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DIVISION ONE

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**Court of Appeals No. 70336-6
King County Cause No. 12-2-18444-5 SEA**

SEP 26 2013
COURT OF APPEALS
DIVISION ONE
STREET

**COURT OF APPEALS
DIVISION I
STATE OF WASHINGTON**

AZITA SHORKHANLOO,

Appellant
(Plaintiff Below)

v.

LAURIE OLSON-GAINES and EDWARD SCHAU,

Respondents
(Defendants Below)

APPEAL BRIEF OF APPELLANT AZITA SHIRKHANLOO

Decisions to be Reviewed:

Order of King County Superior
Court Judge Teresa Doyle of
04/12/13 Granting Summary
Judgment to Respondents

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I. INTRODUCTION

Comes now the Appellant, AZITA SHIRKHANLOO, (Plaintiff below), by and through his attorney of record, Stuart E. Brown, and respectfully submits her Appellate Brief under RAP 10.3.

The parties to the underlying dissolution case leading to the lawsuit against Ms. Laurie Olson Gaines (parenting evaluator (PE) in the underlying case) and Clinical Psychologist Edward Schau, Ph.D., were the Petitioner/Father, Timothy Smith (hereafter referred to as ‘the father’) and the Respondent/Mother, Azita Shirkhanloo (hereafter referred to as ‘the mother’). The only child at issue in the case was Nathan Smith (DOB: 01/23/09), the natural child of the parties.

The parties met in Europe in 11/06 where the parties both worked at the time and then resided together for almost a year. The couple then separated when the mother complained of abusive treatment at the hands of the father but then reconciled and married in 01/08, and the mother became pregnant with Nathan in 04/08. The couple then relocated permanently to the United States (Seattle) at the father’s request in 10/08 when the mother was 6-7 months pregnant with Nathan. She gave up her career and moved with the father to the U.S. Starting from the time that the couple arrived in the U.S. in 10/08 to the time Nathan was born in late 01/09, the mother reported that the father was verbally, emotionally and

physically abusive, and made several reports to the authorities. The mother then filed for a protection order on 04/06/09, a day after she reported particularly violent physical abuse at the hands of the father, alleging domestic violence (DV) against the father who was then charged with DV harassment in King County. The couple never lived together or reconciled after that time. The father denied that he engaged in any DV behavior against the mother. The mother maintained that all of her DV and abuse claims against the father were 100% valid including that he has struck her, choked her, pushed her, pounced on her angrily while she was pregnant while destroying property; etc.

The father then filed for divorce on 05/07/09 and on 08/03/09, Laurie Olson Gaines, LICSW, was appointed as the parenting evaluator (PE) in the case. In her role as PE, she was legally required to complete a fair, objective, impartial Parenting Evaluation of the parties, while strictly adhering to statutory requirements pertaining to conducting of a PE as detailed in WAC-246-924-445 (Parenting Evaluation Standards). The PE issued her 'Interim Parenting Evaluation' report on 11/30/09 and was based on a total of only three hours interview time with the mother, and on a total of *only* 1.2 hours of mother and child observation time, and a total of 3.5 hours interview time with the father and *only* 1.2 hours of father and child observation time. The mother maintained that both this this initial

evaluation and the final evaluation of the PE were deficient and incompetent and failed to follow both statutory requirements and professional standards both during the actual evaluation process itself leading to the loss of her child (see below) and at the actual trial itself before Superior Court Judge Deborah Fleck in 04/12 (see below). Expert Evidence to support the mother's claims of incompetence and failure to follow standards of practice and stay within the scope of court ordered assignments and duties (for both Ms. Olson Gaines and Dr. Schau in terms of their evaluations and reports) were provided in sworn declarations of Dr. Sarah Baxter (Psychologist), Dr. JoAnne Solchaney (Psychologist), Dr. Diana Cook (Psychologist), Dr. Sharon Aboosaidi (Psychotherapist), and Dr. Art Wassmer (Psychologist). Ms. Olson Gaines acting as the court ordered PE, specifically selected Dr. Edward Schau to complete psychological testing of both parties for her parenting evaluations. The mother also maintained at the actual trial before Judge Fleck that Ms. Olson Gaines as PE went far beyond her role and charge as a PE, including offering her own diagnosis of the mother (but not of the father) that certainly were not supported by any testing or psychological data. The mother maintained that the net results of the PE's behavior, actions, and faulty evaluations, was to assist the father and his attorney in producing one of the most punitive, demeaning, and coercive parenting plans

imaginable (as also supported by Judge Fleck in her final oral decision before this (appellate) court. The PE produced her final parenting evaluation on 09/09/10 which led *directly* to the new final orders pursued by the father and his attorney of 01/15/10 (see below).

