FILED
COURT OF APPEALS
DIVISION II

2016 JUN 20 AM 11:30

STATE OF WASHINGTON
BY
DEPUTY

COURT OF APPEALS NO. 48587-7-II

CLARK COUNTY SUPERIOR COURT NO. 15-2-02252-4

IN THE COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

BECKY DEVELLE,

Appellant,

v.

LANDON POPPLETON, et ux., and
NW FAMILY PSYCHOLOGY, LLC,

Appellees.

OPENING BRIEF OF APPELLANT

Becky Develle
5702 NE 64 ST
Vancouver WA 98661

Ramona Hunter
Andrews - Skinner, P.S.
645 Elliott Ave W. Suite 350
Seattle, WA 98119

TABLE OF CONTENTS

I. TABLE OF AUTHORITIES ii

II INTRODUCTION 4

III. ASSIGNMENTS OF ERROR
No. 1 6
No. 2 6
No. 3 6
No. 4 6

Issues Pertaining to Assignments of Error
No. 1 6
No. 2 6
No. 3 7
No. 4 7

IV. STATEMENT OF THE CASE
No. 1 7
No. 2 7
No. 3 8
No. 4 8

V. ARGUMENT
No. 1 8
No. 2 11
No. 3 16
No. 4 17

VI. CONCLUSION 19

I TABLE OF AUTHORITIES

Washington Cases	Page #
Adkins v. Clark County, 105 Wn.2d 675, 717 P.2d 275 (1986)	3, 13
Bader v. State, 43 Wn. App. 223, 716 P.2d 925 (1986)	14
Barr v. Day, 124 Wash.2d 318, 879 P.2d 912 (1994)	14
Creelman v. Svenning, 67 Wn.2d 882, 885, 410 P.2d 606 (1966)	13
Kelley v. Pierce, 4398-2-II (2014)	18, 19
Lallas v Skagit County, 167 Wn.2d 861, 225 P.3d 910 (2009)	11
Lutheran Day Care v. Snohomish County, 119 Wn.2d 91, 829 P.2d 746 (1992)	11, 14, 17
Petersen v. State, 100 Wn.2d 421, 671 P.2d 230 (1983)	15
Reddy v. Karr, 9 P.3d 927 (Div. 1, 2000)	10, 13
Tobis v State, 52 Wn. App. 150, 223, 716 P.2d 925 (1986)	15
West v. Osborne, 108 Wn. App.764, 34 P.3d 816 (2001)	14
Washington State Statutes	
RCW 26.12.050	9
RCW 26.12.177	9
Federal Cases	
Beard v. Udall, 648 F.2d 1264 (9th Cir.1981)	16
Butz v. Economou, 438 U.S. 478, 506, 98 S. Ct. 2894 (1978)	12, 15
Elliott V. Perez, 561 F.Supp. 1325 (1983)	15
United States v. Lee, 106 U.S. 196, 220	12
Other	
Washington Superior Court case no.: 11-3-00581-7 Clerk's notes, CP 37	9

II. INTRODUCTION

This appeal arises from a custody evaluation undertaken during a dissolution proceeding. Becky Develle, appellant, (hereinafter Develle) was court ordered to participate in an evaluation along with her ex husband. The appellee, Landon Poppleton, (hereinafter Poppleton) employed by NW Family Psychology (herein after NWFP) was charged with the duty to protect the best interests of the children involved in the custody dispute.

During the process of the evaluation Poppleton demonstrated gender bias against Develle and made the interviewing sessions hostile as he tried to enforce his political and religious views on her. Develle and her ex husband received disparate treatment during the process because Develle's views contradicted those of defendant. Poppleton intentionally tried to intimidate Develle, threatened her with loss of her children for disagreeing with him and refuting his report. He even utilized his secretary to attempt "buy off" Develle's compliance.

Poppleton negligently failed to interview all of the witnesses that Develle provided and did not report all findings of the testing he did which tend to show Develle in a preferable light over her ex husband.

Develle hired another expert in the field to refute his negligent report. After notification that his report was deficient, Poppleton became

visibly enraged and threatened Develle to have her children taken away. Because of this Poppleton revised his report in direct retaliation to her. He made reports based upon another child outside of the family whom he had never met. Poppleton knew at the time of the evaluation that Develle's child, J.D., needed mental health care yet that is lacking from his report.

