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Colafranceschi v. Briley Respondent's Brief 2 Dckt. 41742

IN THE SUPREME COURT OF THE STATE OF IDAHO

MARK D. COLAFRANCESCHI,

Plaintiff/Appellant,

v.

SHAWN BRILEY and ASHLEY ROBINSON,

Defendants/Respondents.

Supreme Court Docket No. 41742-2014

RESPONDENT ROBINSON'S BRIEF

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Appeal from the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Valley

The Honorable Gerald F. Schroeder, Senior District Judge, Presiding

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A. Statement of the Case

This appeal arises from the District Court's dismissal of *pro se* plaintiff-appellant Mark Colafranceschi's Second Amended Verified Complaint and Demand for Jury Trial against Ashley Robinson on Ms. Robinson's motion to dismiss pursuant to Idaho Rule of Civil Procedure 12(b)(6). Appellant Colafranceschi's Second Amended Complaint asserted causes of action for defamation and professional malpractice related to Ms. Robinson's performance as a court-appointed child custody evaluator. The District Court found that the claims asserted in the Second Amended Complaint should be dismissed pursuant to Rule 12(b)(6) based on the doctrine of quasi-judicial immunity and Colafranceschi's failure to plead facts constituting misrepresentation with sufficient specificity. Appellant Colafranceschi appeals both the District Court's dismissal of his action and the District Court's denial of appellant Colafranceschi's motion for reconsideration related thereto.

B. Procedural History

The initial complaint in this matter was filed on November 16, 2012, (Record ("R.") at 9-34), and was subsequently amended by the Amended Verified Complaint and Demand for Jury Trial ("First Amended Complaint"), filed on December 6, 2012. (R. at 35-52.)

Following service, appellee Robinson filed a motion to dismiss the First Amended Complaint, on January 16, 2013. (R. at 321.) Following briefing upon Robinson's motion, along with defendant-appellee Shawn Briley's and defendant

Kim Batt-Lincoln's similar motions, argument was held on April 15, 2013. (*See generally*, Transcript, April 15, 2013, ("April Tr.")). At hearing, the District Court granted appellee Robinson's motion to dismiss, directing submission of a second amended complaint to set forth "specific facts of fraud or misrepresentation in obtaining the appointment" as child custody evaluator. (April Tr. ll. 36:22-37:6.) A related Order was subsequently issued on April 30, 2013. (R. at 293-295.)[1]

The Second Amended Verified Complaint and Demand for Jury Trial ("Second Amended Complaint") was filed on April 25, 2013. (R. at 142-286.) Appellee Robinson subsequently filed her Renewed Motion to Dismiss on May 7, 2013. (R. at 422-423.) Following briefing,[2] argument was held on June 17, 2013.[3] (*See generally*, Transcript, Jun 17, 2013 ("June Tr.")). The Court thereafter issued its written Order Dismissing the Second Amended Verified Complaint on September 16, 2013, on the grounds of quasi-judicial immunity and failure to sufficiently plead misrepresentation. (R. at 296-299.)

Appellant Colafranceschi then filed his Motion to Reconsider Order Dismissing Claim on September 24, 2013, (R. at 300-306.) After briefing, the District Court issued its Order Denying Motion to Reconsider, and related Judgment, on November 5, 2013. (R. at 307-310.)

Appellant Colafranceschi filed his Notice of Appeal on December 13, 2013.

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[1] Neither the order dismissing appellant Colafranceschi's First Amended Complaint and requiring submission of a further amended complaint, nor the dismissal of defendant Batt-Lincoln, have been appealed by appellant Colafranceschi.

[2] While appellant Colafranceschi filed a "Motion to Strike" regarding the renewed motions to dismiss, appellant failed to otherwise submit a written opposition to appellant Robinson's Renewed Motion to Dismiss prior to the hearing on that motion. (*See generally*, R. at 7; June Tr., at ll. 70:7-9.)

[3] Appellee Briley's renewed motion to dismiss was also addressed at the June 7, 2013, hearing.

(R. at 313-315.)