In terms of Dr. Schau's evaluation work completed for the PE as part of her work, Dr. Schau completed and issued his initial Psychological Assessments of the parties in 10/09 and admits to administering different psychological tests to the parties, making any comparison between the parties invalid and professionally inappropriate as testified to by other expert professionals involved in the case and as eventually determined by the Washington Department of Health Licensing (DOL) which sanctioned Dr. Schau for these very same improprieties and stemming (the sanctions) *from this very case* (italicized for emphasis here and below). Evidence presented at trial revealed that Dr. Schau (and the PE) paid no serious attention to or accounted for the mother's different (Persian) cultural background, and her misunderstanding of many English phrases, colloquial expressions, syntax, and word orders, making the evaluations further fatally flawed. Dr. Schau was further sanctioned by the DOH for his engaging in a form of parenting evaluation without his *ever* having observed the mother (or the father) with the child, and thus essentially having no basis to conclude as to parenting skills and possible parenting

problems, and despite positive psychological testing results on the part of the mother (while ignoring negative results and negative legal history of the father) with no evidence of any pathology on her part. Further, Dr. Schau required what he termed 'Level II testing' for the mother and not for the father, thus making up his own professional standards for testing for which he was also sanctioned by the DOH which noted that there was no such legal or professional basis for any such 'Level II' (or even 'Level I'). These terms and procedures were in fact made up by Dr. Schau and simply accepted by the PE without any investigation or concern. No such 'Level II' testing was ever given or required of the father. The DOH charges against Dr. Schau and the settlement with sanctions against Dr. Schau by the DOH make it 100% clear that he strayed far from anything remotely approaching a professional psychological assessment and to his appropriate role as psychological evaluator.

The PE then issued her final report on 09/09/10 and while failing to report anything but positive and healthy mother to child interactions based on her observation, concluded that "Nathan is at risk for developmental and emotional problems as well as relationship issues because of his mother's personality disorder. She recommended that the mother be restricted to only professionally supervised visits for a few hours per week for the mother who had been the unquestionable primary

parent for the child's entire life up to that time (with a father required to have had supervised visits for the better part of a year previously), and who had been observed by the same PE to be an excellent mother with no evidence of any problems. The PE cited safety concerns for the child with the mother despite no evidence ever of any such safety problems for the mother. The PE recommended *two full years of treatment* for the mother before any unsupervised time with the child was possible, recommended .191 restrictions for the mother only, recommended giving the father sole decision making, and required the mother to initiate and complete DBT (Dialectical Behavioral Therapy) and follow all treatment recommendations for a minimum of two years." The mother was also restricted from giving the child *any* gifts, restricted from speaking in her native tongue (Farsi) with the child, and restricted from having her relatives spend time with the child. In the year following the adoption by underlying trial court of all of the PE's recommendations, the mother was forced to complete all of the above PE recommendations but was eventually evaluated by a number of other professionals (including by Dr. Cook and Dr. Aboosaidi, an Iranian-American mental health expert) who found that the mother *did not* suffer from Borderline Personality Disorder or from *any* Personality Disorder as claimed by the PE, and was *not* in any

need of DBT or any other form of therapy and certainly was not a risk to the child in any manner.

The father thus had sole custody of the child from September 16, 2010 to September 8, 2011, a period marked by constant change and chaos in the child's life as argued at the trial before Judge Fleck. The mother then filed her motion to vacate the final orders as to the draconian Parenting Plan noted above and on 09/08/11 the court (Judge Fleck) granted the motion to vacate and returned custody to the mother and ordered a new trial based in large part (in her own words in the oral ruling) on the unscientific nature of the evaluation completed by Ms. Olson Gaines and Dr. Edward Schau. The mother thus had been denied any unsupervised contact with her child for a full year from September 10, 2010 until September 8, 2011, due to the misbehavior and improprieties of the PE and Dr. Schau according to Judge Fleck's ruling. The child was returned to the primary care and custody of his mother by ordering a return to the temporary PP in existence prior to 09/14/10. All *RCW 26.09.191* restrictions as to the mother were also vacated. In its ruling to vacate, the court expressed concern that the PE had put the child at risk by placing the child with the father with an unaddressed DV issue and the mother's civil rights had been violated.

A lengthy 4-5 week trial then took place in April and May of 2012, during which time the Defendants testified and were subjected to extensive cross examination lasting a combined 4-5 days of trial time. Transcripts of the Defendant's testimony were prepared and are also before this (appellate) court. Defendant Olson Gaines' testimony validated that she had seriously and continuously violated provisions of WAC 246-924-445 to which she is statutorily held as a PE, had no awareness or care as to ethical standards she was required to meet, evidenced a level of incompetency and disregard for scientific and ethical standards of practice, evidenced clear bias toward the mother and protection of the father by summarily ignoring all of his defects and problems arising to a clear pattern of favoritism, was negligent and reckless in carrying out her charge, evidenced an alarming lack of knowledge and/or skill as to her charge, and purposefully mischaracterized and/or was deceitful as to facts of the case. Defendant Schau's testimonial transcripts validated his own negligence and violation of numerous ethical and practice standards. After the mother presented her case in chief which included the very damaging (to his case) and scientifically flawed evaluations (Judge Fleck's conclusions) of both the PE and Dr. Schau, the father decided to settle with the mother being primarily custody and sole decision making with the father receiving five days per month with two weeks summer vacation.

The mother then filed her initial personal injury complaint against Defendants Laurie Olson Gaines and Edward Schau on 05/22/12 and filed her amended complaint on 07/23/12, claiming in part that the Defendants engaged in extreme and outrageous conduct and grossly misused their authority and positions, constituting Intentional Infliction of Emotional Distress of the Plaintiff and the child Nathan Smith Shir Khanloo, and seriously damaged the child and the mother-child relationship due to their actions. The amended complaint noted that the PE in her court appointed role was required to complete an objective, *factual*, impartial PE of the parties while strictly adhering to the PE standards of WAC 246-924-445. She not only did not, but even admitted under oath that she did not and was falsely claimed she not required to do so and admitted that she did not follow those standards “as she was not a psychologist,” despite having already filed a sworn declaration at the start of her work showing that she was obligated to follow these standards. In fact she stunningly testified under oath that she did not believe she needed to follow *any* standards but in the end decided followed GAL standards *despite not being a GAL in the case*. The amended complaint noted that both the PE and Dr. Schau had utterly failed to carry out their court ordered duties in any manner remotely following ethical or professional standards, had engaged in perjurious or false testimony, had strayed far from the scope of their

appointments, and in short had engaged in grossly negligent and reckless behavior in terms of their investigations and testimony.

