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DIVISION II
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STATE OF WASHINGTON
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No. 48587-7-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

BECKY DEVELLE,
Appellant

v.

LANDON POPPLETON, et al.,
Respondent

**BRIEF OF RESPONDENT
LANDON POPPLETON**

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I. INTRODUCTION

Pro se litigant Becky Develle challenges whether quasi-judicial immunity applies to persons who perform investigative or fact finding functions on behalf of a court, pursuant to a court order, and asks this Court to reverse the dismissal of her lawsuit against parenting evaluator Landon Poppleton, Ph.D., at the CR 12 stage on immunity grounds. In her underlying dissolution action, the trial court ordered Dr. Poppleton to conduct a Parenting Evaluation. After Dr. Poppleton submitted his Parenting Evaluation and testified at trial, Becky Develle and her former husband, Mark Develle, reached “a global agreement on all of the issues” and the trial court adopted the parties’ agreement. Becky Develle subsequently violated the agreement, was found in contempt, and lost custody of her children. She then appealed the trial court’s custody decision unsuccessfully to this Court. Thereafter, Becky Develle commenced a civil action against Dr. Poppleton alleging that he negligently performed the Parenting Evaluation. A different trial court properly dismissed her civil action against Dr. Poppleton at the CR 12 stage, finding as a matter of law that Dr. Poppleton is entitled to quasi-judicial immunity.

Washington law does not recognize any cause of action for a litigant who merely disagrees with the professional opinions of court-appointed experts. Washington law concerning the protection afforded to court-appointed experts is long-standing and absolute. Accordingly, this Court should affirm.

II. RESPONSE TO ASSIGNMENT OF ERROR

Pro Se litigant Becky Develle wrongly asserts that the trial court overseeing her divorce proceeding did not have authority to appoint Dr. Poppleton as parenting evaluator. She also makes unsupported “factual” allegations that she wrongly assumes, without authority, abrogate the quasi-judicial immunity afforded to court-ordered professionals conducting judicial duties. As the Court of Appeals made clear in *Reddy v. Karr*, 102 Wn. App 742, 748, 9 P.3d 927 (2000), quasi-judicial immunity extends to parenting investigators and other professionals who engage in court-ordered parenting evaluations on behalf of the court pursuant to a court order. The cases and statutes cited by Develle as excepting professionals in private practice from being appointed as experts and, by extension, quasi-judicial immunity do not, in fact, carve out any exception, nor do they limit the holding in *Reddy*. Indeed, none of the authority cited by Develle addresses or otherwise stands for the proposition that a trial court cannot appoint a professional in private practice to investigate as parenting evaluator, nor does any case hold that a court-appointed expert otherwise engaged in private practice is not entitled to quasi-judicial immunity. Develle misunderstands the law and the superior court properly dismissed her claims.

III. COUNTERSTATEMENT OF ISSUES ON APPEAL

1. The trial court committed no error in finding that Dr. Poppleton was entitled to quasi-judicial immunity as a court-appointed parenting evaluator.

2. The record is devoid of any evidence of improper conduct on the part of Dr. Poppleton, let alone any evidence of “gross negligence” or intentional misconduct.
3. Ms. Develle’s own conduct was the proximate cause of her alleged injuries. Dr. Poppleton did not cause Ms. Develle to violate the parenting Order to which she had previously voluntarily agreed.
4. Dr. Poppleton’s practice, NW Family Psychology, LLC (“NWFP”), was not a defendant in the action and has been wrongly added to this appeal by the pro se plaintiff. Petitioner’s arguments as to NWFP should be stricken and NWFP should be removed from the appellate case caption. Develle never commenced a valid action against NWFP and, therefore, maintains no colorable appeal against that entity.

IV. COUNTERSTATEMENT OF THE CASE

A. Develle Divorce.

This lawsuit arises out of pro se litigant Becky Develle’s divorce from her former husband, Marc Develle, in which defendant Landon Poppleton, Ph.D., served as the court-appointed parenting evaluator. This Court previously summarized the factual circumstances of the underlying divorce proceedings in an unpublished opinion as follows:

Marc and Becky were married in June 1986. Becky filed for legal separation in March 2011. Marc and Becky had eight children together, five of whom were dependents at the time of trial. Throughout the marriage, Becky was a homemaker who also homeschooled the children.