C. Statement of Facts[4]

"On review of a district court's I.R.C.P. 12(b)(6) dismissal, this Court views all inferences in the light most favorable to the non-moving party." Allied Bail Bonds, Inc. v. Cnty. of Kootenai, 151 Idaho 405, 409, 258 P.3d 340, 344 (2011). With this admonition in mind, the "facts" of this matter—the allegations contained in appellant Colafranceschi's Second Amended Complaint—are summarized as follows.

Robinson is an LMSW (Licensed Masters Social Worker). (R. at 143, ¶3.) Per the Second Amended Complaint, Robinson previously testified that, upon moving to McCall, she sent the court a letter and resume detailing her experience, offering to assist the Court.[5] (R. at 144, ¶3.) Robinson testified that she later had lunch with Valley County Magistrate Henry R. Boomer and other county personnel in January 2011, to discuss the prospect of doing work for the courts and Valley County. (*Id.* at ¶4.) Robinson denied discussing Colafranceschi's cases at that lunch. (*Id.* at ¶4.)

On February 2, 2011, Judge Boomer, in a matter entitled *Mark D. Colafranceschi v. Durena Schoonover*, Valley County Case No. CV 2010-312-C ("*Schoonover*"), entered an Amended Order for Child Custody Evaluation appointing appellant Robinson to complete a child custody evaluation in that

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[4] Appellant Colafranceschi's "Statement of Facts/Arguements" [sic] section does not clarify that many of the 'facts' identified – particularly as to the alleged misconduct by appellee Robinson – are merely allegations stated in his Second Amended Complaint, and have not in any way been established or otherwise proven in the litigation.

[5] The Second Amended Complaint does not attach copies of that letter or the resumé.

case, with the cost of the home study to be shared by the parties, subject to reapportionment. (R. at 145-146, ¶12, & 168-169.) On February 7, 2011, Judge Boomer, in another matter entitled *Mark D. Colafranceschi v. Susie Ericson*, Valley County Case No. 06-521 ("*Ericson*"), entered an Amended Order for Child Custody Evaluation appointing Robinson to complete a child custody evaluation in that case, with the cost of the home study to be shared by the parties. (R. 171.) In both *Ericson* and *Schoonover* the parties, including Colafranceschi, entered into a written *Informed Consent For Participants* agreement with Robinson. (R. 173-197.) The Agreements confirmed that child custody evaluations had been ordered by the Court and that Robinson did not work for either parent. (*Id.*) The Second Amended Complaint does not assert that appellant Colafranceschi made any objection to the appointment of Robinson, in either matter, at the time of appointment.

In both *Ericson* and *Schoonover,* Robinson conducted evaluations for the purpose of making written child custody and visitation recommendations to the Court. (R. at 198-240.) Robinson's evaluation(s) included interviews with the parents and children; observations of the children with each parent; interviews of other members of each parent's household; a review of documents and collateral interviews of individuals who were identified by the parents. (*Id.*) Both evaluations were filed in their respective actions on April 18, 2011. (*Id.*)

Judge Boomer's decision in *Ericson* was reheard by Judge Comstock on August 28 and 29, 2012. (R. at 160, ¶75.) Following testimony, Judge Comstock

ruled that Robinson was not qualified as an expert, excluding her report from evidence. (R. at 150, ¶30.) Judge Comstock is quoted as stating:

> I have some experience with the AFCC model standards. I know there is some concern about folks that get into forensic custody evaluation who start doing that without the careful supervision with someone that has handled these before. She has handled them before in the context of dependency proceedings but not in any private civil cases involving post divorce, or divorce or custody modification or initial custody cases it's a different analysis it's a different type of recommendation. The end result is different because of the legal standards that differ between dependency proceedings and child custody law.

(*Id.*) The Second Amended Complaint concedes that while asserting that Ms. Robinson had not performed a private home study prior to appointment, she "had done case work with foster care children and health and welfare case." (R. at 144, ¶6.)

II. ISSUES PRESENTED ON APPEAL

1. Did the District Court err in dismissing appellant Colafranceschi's Second Amended Complaint?

2. Did the District Court err in denying appellant Colafranceschi's motion to reconsider the dismissal of the Second Amended Complaint?