On 02/01/13, attorneys for the Defendants filed a Motion for Summary Judgment (MSJ) claiming that they were both court appointed and thus were entitled to absolute quasi-judicial and expert witness immunity and in essence could not be held responsible for any negligence whatsoever, regardless of how egregious. The parties to the suit presented argument before King County Superior Court Judge Theresa Doyle on 04/12/13 as to the MSJ and on 04/15/13 the court issued its order granting summary judgment to the Defendants and stated “Gaines (PE Laurie Olson Gaines) conducted a parenting evaluation and Schau (Dr. Edward Schau) conducted psychological testing, both pursuant to the court’s order. Thus, both Gaines and Schau enjoyed absolute quasi-judicial immunity for acts pursuant to that appointment. *Reddy v. Karr*, 102 Wn. App. 742, 748; 9 P.3d 927 (2000).”

The mother then filed her notice of appeal to this appellate court on 05/13/13. The mother now argues that this order granting summary judgment should be rejected for reasons cited and essentially argues that there are indeed genuine issues of fact before the court in terms of the defendants so significantly and egregiously failing to even remotely carry out their charge and stay within the scope of their appointments, that they

are not entitled to any such immunity. The mother argues that our Supreme Court never intended to protect persons engaging in the behavior alleged as to the Defendants. The trial date of 10/21/13 was then struck and we ask that a new trial date be re-scheduled.

II. ASSIGNMENT OF ERROR

The court (Judge Doyle) erred in granting the Defendants' MSJ based on *Reddy v. Karr*, 102 Wn. App. 742, 748; 9 P.3d 927 (2000) (and/or on other cases raised by defendants' attorneys at the hearing of 04/12/13 as discussed below) and finding that the defendants were immune from any form of lawsuit and personal responsibility for their actions as court appointed evaluators, investigators, or witnesses based on *Reddy v. Karr* under the doctrine of absolute quasi-judicial immunity. The court ignored a series of cases that 'craved out' exceptions to the general rule providing for absolute quasi-judicial immunity for court appointed evaluation and investigation experts and witnesses such as the defendants. The court as well ignored extensive facts that could have and should have been allowed to be presented and argued at a trial that showed that both defendants had *not* carried out their court appointed duties, had strayed far from their scope of appointed duties, had not followed professional and ethical standards required of a PE and a licensed clinical psychologist, and had perpetrated a fraud on the (trial court), and thus were *not* entitled to

protection under *Reddy v. Karr* (and other related cases) as to absolute quasi-judicial immunity. The mother contends that our Appellate and Supreme Court *did not* intend to provide unbridled and absolute immunity from personal suits in a case where court appointed experts have so blatantly and deliberately ignored carrying out of their court appointed duties while failing to remain within the scope of their duties.

III. ISSUES PERTAINING TO ASSIGNMENT OF ERRORS

Did the court (Judge Doyle) err in granting the Defendants' MSJ based on *Reddy v. Karr*, 102 Wn. App. 742, 748; 9 P.3d 927 (2000)?

Answer: Yes.

The court ignored a series of cases that 'craved out' exceptions to the general rule providing for absolute quasi-judicial immunity for court appointed evaluation and investigation experts and witnesses such as the defendants. The court as well ignored extensive facts that could have and should have been allowed to be presented and argued at a trial that showed that both defendants had *not* carried out their court appointed duties, had strayed far from their scope of appointed duties, had not followed professional and ethical standards required of a PE and a licensed clinical psychologist, and had perpetrated a fraud on the (trial court), and thus were *not* entitled to protection under *Reddy v. Karr* (and other related

cases) as to absolute quasi-judicial immunity. The mother contends that our Appellate and Supreme Courts *did not* intend to provide unbridled and absolute immunity from personal suits in a case where court appointed experts have so blatantly and deliberately ignored carrying out of their court appointed duties while failing to remain within the scope of their duties; and purposely ignoring professional, ethical and statutory standards required of such experts as court appointed experts.

IV. STATEMENT OF THE CASE

Timothy Smith ('the father') and Azita Shirkhanloo ('the mother') met and lived together abroad, married in 01/08, and their only child Nathan was born in Washington in 04/08 after the couple had moved to the United States permanently. The mother reported an extensive history of abuse and domestic violence (DV) at the hands of the father both before and after their marriage and she left the father for good in 04/09 and the father filed for divorce shortly thereafter on 05/07/09. Starting from the time that the couple arrived in the U.S. in 10/08 to the time Nathan was born in late 01/09, the mother reported that the father was verbally, emotionally and physically abusive, and made several reports to the authorities. The mother then filed for a protection order on 04/06/09, a day after she reported particularly violent physical abuse at the hands of the

father, alleging domestic violence (DV) against the father who was then charged with DV harassment in King County. The couple never lived together or reconciled after that time. The father denied that he engaged in any DV behavior against the mother. The mother maintained that all of her DV and abuse claims against the father were 100% valid including that he has struck her, choked her, pushed her, pounced on her angrily while she was pregnant while destroying property; etc. (CP 24, Exhibit 2, Mother's Trial Brief for Dissolution Trial, Pages 1-6).

