but not limited to claims of negligence and claims for intentional infliction of emotional distress. *Bruce v. Byrne-Stevens & Assoc.*, 113 Wn.2d at 135. Whether Appellant alleges that Ms. Gaines acted individually to deprive them of a right, or as part of a conspiracy, she maintains absolute immunity under either theory. *See e.g. Babcock v. Tyler*, 884 F.2d 497, 502 (9th Cir. 1989), *cert. denied*, 493 U.S. 1072, 110 S.Ct. 1118, 107 L.Ed.2d 1025

(1990). Moreover, absolute immunity ‘frees one who enjoys it from a lawsuit whether or not he acted wrongly’. *Gilliam v. State Dept. of Social and Health Svcs.*, 89 Wn.App. 569, 577-578, 950 P.2d 20 (1998).

In evaluating the availability of such broad immunity the Courts have found that:

The focus of an inquiry into a proposal for absolute immunity is the degree to which the function performed by the conduct at issue is ‘intimately associated’ with the judicial phase of a proceeding.

Id.

Here, Ms. Gaines’ only involvement with the Appellant was through her appointment by the court as a parenting evaluator during the pendency of the dissolution. (CP 838-841.) All of Ms. Gaines’ services were performed within the judicial proceedings as her appointment was to investigate and advise the court in that proceeding. Lastly, the importance of insulating those serving in a quasi-judicial function should not be disturbed as it protects “the nature of the judicial process itself.” *Briscoe v. LaHue*, 460 U.S. 325, 334, 103 S.Ct. 1108, 1115, 75 L.Ed.2d 96 (1983) relied upon in *Gilliam v. DSHS*, 89 Wn.App. 569, 580 (1998). Ms. Gaines served only as an information source, subject to the rigors of cross-examination and without ultimate decision-making authority which at all times remained with the trial

judge. These safeguards minimize, and arguably eliminate, any irremediable wrong to the litigants. *Gilliam v. DSHS, supra*, at 580-582.

Under existing Washington legal authority, Ms. Gaines is entitled to absolute immunity from suit for testimony and reports that were requested by the trial court in the underlying trial court proceeding. That immunity has been held to extend regardless of the nature of the claims against persons such as Ms. Gaines who act as an arm of, and at the request of the Court, whether based in a theory of negligence, conspiracy, or an allegedly intentional wrongful act. *See, Bruce v. Byrne-Stevens & Assoc.*, 113 Wn.2d at 135; *Gilliam v. State Dept. of Social and Health Svcs.*, 89 Wn.App. at 578-579.

4. Witness Immunity Extends to Actions Forming the Basis of the Testimony.

Immunity extends beyond testimony to also protect the actions or investigation that forms the basis of a witnesses' testimony. *Bruce v. Byrne-Stevens & Associates*, 113 Wn.2d at 135-136. The court in *Bruce* found that:

In sum, the immunity of expert witnesses extends not only to their testimony, but also to acts and communications which occur in connection with the preparation of testimony. Any other rule would be unrealistically narrow, would not reflect the realities of litigation and would undermine the gains in forthrightness on which the rule of witness immunity rests.

Id. at 136. See also *Gustafson v. Mazer*, 113 Wn.App. 770, 776, 54 P.2d 743 (2002).

In this case, Ms. Gaines was Court appointed to conduct an investigation in connection with completing a parenting evaluation. (CP 838-841.) She developed an expert opinion and recommendations at the request of, and for use by, the Court in connection with King County Cause No. 09-3-03369-6 SEA. Without question Ms. Gaines' reports were a communication made in connection with a judicial proceeding and the trial court was correct in entering its order that affirmed absolute immunity required that Appellant's claims against Ms. Gaines be dismissed as a matter of law. (CP 826-828.)

B. Absolute Immunity is Not Subject to a Good Faith Standard But Rather is Absolute in Nature.

Washington does not apply a subjective good faith standard to immunity for court-appointed experts or expert witnesses.