3. Is appellee Robinson entitled to costs if she prevails on appeal?

III. ATTORNEY FEES ON APPEAL

Appellee Robinson only seeks an award of those costs awarded as a matter of course should she prevail, pursuant to I.A.R. 40.

IV. ARGUMENT

A. Standard of Review

The motion submitted by Appellee Robinson, and ruled upon by the District Court, was a motion to dismiss made pursuant to I.R.C.P. 12(b)(6).[6] (R. at 296-296 & 422-423.) The applicable standard of review, as set forth by this Court, is as follows:

> The Court's standard of review for an order of the district court dismissing a case pursuant to I.R.C.P. 12(b)(6) is the same as the summary judgment standard of review. *See Coghlan v. Beta Theta Pi Fraternity,* 133 Idaho 388, 398, 987 P.2d 300, 310 (1999); *see also Orthman v. Idaho Power Co.,* 126 Idaho 960, 962, 895 P.2d 561, 563 (1995). After viewing all facts and inferences from the record in favor of the non-moving party, the Court will ask whether a claim for relief has been stated. *Coghlan,* 133 Idaho at 398, 987 P.2d at 310. "The issue is not whether the plaintiff will ultimately prevail, but whether the party is 'entitled to offer evidence to support the claims.'" *Id., citing* Orthman 126 Idaho at 962, 895 P.2d at 563, *quoting Scheuer v. Rhodes,* 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90, 96 (1974) (citation omitted).

Gallagher v. State, 141 Idaho 665, 667, 115 P.3d 756, 758 (2005) (quoting Bradbury v. Idaho Judicial Council, 136 Idaho 63, 67, 28 P.3d 1006, 1010 (2001)).

Similarly, "when reviewing a trial court's decision to grant or deny a motion for reconsideration, this Court utilizes the same standard of review used by the lower court in deciding the motion for reconsideration." Fragnella v. Petrovich, 153 Idaho 266, 276, 281 P.3d 103, 113 (2012).

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[6] Appellant Colafranceschi incorrectly cites the summary judgment rule, Rule 56, as the applicable rule at issue on appeal. (Appellant's Brief at 15.)

B. The District Court's decision dismissing the Second Amended Complaint should be affirmed.

1. The District Court's dismissal.

In ruling upon appellee Robinson's Renewed Motion to Dismiss, the District Court summarized the allegations made by appellant Colafranceschi in his Second Amended Complaint as follows:

> According to the Second Amended Complaint, Robinson sent a letter to the Court with her resume, offering her assistance to the Court. The specific contents of that letter are not set forth. Within a short time the presiding Judge in the two custody disputes in which the Plaintiff was involved met with Robinson, along with others. Thereafter, Robinson was appointed as the home evaluator by the presiding judge. According to the Plaintiff's Amended Complaint, "Ms. Robinson willfully misrepresented her qualifications to the court staff. Ms. Robinson claimed to have experience in home studies when in fact she had never done a home study of this sort. She had done case work with foster care children and health and welfare cases. Ms. Robinson had never performed a private home study—like the one involved." The Amended Complaint alleges that Robinson did not begin the process of becoming a clinical licensed social worker until after the custody proceedings involved.

(R. at 296-297.) The District Court determined that such allegations fail to establish a cause of action against appellee Robinson in light of the quasi-judicial immunity doctrine:

> Reduced to its basics the Plaintiff's Complaint alleges that Robinson misrepresented to the Court her qualifications to perform the home study. If that be the case, it should not have occurred. Nonetheless that allegation does not defeat the application of the doctrine of quasi-judicial immunity to the Defendant. Her background was subject to scrutiny prior the completion of the home study. The report itself was subject to scrutiny, and the competence of the evaluator was subject to critical examination concerning her expertise and the contents of the evaluation. If there were an ethical violation, that would be the subject of review by the appropriate supervising authorities. If the Court for which the report was prepared determined that there was

> insufficient expertise to justify acceptance of the evaluation, the Court could disregard the evaluation. The Plaintiff could challenge the facts and conclusions of the evaluation by other evidence. In sum, there are remedial avenues short of exposing an evaluator to open ended litigation if there is a perceived flaw in the appointment process.