On 08/03/09, Laurie Olson Gaines, LICSW, was appointed as the parenting evaluator (PE) in the case. In her role as PE, she was legally required to complete a fair, objective, impartial Parenting Evaluation of the parties, while strictly adhering to statutory requirements pertaining to conducting of a PE as detailed in WAC-246-924-445 (CP 24, Exhibit 12, WAC Parenting Evaluation Standards). The PE issued her 'Interim Parenting Evaluation' report on 11/30/09 (CP 24, Exhibit 6, interim and final reports of PE Olson Gaines). The mother maintained that both this initial evaluation and the final evaluation (CP 24, Exhibit 6, Final Report of PE) of the PE were deficient and incompetent and failed to follow both statutory requirements and professional standards both during the actual evaluation process itself leading to the loss of her child (see below) and at the actual trial itself before Superior Court Judge Deborah

Fleck in 04/12 (CP 24, Exhibit 2, Mother's Trial Brief for Dissolution Trial, Pages 7-27; Exhibit 2, Mother's Motion to Vacate Final PP). Expert Evidence to support the mother's claims of incompetence and failure to follow standards of practice and stay within the scope of court ordered assignments and duties on the part of both Ms. Olson Gaines and Dr. Schau in terms of their evaluations and reports, was provided in sworn declarations of Dr. Sarah Baxter (Psychologist), Dr. JoAnne Solchaney (Psychologist), Dr. Diana Cook (Psychologist), Dr. Sharon Aboosaidi (Psychotherapist), and Dr. Art Wassmer (Psychologist) (CP 24, Exhibit 4). Ms. Olson Gaines acting as the court ordered PE, selected Dr. Edward Schau to complete psychological testing of both parties for her parenting evaluations. The mother also maintained at the actual trial before Judge Fleck that Ms. Olson Gaines as PE went far beyond her role and charge as a PE, including offering her own diagnosis of the mother (but not for the father) that were not supported by any testing or psychological data. The mother maintained that the net results of the PE's behavior, actions, and faulty evaluations, was to assist the father and his attorney in producing one of the most punitive, demeaning, and coercive parenting plans imaginable (as also supported by Judge Fleck in her order to vacate the final PP (CP 24, Exhibit 2, Mother's Trial Brief for Dissolution Trial, Pages 7-27; Exhibit 11, Trial Transcripts of Cross Examination of Laurie

Olson Gaines (PE) and Edward Schau, Ph.D.; Exhibit 3, Judge Fleck's Order Vacating Final PP and CR2A agreement).

The PE produced her final parenting evaluation and recommendations on 09/09/10 which led directly to the new final orders pursued by the father and his attorney of 01/15/10 (CP 24, Exhibit 6). In terms of Dr. Schau's evaluation work completed for the PE as part of her work, Dr. Schau completed and issued his initial Psychological Assessments of the parties in 10/09 (CP 24, Exhibit 6; CP 25) and admits to administering different psychological tests to the parties (CP 24, Exhibit 11, Trial Transcript of Dr. Schau), making any comparison between the parties invalid and professionally inappropriate as testified to by other expert professionals involved in the case (CP 24, Exhibit 4) and as eventually determined by the Washington Department of Health Licensing (DOL) which sanctioned Dr. Schau for these very same improprieties and stemming from this very case (CP 24, Exhibit 10). Evidence presented at trial revealed that Dr. Schau (and the PE) paid no serious attention to or accounted for the mother's different (Persian) cultural background, and her misunderstanding of many English phrases, colloquial expressions, syntax, and word orders, making the evaluations further fatally flawed (CP 24, Exhibit 11; Exhibit 10; CP 25). Dr. Schau was further sanctioned by the DOH for his engaging in a form of parenting evaluation without his

ever having observed the mother (or the father) with the child or without ever have been assigned by the court to do so (CP 24, Exhibit 10, Exhibit 11; CP 25) and thus having no basis to conclude as to parenting skills and possible parenting problems. Further, Dr. Schau required what he termed 'Level II testing' for the mother and not for the father, thus making up his own professional standards for testing for which he was also sanctioned by the DOH which noted that there was no such legal or professional basis for any such 'Level II' (or even 'Level I) (CP 24, Exhibit 10). These terms and procedures were in fact made up by Dr. Schau and simply accepted by the PE without any investigation or concern. No such 'Level II' testing was ever given or required of the father. The DOH charges against Dr. Schau and the settlement with sanctions against Dr. Schau by the DOH make it 100% clear that he strayed far from anything remotely approaching a professional psychological assessment and to his appropriate role as psychological evaluator (CP 24, Exhibit 10).

The PE then issued her final report on 09/09/10 and while failing to report anything both positive and healthy mother to child interactions based on her observation, concluded that "Nathan is at risk for developmental and emotional problems as well as relationship issues because of his mother's personality disorder. She recommended that the mother be restricted to only professionally supervised visits for a few

hours per week for the mother who had been the unquestionable primary parent for the child's entire life up to that time (with a father required to have had supervised visits for the better part of a year previously), and who had been observed by the same PE to be an excellent mother with no evidence of any problems. The PE cited safety concerns for the child with the mother despite no evidence ever of any such safety problems for the mother. The PE recommended *two full years of treatment* for the mother before any unsupervised time with the child was possible, recommended .191 restrictions for the mother only, recommended giving the father sole decision making, and required the mother to initiate and complete DBT (Dialectical Behavioral Therapy) and follow all treatment recommendations for a minimum of two years." The mother was also restricted from giving the child *any* gifts, restricted from speaking in her native tongue (Farsi) with the child, and restricted from having her relatives spend time with the child (CP 24, Exhibit 6; Exhibit 11, Trial Transcript of Laurie Olson Gaines). In the year following the adoption by underlying trial court of all of the PE's recommendations, the mother was forced to complete all of the above PE recommendation but was eventually evaluated by a number of other professionals (including by Dr. Cook and Dr. Aboosaidi, an Iranian-American mental health expert) who found that the mother *did not* suffer from Borderline Personality Disorder

or from *any* Personality Disorder as claimed by the PE, and was *not* in any need of DBT or any other form of therapy and certainly was not a risk to the child in any manner (CP 24, Exhibit 4).