Appellant's reliance on case authority addressing "qualified" (NOT absolute) immunity, including prosecutorial immunity is not only inapplicable factually but legally devoid of support. It is noteworthy that Appellant refers to a single reference from the dissent in *Bruce v. Byrne-Stevens & Associates, supra*. However it is far more compelling that in the 24 years since *Bruce v. Byrne-Stevens* became the law in the State of

Washington, neither the Washington Supreme court nor the Washington legislature has taken any steps to change this law. Absolute immunity for witnesses remains the law of the land.

Unlike absolute immunity, which Appellant agrees is granted to Ms. Gaines as both a court-appointed expert and as an expert witness, qualified immunity is reviewed and subject to challenge on a good faith basis. There is no case authority that supports blurring the very real distinction between the absolute immunity afforded to court-appointed experts here at issue and a qualified immunity, which is inapplicable to the facts before the court.

None of the cases relied upon by Appellant that discuss qualified prosecutorial immunities, or statutorily derived immunities, have any bearing on the absolute immunity conferred upon Ms. Gaines. Unlike prosecutors or other professionals who may serve a role outside of the scope of serving as an arm of the court, Ms. Gaines only role was that of a court-appointed parenting evaluator. Her only role was that of serving as an arm of the Court.

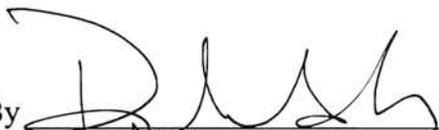
In the final analysis, what the Appellant is requesting of this court is to change the law and modify the immunity afforded court-appointed experts from “absolute” to “qualified.” Such a dramatic and unwarranted change in existing Washington law should be rejected.

V. CONCLUSION

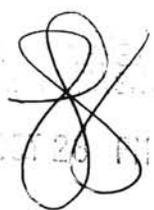
The trial court's Order (CP 826-828) granting dismissal of Appellant's claims against Ms. Gaines should be affirmed. The Order was factually supported and legally sound. Having offered no good faith basis, or compelling argument of any kind, for a change in the existing legal standards that afford court-appointed experts absolute, quasi-judicial immunity, Appellant's request for a change in the existing legal standards and nature of the immunity afforded court-appointed experts, should be declined.

RESPECTFULLY SUBMITTED this 28th day of October, 2013.

ANDREWS ▪ SKINNER, P.S.

By 

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LAURIE OLSON GAINES and EDWARD SCHAU,
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**DECLARATION OF SERVICE OF
BRIEF OF RESPONDENT LAURIE OLSON GAINES**

King County Cause No. 12-2-18444-5 SEA

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Attorney for Respondent Laurie Olson Gaines

ORIGINAL

I, JANE JOHNSON, hereby declare as follows:

1. That I am a citizen of the United States and of the State of Washington, living and residing in King County, in said State, I am over the age of eighteen years, not a party to the above-entitled action, and competent to be a witness therein.

2. On the 28th day of October, 2013, I caused a copy of Brief of Respondent Laurie Olson Gaines to be served upon the following in the manner noted:

<p><u>Attorney for Appellants:</u> Stuart E. Brown, WSBA #35928 12535 15th Ave. NE, #201 Seattle, WA 98125 206-407-9183 fstnat@gmail.com <u>Via Email and Regular US Mail</u></p>	<p><u>Respondent Schau:</u> Ramona N. Hunter, WSBA #31482 Craig Bennion, WSBA #11646 Cozen O'Connor 1201 3rd Avenue, Suite 5200 Seattle, WA 98101-3041 206-340-1000 Email: Rhunter@cozen.com; cbennion@cozen.com <u>Via Email and Regular US Mail</u></p>
<p><u>Court of Appeals:</u> Court of Appeals, Division I <u>Via Messenger</u></p>	

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 28th day of October, 2013 at Seattle, Washington.



JANE JOHNSON, Legal Assistant to
Pamela M. Andrews, Attorney for
Respondent Laurie Olson Gaines