(R. at 297.) The District Court mused that there might be a loss of the immunity in some fraudulent appointment scenario, but that appellant Colafranceschi alleged no such facts as would preserve his action:

> In high conflict custody cases there is likely discontent in many situations. The protection of those who do such evaluations afforded by the principle of quasi-judicial immunity is significant. It should not be lost easily. Allegations of fraud or some other mischief in obtaining an appointment might rise to the level of eliminating the shield, particularly if there are no avenues to remediate the alleged misconduct. The allegations of the Second Amended Complaint do not rise to that level.

(R. at 297.) (emphasis added).

2. Quasi-judicial immunity in Idaho, generally.

The Idaho Supreme Court recognized the doctrine of quasi-judicial immunity in McKay v. Owens, 130 Idaho 148, 150, 937 P.2d 1222, 1224 (1997). In McKay, the Court was asked to decide whether or not an attorney, who had been appointed by the court as a minor's guardian ad litem, could be sued for malpractice.[7] The attorney argued that since he had been acting as a court appointed guardian ad litem, he was an "arm of the court" and should be granted quasi-judicial immunity status. In examining this question, the Court applied a "functional approach" to determine if the guardian ad litem performed a function

[7] "Parenting Coordinators," also appointed in Idaho family law actions after custody orders are entered, are expressly afforded immunity by rule. I.R.C.P. 16(l)(K)(" The Parenting Coordinator has qualified judicial immunity in accordance with Idaho law as to all acts undertaken pursuant to and consistent with the order of appointment.").

related to the judicial process:

> We have not previously considered this question in Idaho, but we note that the "arm of the court" analysis stems from an analysis employed by the United States Supreme Court. That Court stated that it has "applied a 'functional approach' . . . which looks to 'the nature of the function performed, not the identity of the actor who performed it.'" *Buckley v. Fitzsimmons,* 509 U.S. 259, 269, 113 S.Ct. 2606, 2613, 125 L. Ed. 2d 209 (1993) (citations omitted). Therefore, the question becomes whether a guardian ad litem, acting under I.C. § 5-306, is functioning as an arm of the court.

McKay, 130 Idaho at 156, 937 P.2d at 1230. In applying the "functional analysis" to a guardian's duties, the Court found:

> Using the functional analysis employed by the United States Supreme Court, the guardian's duty under I.C. § 5-306 is to consider all of the alternatives and give its recommendation to the Court based on what will be best for the ward. Therefore, the guardian can be seen as an "agent of the court."

Id. at 157, 937 P.2d at 1231 (citations omitted). Having found that a court-appointed guardian was acting in a quasi-judicial capacity, the McKay Court then examined the policies behind quasi-judicial immunity:

> Although I.C. § 5-306 itself, and the proceedings below, do not provide a clear-cut answer to the issue, the policies behind quasi-judicial immunity lead us to the conclusion that guardians under I.C. § 5-306 should be given absolute quasi-judicial immunity. The Minnesota Supreme Court noted that although a guardian may even act as an advocate to some degree, quasi-judicial immunity is not inappropriate. Specifically, that court held that:
>
> > A guardian ad litem is an officer of the court. The guardian's duty is to act within the course of that judicial proceeding in furtherance of the best interests of the child for whom the guardian has been appointed. A guardian must be free, in furtherance of the goal for which the appointment was made, to engage in a vigorous and autonomous representation of the child. Immunity is necessary to avoid harassment from disgruntled parents

> who may take issue with any or all of the guardian's actions.