The father thus had sole custody of the child from 09/16/10 to 09/08/11. The mother then filed her motion to vacate the final orders and on 09/08/11 the court (Judge Fleck) granted the motion to vacate and returned custody to the mother and ordered a new trial based in large part on the unscientific nature of the evaluation completed by Ms. Olson Gaines and Dr. Edward Schau (CP 24, Exhibit 3). The mother thus had been denied any unsupervised contact with her child for a full year from 09/10/10 until 09/10/11 based on the evaluation reports of the PE and Dr. Schau. The child was returned to the primary care and custody of his mother by ordering a return to the temporary PP in existence prior to 09/14/10. All *RCW 26.09.191* restrictions as to the mother were also vacated. In its ruling to vacate, the court expressed its concern that the PE had put the child at risk by placing the child with the father with an unaddressed DV issue and the mother's civil rights had been violated (CR 24. Exhibit 3).

A lengthy 4-5 week trial then took place in April and May of 2012, during which time the Defendants testified and were subjected to extensive cross examination lasting a combined 4-5 days of trial time (CP

24, Exhibit 11). Defendant Olson Gaines' testimony validated that she had seriously and continuously violated provisions of WAC 246-924-445 to which she is statutorily held as a PE, had no awareness or care as to ethical standards she was required to meet (CP 24, Exhibit 11). After the father presented her case in chief which included cross examinations of both Defendants (CP 24, Exhibit 11) the father decided to settle with the mother being named the primarily custodian with sole decision making with the father receiving five days per month with two weeks summer vacation.

The mother then filed her initial personal injury complaint against Defendants Laurie Olson Gaines and Edward Schau on 05/22/12 and filed her amended complaint on 07/23/12, claiming in part that the Defendants engaged in extreme and outrageous conduct and grossly misused their authority and positions, constituting Intentional Infliction of Emotional Distress of the Plaintiff and the child Nathan Smith Shir Khanloo, and seriously damaged the child and the mother-child relationship due to their actions. The amended complaint noted that the PE in her court appointed role was required to complete an objective, *factual*, impartial PE of the parties while strictly adhering to the PE standards of WAC 246-924-445 which the mother maintained was not done (CP 24, Exhibit 1). The PE in fact admitted under oath that she had not followed the required WAC

standards for a PE and claimed she not required to do so and admitted that she did not follow those standards “as she was not a psychologist,” despite having already filed a sworn declaration at the start of her work showing that she was obligated to follow these standards (CP 24, Exhibit 11, Trial Transcript of Laurie Olson Gaines). She testified under oath that she did not believe she needed to follow any standards but in the end decided to follow GAL standards despite her not being a GAL in the case (CP 24, Exhibit 11, Trial Transcript of Laurie Olson Gaines). The amended complaint noted that both the PE and Dr. Schau had failed to carry out their court ordered duties in any manner remotely following ethical or professional standards, had engaged in perjurious or false testimony, had strayed far from the scope of their appointments, and had engaged in grossly negligent and reckless behavior in terms of their investigations and testimony (CP 24, Exhibit 1).

On 02/01/13, attorneys for the Defendants filed a Motion for Summary Judgment (MSJ) claiming that they were both court appointed and thus were entitled to absolute quasi-judicial and expert witness immunity and in thus could not be held responsible for any negligence whatsoever, regardless of how egregious and regardless of the nature of the behavior of the defendants (CP 16 and 19). The parties to the suit presented argument before King County Superior Court Judge Theresa

Doyle on 04/12/13 as to the MSJ (CP 24 and CP 25) and on 04/15/13 the court issued its order granting summary judgment to the Defendants and stated “Gaines (PE Laurie Olson Gaines) conducted a parenting evaluation and Schau (Dr. Edward Schau) conducted psychological testing, both pursuant to the court’s order. Thus, both Gaines and Schau enjoyed absolute quasi-judicial immunity for acts pursuant to that appointment. *Reddy v. Karr*, 102 Wn. App. 742, 748; 9 P.3d 927 (2000).” (CP 35).

The mother then filed her notice of appeal to this appellate court on 05/13/13 arguing that the order of Judge Doyle granting summary judgment should be rejected for reasons cited and argues (see below as to argument section) here that there are genuine issues of fact before the court in terms of the defendants so significantly and egregiously failing to carry out their charge and stay within the scope of their appointments, and thus are not entitled to any such immunity and argues further in this case of “First Impression” that the Washington Supreme Court never intended to protect persons engaging in the behavior alleged as to the Defendants.