Dr. Landon Poppleton, a clinical psychologist, conducted a custody evaluation for the Develle family. The efficacy of Becky's teaching methods was central to the resolution of the parenting plan. Dr. Poppleton found that, notwithstanding intelligence quotients in the normal ranges, each of the children scored unacceptably low in various domains of their academic achievement. Citing complaints from the children, Dr. Poppleton noted serious concerns regarding Becky's ability to provide a healthy, supportive home routine including adequate nutrition. Dr. Poppleton also had concerns about Becky's live-in boyfriend's son (D.J.) who had propositioned one of Becky's young daughters for sex.

The trial court appointed Erin Wasley as guardian ad litem to serve as a liaison between the court and the Develle children. Wasley's subsequent investigations corroborated many of Dr. Poppleton's concerns.

The parties proceeded to trial in August 2012. On the second day of trial, the parties announced on the record that they had reached "a global agreement on all of the issues at this time." 2 Report of Proceedings (RP) at 35. The parties agreed that the two youngest children, H.D. and B.D., would remain primarily with Becky while Marc would retain custody over the remaining three dependent children. The trial court adopted the parties' agreement including a review

hearing 45 days after entry of the order to determine whether the parenting schedule proved successful for the family and also to reexamine the custody arrangement if necessary. The agreement provided that Marc would pay Becky \$1,000 per month in child support, but the trial court made it clear that this amount was subject to review at a later date.

The agreement further specified that Marc had sole decision-making rights relating to the children's education and that Becky could no longer homeschool the children. Moreover, the parties agreed that D.J. would not have unsupervised contact with H.D. or B.D.

The parties agreed that Marc would receive the family home. The trial court ordered Becky to vacate the home and to leave it in a clean and habitable condition. The trial court permitted Becky to take some of the personal property from the home provided she made a list of those items and left the children's possessions there. The court specifically warned Becky not to leave the home empty of furnishings.

The trial court discussed each agreement provision, asking Becky and Marc separately whether they agreed. Becky answered in the affirmative to each question, including the maintenance and child support issue (with the associated review period) as well as the custody arrangement. Becky also answered affirmatively when the

trial court asked her whether she "firmly believed" that she and Marc had an agreement. 2 RP at 60. The terms of the agreement were accurately memorialized in a decree of dissolution, parenting plan, and order of child support.

The trial court instructed Wasley to monitor the children's progress to determine whether the parenting schedule and custody arrangement was working for the family. Before the first review hearing, Marc filed a motion for contempt based in part on reports that there had been a second incident involving D.J. making inappropriate sexual remarks to H.D. Marc alleged that Becky continued to fail to protect H.D. from D.J. contrary to the court's previous order. Marc also complained that the home was in disarray when Becky left and that she took the children's personal property.

The trial court set these matters over for a review hearing the following week. There, informed initially by Wasley's report, the trial court heard testimony from Becky regarding her efforts to supervise her children around D.J. amidst allegations that there had been further unseemly conduct. Becky conceded that she had left H.D. alone with D.J. for a short time on one occasion. Becky also admitted that she allowed B.D. and D.J. to sleep in the same bedroom, asserting ignorance as to that particular prohibition in the parenting plan.

The trial court awarded temporary custody of H.D. and B.D. to Marc pending an evidentiary hearing. Wasley testified at the evidentiary hearing and recommended that Becky be denied overnight visits from that point forward. Wasley's recommendation was based on her ongoing investigation and her interviews with the Develle children. Wasley noted that Becky actively minimized the risk D.J. posed and that the children strongly preferred the current schedule with Marc as the primary parent. Wasley also doubted whether Becky was willing to enforce the court's restrictions.

The trial court examined the factors contained in RCW 26.09.187(3) and concluded that Marc was best suited for primary custody of all the dependent children. The court expressed several concerns, not the least of which was its uncertainty that Becky could provide a loving, stable, and consistent relationship with each of the children. The trial court also noted that, in its view, Becky had overlooked the emotional and developmental needs of the children and that, unlike Marc's home, there were allegations of recent emotional and physical abuse in Becky's home. The court awarded primary custody to Marc on a permanent basis.

Becky moved for reconsideration, claiming that the children had been coached to lie. The court denied Becky's motion, ruling that she had not established her burden under

either CR 59 or CR 60. The trial court then found Becky in contempt for failing to leave the family home in a clean and habitable condition and because she defied the same order by taking the vast majority of the parties' personal property, including the children's personal property. The trial court allowed her to purge the contempt finding by returning specific items belonging to the children. Becky appeals.