After being put on notice that his report was negligently deficient, Poppleton revised his report and rather than correct his mistakes, he chose to retaliate against Develle, advising the court to place the children with the other - unfit - parent. This constitutes gross negligence and intentional, tortious conduct all stemming from bad faith, all falling outside the scope of duty of a custody evaluator.

Because of the recommendation by Poppleton, the court placed custody of Develle's children with an incompetent parent who was negligent in seeking proper care for the children, contrary to the best interests of the children. Untreated depression in her son, J. D., lead to his tragic death by suicide.

In her Complaint, Develle alleges that the death of the child in such a manner is reasonably foreseeable and that Poppleton is a proximate cause.

Develle brought suit in lower court which dismissed with prejudice on a 12(b)(6) motion to dismiss for failure to state a claim upon which

relief can be granted. It was erroneously asserted that Poppleton is protected by quasi judicial immunity.

Develle now appeals to this Court for justice and fairness, and to clarify the bounds of quasi judicial immunity.

III. ASSIGNMENTS OF ERROR

1. The trial court erred by calling an order directing the parties an appointment of another person outside of the court's jurisdiction. CP 37

2. The trial court erred by conferring upon a mental health practitioner in private practice, employed by a private LLC, quasi judicial immunity.

3. The trial court erred by extending quasi judicial immunity to a private LLC. CP 19

4. The trial court erred by applying quasi judicial immunity to acts of bad faith and gross negligence. CP 19

Issues Pertaining to Assignments of Error

1. Does a court order directing parties to participate in a custody evaluation with a mental health practitioner in private practice, employed by a private LLC and whom the court has no authority to compel, meet the standard of appointing a surrogate of the court?

2. Does a mental health practitioner in private practice, employed by a

private LLC meet the standards under the Washington law for quasi judicial immunity?

3. Did the trial court err by extending quasi judicial immunity to a private LLC?

4. Did the trial court err by applying quasi judicial immunity to acts of bad faith and gross negligence?

IV. STATEMENT OF THE CASE

1. On April 29, 2011, the lower court entered an order that Develle "undertake" and "cooperate" with an evaluation along with her ex husband. Poppleton was chosen by recommendation of opposing counsel. The order does not specifically appoint Poppleton it merely ordered the parties in the case participate. Likewise the lower did not possess authority to compel Poppleton to perform. At all times Poppleton retained the power and discretion to perform services which could be discontinued at any point including but not limited to failure of payment by the parties and without permission of the court. CP 37

This does not make him an employee nor an appointee of the court meriting any form of immunity as an 'arm of the court'.

2. Poppleton is a mental health professional in private practice,

working under the cover of a private LLC, NW Family Psychology. Either Poppleton was employed by the courts or he was employed by NWFP. All documents show that Poppleton was at all times working for NWFP and there was no direction by the court at any time for those services.

3. NWFP and Poppleton are two separate entities. Even if the natural person has quasi-judicial immunity, the corporation does not have that same covering. There is no relationship at all between the courts and the LLC. Therefore it was improper for the court to dismiss an action against such a party. The trial court erred by extending quasi judicial immunity to a private LLC. CP 19

4. The events giving rise to the suit include intentionally tortious conduct on the part of Poppleton towards Develle. After being put on notice as to his negligence, Poppleton acted out in retaliation against Develle. Those actions were done in bad faith and are grossly negligent. His inaccurate reports constitute a fraud upon the court.

V. ARGUMENT OF THE CASE

1. When the lower court entered an order on April 29, 2011,

ordering the parties to undergo a custody evaluation, with Poppleton as the evaluator, the court did not have jurisdiction to compel Poppleton. In fact he had the power to decline or withdraw at any point. He was under no compulsion by the court to perform. Develle was ordered by the lower court to "undertake" and to cooperate" with Poppleton. *See item #37,* Washington Superior Court case no. 11-3-00581-7.

Poppleton does not meet the Washington statutory requirements for a court duly appointing a Guardian ad Litem. Directing the Appointment of assistants under RCW 26.12.050:

> (1) in each county the superior court may appoint the following persons to assist the family court in disposing of its business:
>
> (b) Such investigators, as the court shall find necessary to carry on the work of the family court.
>
> (3) The <u>appointments provided for in this section shall be made by majority vote of the judges of the superior court of the county</u> (Emphasis added.)
>
> Family court investigators shall serve at the pleasure of the judges appointing them and shall receive such compensation as the county legislative authority shall determine.