V. ARGUMENT

The sole issue before the Court of Appeals is whether there are *any* behaviors whatsoever, engaged in by a court appointed expert or witness such as Laurie Olson Gaines and Dr. Edward Schau, that would result in a loss of absolute quasi-judicial and witness immunity. Judge Theresa

Doyle, in her order granting the MSJ of the Defendants based on *Reddy v. Karr*, determined that there was not and thus ended the opportunity for Azita Shirkhanloo ('the mother') to move forward in her suit against both defendants. The mother maintains that it could not have been the intention of our highest courts to allow court appointed experts to engage in fraud before the court, perjury as a witness, completing a court ordered task without following ethical and professional standards, utterly fail to operate with the scope of their appointment, violate WAC standards, be found by the DOH to have engaged in unethical and unprofessional behaviors making an evaluation invalid, fail to even know their court ordered role or requirements in terms of completing evaluations, etc. All of these egregious violations occurred in this case and we ask this court to review the mother's appeal as a 'case of first impression,' in order that justice is served and professionals appointed by the court who engage in such egregious behaviors that cause significant damage our citizens not go unpunished. As noted below, our courts and legislature have certainly provided exceptions to the rule of absolute immunity as to various professionals in order to assure such justice, and the argument made before Judge Doyle (CP 24 and CP 25) outlined these several exceptions. We maintain that this court can certainly do the same here as a case of first impression and find that when a court appointed professional so far strays

from its court ordered role and requirements, fails to stay with the scope of appointment, utterly fails to meet basic professional and ethical standards to the point they are sanctioned by their licensing agency (as to Dr. Schau), acts in a role different than that assigned by the court (as to Laurie Olson Gaines who maintained that she was acting as a GAL in the case when she was appointed as a PE), and acts in a reckless and destructive manner as here; this court can and should not provide immunity. Public policy is certainly not served by allowing no limit as to the misbehavior of a court appointed professional and resultant damage caused, and the very public policy basis the court raised for providing for such immunity (to assure that competent, honest, and ethical professionals who follow standards and guidelines in their work for the court, are not hesitant to engage in such efforts for fear of suit) is simply 'turned on its head' by allowing professionals such as Dr. Schau and Laurie Olson Gaines to engage in purposeful and destructive behavior that leaves a citizen with absolutely no recourse in terms of being made whole. This could not have been the intent of our highest courts. The evidence presented herewith (see above) provide ample evidence that both Dr. Edward Schau and Ms. Olson Gaines were incompetent, reckless, grossly negligent, duplicitous, likely committed perjury during the trial, failed to meet ethical standards and/or even know what standards they were required to meet, etc. Ms.

Olson Gaines reported to the court under oath that she was operating as a GAL when she was a court appointed PE required to follow WAC standards which she failed to do by her own admission, while Dr. Schau was eventually sanctioned by the DOH for his unethical behavior and failure to follow standards while making up new testing standards that were applied to the mother in this case. In short, based on such behavior, both defendants are not entitled to immunity protection as they have failed to meet requirements that entitle them to such immunity protection. Neither professional acted in anything approaching acting in good faith and consistent with their court ordered appointments and should not be granted any immunity as experts in this case and never carried out their court ordered tasks.

Ms. Olson Gaines' own attorney notes in her MSJ (CP 16, Page 2, and CP 19), "Pursuant to the Court's Order (of appointment of Ms. Gaines as PE in the King County case (09-3-03369-6 SEA) of Azita Shir Khanloo v. Timothy Smith), Ms. Gaines was tasked with investigating and reporting *factual* information to the court concerning parenting arrangements for the child." As evidence provided herewith (see above) makes clear, Ms. Olson Gaines utterly failed to investigate and report such *factual* information and deviated from her charge in a grossly negligent and reckless manner while not only failing to meet professional standards

expected of her as a court appointed PE, but by her own admission (CP 11, Trial transcript of Ms. Olson Gaines) followed *no standards* and had no idea what he actual role was. On page 15, line 9 of her trial transcript (CP 11), she establishes that she really has no idea what a forensic evaluator is even though she specifically refers to herself as such. On page 33, line 22 of her trial transcript (CP 11), she begins testimony as to whether or not she met the requirements of WAC 246-924-445 or was even required to as to the required ethical and practice standards for those completing a parenting evaluation as did Ms. Gaines. On page 34, line 9, she at first appears to admit the obvious, that she is required to meet such ethical and practice standards but then stunningly states over the next few pages that she is *not* required to follow these WAC standards and then maintains under oath on page 35, line 12, “I actually do not believe I am obligated to [follow these laws/standards].” On page 37, line 1, she is then asked what standards she believes she has to follow as a PE in this case, and states on line 6, “I follow the GAL rules.” She was then confronted with the obvious reality that she was *not* a GAL in this case. Based on this sworn admission alone, she should lose all protections afforded by the immunity doctrine as she *did not* carry out her court appointed tasks or role *as a Parenting Evaluator*.

For his part, Dr. Schau was sanctioned by the DOH for his own clear unethical behavior and failure to follow professional standards for Psychologists. The DOH settlement documents (CP 24, Exhibit 10) related to Dr. Schau make it very clear that he violated almost every conceivable practice standard for Psychologists possible, including engaging in his own parenting evaluation *without directive or appointment by the court*, using inappropriate tests, engaging in clear bias against the mother, abdicating his professional role to Ms. Olson Gaines, violated WAC 246-924-457 (scope of limited evaluations) , RCW 26.09.191 and WAC 246-924-445 as to discussion of limiting and cultural factors, etc. Thus he as well should not be afforded any protections under the immunity doctrine at issue here.