In re the Marriage of Develle, No. 44484-4-II (Wash. App. 2015).

B. Civil Action Against Dr. Poppleton.

In August 2015, appellant Becky Develle filed a Complaint for Damages Personal Injuries and Wrongful Death against Dr. Poppleton in Clark County Superior Court entitled *Develle v. Poppleton*, Cause No. 15-2-02252-4. CP 30-32. In her Complaint, Develle alleged that Dr. Poppleton “breached his Fiduciary Duties as entrusted by this Honorable Court to protect the children involved in the dispute by recommending a custody placement with a neglectful parent.” CP 31. She also alleged that Dr. Poppleton participated in a civil conspiracy against her that resulted in the loss of custody of her children and in other pleadings, baldly, stated that his conduct amounted to gross negligence. CP 31-32, CP 12-18. Ms. Develle blames Dr. Poppleton and others, including, but not limited to her former husband, Marc Develle, for the suicide of her son Joshua Develle at age 17, years after her dissolution decree and parenting orders became final. CP 31.

The state court action against Dr. Poppleton was dismissed as a matter of law on December 11, 2015. CP 24-25. Clark County Superior Court Judge

Daniel Stahnke found that, as a court-appointed parenting evaluator, Dr. Poppleton was entitled to quasi-judicial immunity. This appeal followed.

V. ARGUMENT

A. Standard of Review.

Under CR 12(b)(6), a complaint may be dismissed for “failure to state a claim upon which relief can be granted.” A dismissal under this rule involves a question of law, which is reviewed de novo by an appellate court and is appropriate only if it appears beyond a reasonable doubt that the plaintiff cannot prove any set of facts which would justify recovery. *Tenore v. AT&T Wireless Servs.*, 136 Wn.2d 322, 330, 962 P.2d 104 (1998), *cert. denied*, 525 U.S. 1171, 119 S.Ct. 1096 (1999). In such a case, a plaintiff’s allegations are presumed true and a court may consider hypothetical facts not included in the record. *Id.* However, the Court is not required to accept legal conclusions included in the complaint as true. *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 120, 744 P.2d 1032, 750 P.2d 254 (1987), appeal dismissed, 488 U.S. 805, 109 S.Ct. 35 (1988).

B. Quasi-Judicial Immunity Extends to Professionals Who Engage in Court-ordered Parenting Evaluations for the Court.

The superior court dismissed Develle’s civil action based upon the application of quasi-judicial immunity. Washington law is clear that quasi-judicial immunity attaches to persons or entities that perform functions comparable to those performed by judges, so that they share the judge’s absolute immunity while carrying out those functions. *Lutheran Day Care*

v. *Snohomish County*, 119 Wn.2d 91, 99, 829 P.2d 746 (1992) (citing *Butz v. Economou*, 438 U.S. 478, 512-14 (1978)), *cert. denied*, 506 U.S. 1079 (1993). To determine if immunity applies, courts look to the function being performed rather than the person who performed it. *Lallas v. Skagit County*, 167 Wn.2d 861, 865, 225 P.3d 910 (2009).

Quasi-judicial immunity has been extended to a number of different professionals acting on behalf of the court. *See e.g.*, *Adkins v. Clark County*, 105 Wn.2d 675, 717 P.2d 275 (1986) (entitling court bailiff to quasi-judicial immunity against suit); *Barr v. Day*, 124 Wn.2d 318, 332, 879 P.2d 912 (1994) (entitling guardian ad litem to quasi-judicial immunity against negligence claims because the guardian ad litem was acting "as an arm of the court"); *West v. Osborne*, 108 Wn. App. 764, 773, 34 P.3d 816 (2001) (entitling guardian ad litem to quasi-judicial immunity in dissolution matter); *Tuggart v. State*, 118 Wn.2d 195, 203, 822 P.2d 243 (1992) (holding that parole officers were entitled to quasi-judicial immunity for functions performed as an integral part of a judicial or quasi-judicial proceeding); *Tobis v. State*, 52 Wn. App. 150, 758 P.2d 534 (1988) (granting judicial immunity to state and state mental health professionals for evaluation recommending that court unconditionally release patient); *Bader v. State*, 43 Wn. App. 223, 716 P.2d 925 (1986) (holding that court appointed psychiatrists or mental health providers are acting as arms of the court and are thus protected from suit by judicial immunity).