Tindell v. Rogosheske, 428 N.W.2d 386, 387 (Minn. 1988) (citations omitted). Similarly, although written in the context of a custody dispute, the United States District Court for the District of Colorado stated that:

> [t]o safeguard the best interests of the children, [ ], the guardian's judgment must remain impartial, unaltered by the intimidating wrath and litigious penchant of disgruntled parents. Fear of liability . . . can warp judgment that is crucial to vigilant loyalty for what is best for the child; the guardian's focus must not be diverted to appeasement of antagonistic parents. Short [ex rel. Oosterhous v. Short], 730 F. Supp. [1037,] at 1039 [(D. Colo. 1990)]. Further, qualified attorneys might be unwilling to represent a child if "disgruntled or vituperative parents could hold the guardian ad litem personally responsible." Delcourt [v. Silverman], 919 S.W.2d [777,] at 785 [(Tex. App. 1996)].

Id. at 157-58.

More recently, in Abolafia v. Reeves, 152 Idaho 898, 277 P.3d 345 (2012), the Court evaluated whether, once a judicial appointment was terminated by the Court, immunity continued to exist to bar an award of appeal costs against a former guardian who elected to appeal a court decision after his termination as guardian:

> After considering the comments by the parties and their respective counsel and Adler's comments, the magistrate court stated that it accepted the stipulation, and it orally granted the motion to terminate Adler as guardian ad litem. On February 15, 2008, the court entered the order terminating Adler as guardian ad litem and the order modifying the divorce decree pursuant to the parties' stipulation.
>
> On March 21, 2008, Adler, acting pro se, filed a notice of appeal, stating that he was appealing from the order modifying the divorce decree and from the order terminating him as guardian ad litem.

Id. at 901, 277 P.3d at 348. The Court further held that no such immunity survived post-termination:

> Finally, Adler argues that while discharging his duties as guardian ad litem, he had quasi-immunity that protected him from an award of attorney fees. In making that argument, he relies upon *McKay v. Owens,* 130 Idaho 148, 937 P.2d 1222 (1997). In *McKay,* an attorney was appointed pursuant to Idaho Code section 5-306 as a child's guardian ad litem in order to make recommendations to the court regarding the proposed settlement of the child's personal injury action. We held that a guardian ad litem appointed pursuant to Idaho Code section 5-306 to represent a child who was a party in a personal injury action had absolute quasi-immunity because the guardian must be free to make recommendations to the court that the guardian believes are in the child's best interests. *Id.* at 157, 937 P.2d at 1231. That case does not support quasi-immunity here because Adler was not guardian ad litem for the children at the time he filed his appeal.
>
> . . .
>
> The discussion between Adler and the Court continued, and Adler correctly stated, "I serve at the pleasure of the court." When the court did not do what Adler wanted, he decided that he served at his own pleasure and filed the appeal. The sole purpose of the appeal was to assuage his hurt pride. He has provided absolutely no argument or authority that would even remotely support his assertion that he has standing to appeal. All he has done is increase the cost to the parties. The district court did not abuse its discretion in awarding Father and Mother attorney fees on appeal pursuant to Idaho Code section 12-121 on the ground that Adler brought this appeal unreasonably and without foundation.

Id. at 905, 277 P.3d at 352.

3. Appellant Robinson is protected by quasi-judicial immunity, including the appointment process.

a. *Immunity appropriately extends to the appointment process and to evaluators such as Ms. Robinson.*

In this action, appellee Colafranceschi attempts to carve out from quasi-judicial immunity a key and necessary portion of appellee Robinson's service as an "arm of the court"—the appointment process. While the Idaho Supreme Court has made clear in Abolafia that immunity ceases at what should be a readily-apparent

point (the juncture at which the court terminates the appointment), nothing in either the McKay and Abolafia decision suggest any limitation on the immunity for the appointment process, which is part and parcel of the services provided by the appointee.