Counsel for the Defendants argued in their MSJs and at the hearing Before Judge Doyle on 04/12/13 that specific and well established case law made their clients 100% immune for any form of suit as court appointed experts and witnesses. While Dr. Schau was not technically appointed by the court and was selected by the PE to complete psychological testing for her own parenting evaluations of the parties, both professionals look to several cases to support their claims to absolute immunity. Judge Doyle herself pointed to *Reddy v. Karr* alone to support her decision to grant summary judgment to the defendants.

The attorney for Ms. Olson Gaines argues on page 4, line 9 of her Motion for Summary Judgment (CP 16), “Washington Courts follow this broad and long standing doctrine, routinely holding that witnesses in judicial proceedings are absolutely immune from suit based on the testimony. *Bruce v. Byrne-Stevens & Assoc.*, 113 Wash.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.” She further argues, “Witness immunity is absolute rather than qualified, in order to permit performance without fear of litigation.” *Briscoe v. LaHue*, 460 U.S. 325, 335, 103 S.Ct. 1108. 1113-14, 75 L.Ed.2d 96 (1983). She continues, “Quasi-judicial immunity is afforded to court appointed parenting evaluators who act as an arm of the court, at the court’s request, in the court’s determination of the best interests of the child.” *Reddy v. Karr*, 102 Wn.App. 742, 749, 9 P.3d 927 (2000). Finally, she notes, “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 on these facts, Ms. Gaines, in addition to witness immunity, is also entitled to quasi-judicial immunity from suit.”

As argued above and through this brief, Ms. Gaines actually

provided *disinformation* to the court and failed to meet any credible professional standards in addressing her actual charge and should not be protected under cases cited. Support for this claim comes from Judge Fleck's own order to vacate the final PP on page 9, line 2 of her order, "the parenting evaluation of Ms. Gaines and the psychological testing and evaluation by Dr. Schau *are deeply flawed.*"

As this court is well aware, absolute immunity is accorded only to those functions that are an integral part of a judicial proceeding. *Ready v. Karr*, 102 Wash. App. 742, 9 P.3d 927 (2000). Functions integral to a judicial proceeding include judging, advocating, prosecuting, fact finding, and testifying. *Musso-Escude v. Edwards*, 101 Wash, App. 560, 4 P.3d 151 (2000). However, as we argued before Judge Doyle, such immunity is not universally granted. For example, there is no absolute immunity for investigation and other tasks performed by caseworkers. *Ready v. Karr*, 102 Wash. App. 742, 9 P.3d 927 (2000). Instead, caseworkers are entitled to a qualified immunity when they (1) carry out a statutory duty; (2) follow procedures dictated *by statute* and superiors; and *act reasonably* in doing so. *Yuille v. State Dept. of Social & Health Services*, 111 Wash. App. 527, 45 P.3d 1107 (2002). In *Buckley v. Fitzsimmons*, 509 U.S. 259, 113 S.Ct. 2606, 2615, 125 L.Ed.2d 209 (1993), the Federal Supreme Court held that a prosecutor is not absolutely immune when he or she allegedly

fabricates evidence during an investigation by retaining a dubious expert witness. In *Fletcher v. Kalina*, 93 F.3d 653 (1996), the U.S. 9th Circuit Court of Appeals further held that a prosecutor is not absolutely immune when preparing a declaration in support of an arrest warrant. In short, the courts appear consistent in denying absolute immunity when the actor engages in grossly inappropriate and/or unethical behavior as is the case here with Ms. Gaines (and Dr. Schau). While counsel for the defendants have argued in their MSJ replies (CP 26 and CP 33) that these exceptions are not 'on point' in our case, the reality is that our courts have thus recognized that there are limits to when a professional carrying out a court related function or investigation is afforded immunity and we believe this court can and with all due respect, should recognize another exception when professionals so egregiously misbehave as is the case here.

Further, where a plaintiff such as Ms. Shir Khanloo alleges that the defendant has lost qualified immunity by acting in bad faith as is being maintained here, it is insufficient to simply offer evidence that the defendant acted unreasonably. The standard of good faith' is *honesty and lawfulness of purpose.*" *Deschamps v. Mason County Sheriff's Office*, 123 Wn. App. 551, 96 P.3d 413 (2004). Thus, the evidence must establish more than an erroneous judgment or a mistake in the performance of official duties. *Deschamps v. Mason County Sheriff's Office*, 123 Wn.

App. 551, 96 P.3d 413 (2004). We strongly believe that the evidence provided herewith clearly establishes “more than an erroneous judgment or a mistake in the performance of official duties” on the part of Ms. Gaines and Dr. Schau and thus that immunity should not be granted here.

It should be noted that in *Bruce v. Byrne-Stevens & Assoc* (supra) Judge Pearson in dissent stated, “while this court has never ruled on this issue, other jurisdictions considering the question have not allowed the doctrine of immunity to shield negligent experts.” He cited jurisdictions such as Texas in this regard. While certainly not binding on this court, it is of note that the State of California recently passed legislation removing the immunity protection for professionals for much the same reasons as we are arguing here today (AB 2475 as Amended on April 28, 2010).