Poppleton does not have an "appointment" from the court. There was no vote by the local judges to appoint him.

The Washington law establishes the payment schedule for a GAL. RCW 26.12.177, "Including payment schedule." The facts of the instant case show that parties entered into an arrangement for the appellees to perform services as a private, independent, mental health care provider

employed by a private corporate agency and paid for privately. Poppleton was not an employee of the court nor under any direction at all from the courts. CP 37

The order of April 29, 2011 specifies that Poppleton had full discretion to direct the evaluation in any manner and scope that he saw fit.

Poppleton is not under the direct supervision of the court, is not an officer of the court and is not working in any capacity under the court and no functions of Poppleton were in any comparable manner close to that of a judge. Therefore quasi judicial immunity does not attach.

In *Reddy v. Karr*, 9 P.3d 927 (Div. 1, 2000), a court commissioner appointed an employee of King County Family Court Services to investigate which of two parents should receive custody of their child. That person was an employee of the court. Appellees in the instant case are not employees of the county nor the court. There is no relationship established between the court and the appellees either in supervision of function or in any financial connection.

In absence of an employment relationship, the appellate court said, "Reddy fails to show any reason why this case should not be governed by the general rule that a public employee's quasi-judicial immunity extends to the employee's government employer." And, "Its personnel are appointed by the court and serve at the pleasure of the court for the sole

purpose of assisting the court in carrying out its family court functions." In addition they are, ". . . an arm of the court."

> Quasi-judicial immunity is designed to protect the government, not the individual employee, from suit. The doctrine of exemption of judicial and quasi-judicial officers is founded upon a sound public policy, not for the protection of the officers, but for the protection of the public, and to insure active and independent action by individuals charged with fashioning judicial determinations. See *Anderson v. Manley*, 181 Wash. 327, 331, 43 P.2d 39 (1935); see also *Taggart v. State*, 118 Wn.2d 195, 203, 822 P.2d 243 (1992) (the purpose of judicial immunity is not to protect judges as individuals but to safeguard the independence of the judiciary) (citing *Adkins v. Clark County*, 105 Wn.2d 675, 677, 717 P.2d 275 (1986)).

Appellees were not working under the control or direction of the court, nor were they being paid by the court. Instead they were operating in their own capacity as private mental health practitioners. They were not employees of the court in any manner. A clear degree of separation exists. Defendants had autonomy in conducting services.

2. Poppleton, working in a private practice, employed by a private LLC does not meet the standards under the Washington law for quasi judicial immunity.

Cases demonstrating quasi-judicial immunity include those in which parties were under the control, direction, supervision, training, and or payment of the court or in some capacity were agents of the government.

In the case of *Lutheran Day Care v. Snohomish County*, 119

Wn.2d 91, 829 P.2d 746 (1992) the court found:

> Immunity necessarily leaves wronged claimants without a remedy. This runs contrary to the most fundamental precepts of our legal system. Therefore, in determining whether a particular act entitles the actor to absolute immunity, we must start from the proposition that there is no such immunity. *Butz v. Economou*, 438 U.S. 478, 506, 98 S. Ct. 2894 (1978) ("No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.") (quoting *United States v. Lee*, 106 U.S. 196, 220, 1 S. Ct. 240 (1882)). Only when the person claiming absolute immunity can prove that such immunity is justified will we impose it.

The *Lutheran* court was concerned about just such the type of arguments as defendants in the instant case would make.

> We note that these cases, where they contain any analysis of the issue at all, have generally based their holdings on conclusory citation of authority and not on the detailed policy-oriented factual inquiry which we will later show is necessary to decide the immunity question. "When a governmental action is characterized as 'legislative' or 'adjudicative,' there is the risk that the characterization will be carried beyond the specific issue being decided."
>
> . . .
>
> Thus, strict reliance on case law to determine the extent of immunity carries the risk of finding immunity based on the fact that the function being performed has been characterized as "quasi judicial" in a prior case which may have concerned entirely different issues and in which the court did not have reason to consider the policy implications of absolute immunity. Such reliance also carries with it the risk of finding immunity based on analogy to a case where the title held by the relevant official is the same as the one at issue, but the functions, procedures, and inherent protections available are quite different.