More importantly, quasi-judicial immunity has been extended to parenting investigators and other professionals who engage in court-ordered parenting evaluations on behalf of the court. In *Reddy v. Karr*,

102 Wn. App 742, 748, 9 P.3d 927 (Div. I, 2000), the plaintiff brought suit against King County Family Court Services and its investigator alleging that the investigator performed a negligent parenting evaluation during the plaintiff's dissolution proceeding and that the county negligently trained and supervised the investigator. *Reddy*, 102 Wn. App. at 747. The trial court granted defendants' motion for summary judgment and the plaintiff appealed. *Id.*

On appeal, the appellate court found that the investigator was entitled to quasi-judicial immunity because she was ordered by the court to do a parenting evaluation to assist in determining child's custody status. *Id.* at 749. The *Reddy* court explained:

Courts have the grave obligation to serve the best interests of minor children of divorcing parents with respect to where the child shall primarily reside and other issues of great importance to the child, its parents and society as a whole. Courts do not ordinarily perform independent investigations; rather the adversary system of justice ordinarily requires that parties to litigation investigate and present evidence from which the court finds facts and applies legal principles in order to resolve controversies. But the unique obligation of courts to serve the best interests of minor children in cases of divorce often requires independent

investigations of allegations between warring parents, professional evaluation of parenting abilities, determination of the degree of bonding between children and each parent—not to mention the wisdom of Solomon when

the most expedient solution might appear to be to "saw the baby in half." *Judges cannot personally perform these independent investigations and evaluations, due not only to the volume of cases but also to the impropriety of ex parte contact between judges, parties and witnesses. Accordingly, a surrogate is necessary. Family court investigators and evaluators performing court-ordered services do so as surrogates for the court.*

Id. (emphasis added). Thus, in performing the parenting evaluation, the investigator was considered to be acting as an "arm of the court" and thus entitled to quasi-judicial immunity. *Id.*

Develle's analysis fundamentally misunderstands and misapplies the immunity at issue. None of the cases she cites hold that only parenting evaluators enjoy quasi-judicial immunity when employed by a government entity, nor do they limit or overrule *Reddy*. The superior court's decision should be affirmed, because Washington law firmly establishes quasi-judicial immunity to court-appointed professionals in exactly Dr. Poppleton's position.

C. **Quasi-Judicial Immunity Protects Court-Appointed Professional Conducting Judicial Duties Pursuant to a Court Order.**

Dr. Poppleton's Parenting Evaluation was conducted pursuant to a court order. Develle now challenges whether the trial court had authority to issue such an order and offers a lengthy discussion of her obvious dislike of the result of the evaluation. However, her purported legal challenge of the trial court order appointing Dr. Poppleton is not only untimely, but

misdirected. There is no legal merit to Develle's argument that the trial court did not have authority to appoint Dr. Poppleton. She offers no reason or authority for her claims that (1) a psychologist in private practice cannot act as a court-appointed investigator and (2) only public employees acting in that capacity are entitled to quasi-judicial immunity. The pro se appellant misunderstands the scope and purpose of RCW 26.12.050. Further, even if Develle had had a basis to challenge the order appointing Dr. Poppleton in the dissolution matter, such challenge should have been brought in the trial court and/or this Court during the dissolution matter. She cannot maintain a claim against Dr. Poppleton for an order that he did not issue.

D. Develle Failed to Prove Gross Negligence.

Develle seems to argue that her repeated assertions of gross negligence are sufficient to abrogate quasi-judicial immunity. As pointed out above, Dr. Poppleton is entitled to *absolute* quasi-judicial immunity regardless of any alleged gross negligence. Furthermore, Develle's allegations of misconduct against Dr. Poppleton failed to rise to the level of gross negligence, or even ordinary negligence. Gross negligence is negligence that is *substantially* and *appreciably* greater than ordinary negligence. *Nist v. Tudor*, 67 Wn.2d 322, 331, 407 P.2d 798 (1965). This does not mean a total lack of care but, rather, care substantially less than the quantum of care inherent in ordinary negligence. *Id.* Ordinary negligence is "the act or omission which a person of ordinary prudence would do or fail to do under like circumstances or conditions." *Id.* There is no issue of gross negligence without "substantial evidence of serious

negligence." *Id.* at 332. The evidence for gross negligence simply does not exist in this case.