We believe it is also of note as to this case that in 1975 the Washington Legislature passed a statute clarifying and modifying the legal standards for actions against health care providers in our State. *Uniform Health Care Information Act*. RCWA 70.02.005 and 7.70.010. The statute broadly defines the classes of individuals who qualify as a ‘health care provider and defines and describes three types of claims against such health care providers and expressly includes Professional Negligence as the failure to follow acceptable standards of Care (and includes Breach of Warranty and failure to provide informed consent). The statute does not

permit recovery on a basis of a theory other than the three enumerated in the Statute. The statute notes that as to a claim of professional negligence, a plaintiff must show that the defendant failed to exercise the degree of skill, care, and learning expected of a reasonably prudent provider in such circumstances. RCWA 7.70.040. A second statute provides that a plaintiff against a health care provider must show that the defendant failed to exercise the degree of care, skill and learning expected of a reasonably prudent health care provider in the profession or class to which the Defendant belongs in the State of Washington, acting in the same or similar circumstances. *Eng v. Klein*, 127 Wash. App. 171, 110 P.3d 844 (2005). Failure to exercise such skill, care and learning constitutes breach of the standard of care and is negligence. Based on the facts presented herewith, there can be no doubt that Ms. Gaines (and Dr. Schau) utterly and completely failed to exercise the degree of care, skill and learning expected of a reasonably prudent health care provider in the profession or class to which they as Defendants belong in the State of Washington, acting in the same or similar circumstances (RCW 7.70.040), and in fact their behavior meets the requirements for gross negligence and recklessness.

As to affording immunity to professionals, the court must also closely examine whether or not the person claiming absolute immunity is

entitled to it and the person claiming such immunity must show that 1) he or she is performing a function which is analogous to that performed by persons entitled to absolute immunity such as judges or legislators; 2) must show the (public) policy reasons which justify absolute immunity for judges or legislators, also justifies absolute immunity for them; and 3) must show that sufficient safeguards exist to mitigate the harshness of an absolute immunity rule (*Estate of Jones v. State*, 107 Wash. App. 510, 15 P.3d 180 (2000)).

We believe without question that based on all of above, this court should overturn Judge Doyle's decision granting Defendants MSJ and reinstate the trial so that Azita Shirkhanloo may be afforded an opportunity to present facts relevant to showing that her personal and constitutional rights were violated with great damage to herself and to her relationship with her child, in order to have an opportunity to be made whole from the egregious behavior and damage caused by the Defendants.

VI. CONCLUSION

Based on all of the above, we respectfully believe that this court in reviewing *de novo* the decision of Judge Doyle granting the Defendants' MSJ, has the authority to overturn Judge Doyle and should with the greatest of respect to the court, do so in this case of first impression in order to assure the public policy of protecting decent and law abiding

citizens who expect justice and fairness and to have a right to be made whole. The Defendants for all of the reasons detailed above and based on all of the evidence provided herewith, have lost any immunity afforded to them by case law and the immunity doctrine and should not be protected. They have so far departed from their court appointed roles and responsibilities, operated so far outside of their scope of court ordered duties while violating professional and ethical standards and confusing actual court ordered roles, have perpetrated a fraud on the court, and have likely perjured themselves in court and in this case, that any protections afforded expert and witness professionals simply should not apply to them based on public policy and justice if nothing else. We thank the court for its time.

Respectfully submitted this 25th day of September, 2013 by:



Stuart E. Brown, WSBA #35928
Attorney for Appellant Azita
Shirkhanloo

**The Court of Appeals of the State of Washington
Division I**

AZITA SHIRKHANLOO,

Appellate,

v.

**LAURIE OLSON-GAINES &
EDWARD SCHAU,**

Respondents.

Case No. 70336-6

(KING COUNTY SUPERIOR
COURT CASE NO. 12-2-18444-5 SEA)

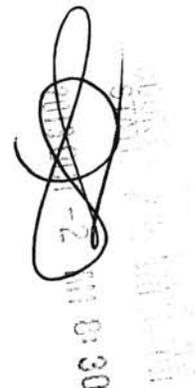
**Return of Service/Declaration of
Service as to Pamela Andrews/
Attorney for Laurie Olson
Gaines and Ramona Hunter/
Attorney for Edward Schau
AsTo Plaintiff's Appeal Brief**

I Declare:

1. I am over the age of 18 years, and I am not a party to this action.
2. I served the following documents to:

PAMELA ANDREWS, ATTORNEY AT LAW
Attorney for Defendant Laurie Olson Gaines
Andrews-Skinner Law Firm
645 Elliott Ave. West, Suite 350
Seattle, WA 98119

RAMONA HUNTER, ATTORNEY AT LAW
Attorney for Defendant Edward Schau
1201 3rd Ave., Suite 5200
Seattle, WA 98101



A handwritten signature in black ink is written vertically on the right side of the page. To its right is a vertical stamp, partially legible, which appears to contain the text 'JUN 21 2012 10:30 AM'.

[X] PLAINTIFF'S APPEAL BRIEF

3. The date, time and place of service were (if by mail refer to Paragraph 4 below):

Date: September 26, 2013
Time: Approximate Time: 2:00 pm

Addresses: Pamela Andrews
645 Elliott Ave. West, Suite 350
Seattle, WA 98119

Ramona Hunter
1201 3rd Ave., Suite 5200
Seattle, WA 98101

4. Service was made:

[X] By personal delivery to the persons named in paragraph 2 above (to the front desk of the law firms of the persons noted in paragraph 2 above)

5. Service of Notice on Dependent of a Person in Military Service: NA

[] The Notice to Dependent of Person in Military Service was [] served on [] mailed by first class mail on (date) _____.

[] Other:

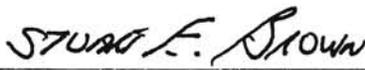
6. Other: NA

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

Signed at Seattle, WA on 09/28/13 by:



Signature



STUART E. BROWN, WDA 35728
Attorney For Plaintiff Azita Shirkanloo
206-407-9183