The court ruled in *Creelman* the state does not, ". . . enjoy the immunity of its Department of Social and Health Services caseworkers." *Creelman v. Svenning*, 67 Wn.2d 882, 885, 410 P.2d 606 (1966). Appellees in the instant case are functioning in a capacity closer to that of social and health services and case workers than of a judge or legislator. Yet they are another degree removed by being private practice mental health practitioners.

"To determine if immunity applies courts look to the function being performed instead of the person who performed it." *Lallas v Skagit County*, 167 wn.2d 861, 225 P.3d 910 (2009). "Thus, judicial immunity applies to judges only when they are acting in a judicial capacity and with color of jurisdiction." Appellees were not in a position to make a ruling.

In *Reddy v. Karr*, 9 P.3d 927, a court commissioner appointed an employee of King County Family Court Services. Poppleton at all times remained in the employ of NWFP and they are not employees of the county nor the court.

The court reasoned in *Adkins v. Clark County*, 105 Wn.2d 675 that because juries see bailiffs as speaking for the judge, the bailiff was acting as the judge's alter ego. The bailiff is paid by the county pursuant to RCW 2.32.360 and works under the control and supervision of Judge. Again, Poppleton was clearly working under his own control and direction.

In *Bader*, the defendant was clearly the state. *Bader v. State*, 43 Wn. App. 223, 716 P.2d 925 (1986). The Appellate Court in Division 3 found immunity,

> "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."

The instant case is purely civil, not criminal and there is no correlation. CP 13

The case of *Barr v. Day*, 124 Wash.2d 318, 879 P.2d 912 (1994) may have involved a Guardian ad Litem but that is as far as the similarity applies. The case involved guardianship proceedings of an incompetent party. Therefore the Guardian ad Litem was entitled to quasi-judicial immunity from civil liability in acting as an arm of the court. Appellees in the instant case were not instructed to determine incompetence nor evaluate the best interest of an incompetent person. What might be suitable in such an extreme case, as *Lutheran* cautions, does not imply immunity is applicable even in cases where there is greater similarity than here. *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91.

The immunity of Guardians ad Litem is not clearly established as noted in, *West v. Osborne*, 108 Wn. App.764, 34 P.3d 816 (2001). ". . . no Washington case has applied quasi-judicial immunity to a guardian ad

Litem in a dissolution case."

In the case of *Tobis v State*, 52 Wn. App. 150 223, 716 P.2d 925 (1986), the court found *Petersen* to be an appropriate standard. *Petersen v. State*, 100 Wn.2d 421, 671 P.2d 230 (1983). Holding, ". . . that a psychiatrist has a duty to take reasonable precautions to protect anyone who might foreseeably be endangered by a patient's mental problems," the appellate court found, ". . . that the state psychiatrist's decision . . . concerning . . . commitment did not fall within the discretionary function exception permitting immunity, and thus the State could be sued for damages by Petersen." Again defendants in both of these cases are the State, not private citizens, still immunity did not attach. Additionally Appellees breached their duty to take reasonable precautions regarding the foreseeability of danger from the mental health problems of Develle's son.

> "Tobis further argues that the Legislature has expressed an intent to impose liability on state employees to protect identifiable victims from the violent behavior of mental patients. In support of this contention, Tobis cites a recent amendment to RCW 71.05.120 which does not permit immunity for duties not performed in good faith or with gross negligence."

The U.S. Supreme Court has cast more than a reasonable doubt on immunity. *Elliott V. Perez*, 561 F.Supp. 1325 (1983). Both this case and the more recent *Butz v. Economou*, 438 U.S. 478, held that State prosecutors are not entitled to absolute immunity while engaged in

administrative or investigative activities, but are only entitled to a qualified (good faith) immunity in these instances. ". . . [W]hen a prosecutor steps outside the confines of the judicial setting, these checks and safeguards inherent in the judicial process do not accompany him, and thus there is a greater need for private actions to curb prosecutorial abuse and to compensate for abuse that does occur." In this case the Defendants' task was investigatory and limited to providing relevant findings for the ensuing judicial decision. CP 37

> The Ninth U.S. Circuit Court of Appeals on the issue of Udall's prosecutorial immunity held that where a prosecutor faces an actual conflict of interest, and files charges he or she knows to be baseless, the prosecutor is acting outside the scope of his or her authority and thus lacks immunity. *Beard v. Udall,* 648 F.2d 1264 (9th Cir.1981).