The record is devoid of any allegation, let alone admissible evidence, of wrongdoing by Dr. Poppleton. Develle's "evidence" of gross negligence is nothing more than conclusory arguments and mischaracterizations of the record. Conclusory statements are not evidence. To show gross negligence, Develle was required to set forth facts proving that Dr. Poppleton's ordered evaluation was *substantially* at odds with the standard of care. Taking away Develle's numerous conclusory statements, and repeated references to inadmissible evidence, there is nothing in this record to support Develle's claim of gross misconduct.

E. Develle Failed to Prove Proximate Cause.

To prevail on a negligence claim, Develle must establish proximate cause, a necessary element of a claim for negligence/professional malpractice. Further, the plaintiff must show (1) that the defendant owed a legal duty to the plaintiff, (2) that the defendant breached its duty, and (3) that the defendant's breach was the proximate cause of the plaintiff's alleged injury. *Ruff v. County of King*, 125 Wn.2d 697, 704, 887 P.2d 886 (1995) (citing *Hansen v. Wash. Natural Gas Co.*, 95 Wn.2d 773, 776, 632 P.2d 504 (1981)). To establish proximate cause, a claimant must prove that the negligent conduct caused the injury complained of in a direct sequence, unbroken by any independent cause. *Hoffer v. State*, 110 Wn.2d 415, 424, 755 P.2d 781 (1988).

Here, Develle is seeking to hold Dr. Poppleton liable for her loss of custody and the subsequent death, years later, of her son by suicide. Her

arguments ignore critical facts: (1) courts decide custody, not experts; (2) Develle willingly stipulated to the parenting order that she was later found to have willfully violated, resulting in the court finding her in contempt; (3) her 17-year-old son committed suicide years after her divorce; and (4) Dr. Poppleton was not a treating therapist. Dr. Poppleton provided certain data and opinions as a forensic investigator, but these were recommendations to the court, not orders. Regardless of what Develle claims, Dr. Poppleton was not the proximate cause of her alleged injuries. Applying Washington law to these facts, the trial court correctly dismissed her claims.

F. NWFP Is Not a Party to This Appeal.

Develle filed her first civil complaint against Dr. Poppleton in August 2015. CP 30-32. Dr. Poppleton answered the Complaint with a CR 12(b)(6) Motion to Dismiss, which was filed on November 23, 2015, and noted for hearing on Friday, December 11. CP 1-6. Thereafter, without leave of court, Develle filed Plaintiff's Second Amended Complaint for Damages, Personal Injuries and Wrongful Death on December 10¹. CP 9-11. Develle added "Jane Doe, husband and wife, and NW Family Psychology, LLC, jointly and severally," to the case caption without leave of court. CP 12. *Id.* Not only did Develle fail to comply with CR 15, she never properly served her amended complaint, yet alone a summons, on the new parties. Dr. Poppleton was the only party to the underlying civil action and, by extension, is the only respondent in this appeal. NWFP is not and never has been party and its name should be removed from the case caption. Likewise, "Jane doe" and

¹ According to the case docket, Develle also filed an Amended Complaint. Since the amended pleading was improper, never received or responded to by Dr. Poppleton, and not designated or referenced by Develle, there is no reason to further address it herein.

any reference to Dr. Poppleton's alleged marital community should be removed. A party may not amend a case caption after filing of a complaint without leave of the court and cannot commence a civil action against a new party without service of a summons and complaint. See CR 3; 4 & 5.

VI. CONCLUSION

Washington law provides quasi-judicial immunity to professionals who perform judicial duties on behalf of the court pursuant to a court order. Develle failed to offer any case law or evidence warranting abrogation of this immunity. Instead, her opposition to dismissal was based on novel legal theories unsupported by law. The superior court properly dismissed her claims and made no error. This appellate court should affirm.

RESPECTFULLY SUBMITTED this 15th day of July 2016.

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DECLARATION OF SERVICE

I, Conor McCauley hereby declare as follows:

1. On the 15th day of July, 2016, I caused a copy of the foregoing Brief of Respondent Lance Poppleton to be sent for service upon the following in the manner indicated:

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

DATED this 15th day of July, 2016, at Seattle, Washington.



Conor McCauley

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