3. As an employer of Poppleton, NWFP holds vicarious liability for the torts of its employees done within the course and scope of employment. If the employer is responsible, that would be at odds with the court being the employer. At all times, the torts and grossly negligent acts of Poppleton were completed while under the direction of NWFP.

The course and scope and direction of the evaluation process were solely determined by Poppleton under NWFP. Develle signed an agreement with NWFP under those conditions.

The Washington statute allows for appointment of individuals as

Guardians ad Litem who then work under the direction of the court. A properly licensed LLC such as NWFP does not meet any of those definitions.

Even if quasi judicial immunity applies to Poppleton as a natural person there is no precedent that it would extend to the LLC. And if he was working under the direction, control, and supervision of NWFP, a private LLC, that would preclude his status as an agent of the court.

In the case of *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, the court found, "only when the person claiming absolute immunity can prove that such immunity is justified will we impose it." The appellees in the instant case have not demonstrated that they perform, "a function which is analogous to that performed by persons entitled to absolute immunity, such as judges or legislators." Contrary to the case *Strawberry Hill 4 Wheelers v. Board of Comm'rs*, cited in *Lutheran*, appellees incorrectly argued that "quasi judicial immunity attaches merely because it has been found in other cases". In the instant case the lower court did not consider the "policy implications of absolute immunity," and the risk of finding immunity where, "the functions, procedures, and inherent protections available are quite different." CP 19

4. The trial court erred by applying quasi judicial immunity to acts

of bad faith and gross negligence.

Qualified immunity attaches to government employees so long as no civil rights are violated. Develle alleges actions in her complaint which violated her rights. CP 13 She also alleges that Poppleton's report was so negligent and inaccurate as to be considered fraud and violates the duties of a GAL/investigator.

This Court in *Kelley v. Pierce*, 4398-2-II (2014) expressly stated, "when a GAL is not acting within his statutory duties, he is not acting as "an arm of the court" and cannot be entitled to quasi-judicial immunity." In this case Kelley alleged intentional torts and misconduct of the GAL. And This Court has specifically upheld that quasi-judicial immunity does not extend to actions outside of the statutory GAL functions:

> "in West we determined that the GAL was acting as an arm of the court at all times, we were referring to all times that were relevant in that case. 108 Wn.App. at 774. The phrase "at all times" cannot be taken out of context. We did not hold in *West* that a GAL is always protected or is never acting outside of his GAL duties. **Such a result would be absurd.**" (Emphasis added.)

Besides being, "absurd", This Court has expressed, "As a result, questions of fact exist as to whether Skagren was acting within his statutory or court-appointed functions when committing the alleged torts, and, therefore, is entitled to quasi-judicial immunity. Accordingly, we affirm the superior court's decision denying the County's motion to

dismiss Kelley's case."

Develle avers that Poppleton's actions were intentional and grossly negligent constituting fraud upon the court and bad faith. CP 13 Thus the lower court erred by dismissing on grounds of quasi-judicial immunity. CP 19 And according to This Court, it would be absurd to grant such actions immunity. In the instant case there are questions of fact as to whether the intentionally tortious and grossly negligent acts were a part of the court ordered functions.

VI. CONCLUSION

For each of the foregoing reasons, Develle requests that this Court hold that the trial court erred in its decision by applying quasi judicial immunity to the defendants and that the decision be reversed.

Develle has suffered greatly because of the tortious and grossly negligent acts of Poppleton. Poppleton was not appointed by the court but engaged the parties by entering into a financial arrangement. Even if Landon Poppleton, the natural person, is entitled to quasi-judicial immunity, the LLC which directed him is not.

Further, even if quasi-judicial immunity applies to all appellees in the instant case, those actions outside the scope of function of investigation and GAL definitively do not merit such an immunity.

The holding in *Kelley* is clear, "A GAL is not entitled to quasi-judicial immunity as a matter of law because if these allegations are true, Skagren was not acting within a GAL' s function when he engaged in this conduct and, therefore, would not be entitled to immunity." Since Poppleton was not acting within his function as an arm of the court and his actions exceeded the functions of a GAL, he is not entitled to quasi-judicial immunity.

When Poppleton began to intimidate Develle and harass her he was maliciously acting out professional pride, ego and his ad hominem attacks have no basis in the functioning of a court appointed investigator or GAL.

Respectfully submitted this 16th day of June, 2016.

Becky Develle

Becky Develle