This issue of immunity in the appointment process was recently explored in California, in La Serena Properties v. Weisbach, 186 Cal. App. 4th 893, 905, 112 Cal. Rptr. 3d 597, 605 (2010). In La Serena, the California Court of Appeal (1st District) examined the question of whether an arbitrator, who allegedly deliberately concealed a conflict in order to secure consent to serve as an arbitrator, was precluded from asserting the immunity. The La Serena Court rejected the claim attempting to defeat immunity on alleged defects in appointment, discussing other authority, and noting:

> As to appellants' argument that the arbitral immunity should not be applied because the failure to disclose occurred, before the decisionmaking process began, this same contention was made by the plaintiff in Olson [v. Nat'l Ass'n Securities Dealers], *supra*, 85 F.3d 381 [(8th Cir. 1996)]. The court rejected the argument concluding that "[t]he appointment of arbitrators is a necessary part of arbitration administration, however, and thus is protected by arbitral immunity." (*Id.* at p. 383.)
>
> This rationale is compelling and equally applicable here. While disclosures take place before the arbitrator's appointment becomes final, and certainly before the commencement of the arbitration itself, it is an integral part of the arbitration process. Indeed, the rules and statutes governing the disclosures by arbitrators make it clear that such disclosures are to occur when the arbitrator is "proposed." Similarly, judges are expected to make the disclosures required of them before the adjudicative function of the courts begin. (Rothman, California Judicial Conduct Handbook (3d ed. 2007) Appen. F, pp. 4–6.) Indeed, we have been reminded recently that a judge's disqualification "occurs when the facts creating disqualification arise, not when

> disqualification is established. [Citations.]" (Christie v. City of El Centro (2006) 135 Cal. App. 4th 767, 776, 37 Cal. Rptr. 3d 718.) Therefore, any claimed misconduct by the arbitrator in association with the failure to make a required disclosure at the inception of his or her selection was sufficiently associated with the arbitration process itself to justify the application of arbitral immunity.

La Serena, 186 Cal. App. 4th at 905, 112 Cal. Rptr. 3d at 605. The court further buttressed this decision by noting that, "[i]n other contexts, similar attempts by plaintiffs to avoid an immunity or privilege by creative pleading have been rejected uniformly by courts." *Id.* at 906, 112 Cal. Rptr. 3d at 606. Thus, the La Serena Court considered the appointment process (and any defects therein) to still be within the scope of the immunity. The same would be true in the context of the appointment of a court-appointed evaluator, as here, which, as a matter of the basic appointment process, requires an initial evaluation by the Court as to the appropriateness of an individual for appointment.

Additionally, the California Court of Appeal (1st District), even more recently, reaffirmed that the quasi-judicial immunity doctrine generally extended to child custody evaluators. In Bergeron v. Boyd, 223 Cal. App. 4th 877, 167 Cal. Rptr. 3d 426 (2014), a parent, unhappy with reporting and orders by a child custody evaluator, filed suit, asserting the evaluator failed to perform appropriately, including the assertion that the evaluator failed to be properly appointed as the Court's expert under California Evidence Code section 730. *Id.* at 882, 167 Cal. Rptr. 3d at 431. Discussing an earlier decision, Howard v. Drapkin, 222 Cal. App. 3d 843, 271 Cal. Rptr. 893 (Ct. App. 1990), the Bergeron court explained:

The principle case authority discussing the evolution of the common law quasi-judicial privilege in California, and one factually similar to the instant case, is Howard v. Drapkin (1990) 222 Cal. App. 3d 843, 271 Cal. Rptr. 893 (*Howard*). In *Howard,* the defendant was a psychologist who was sued by a disgruntled parent/family court litigant after performing a child custody evaluation. After tracing the history and rationale for the common law development of a quasi-judicial privilege, the Court of Appeal concluded that persons performing acts that are judicial in nature are protected by the privilege. In making this determination, the court emphasized that it is the act performed, not the title of the person performing it, which is determinative: "So also, in determining whether a person is acting in a quasi-judicial fashion, the courts look at 'the nature of the duty performed [to determine] whether it is a judicial act—not the name or classification of the officer who performs it, and many who are properly classified as executive officers are invested with limited judicial powers.' (Pearson v. Reed [(1935)] 6 Cal. App. 2d [277,] 286–287, 44 P.2d 592.)" (Howard, *supra*, at p. 853, 271 Cal. Rptr. 893.)

Turning to the function of the family law custody evaluator in that case, the *Howard* court rejected the plaintiff's attempt to analogize the action to one for professional malpractice: "In contrast, the psychologist who is mediating a child custody dispute, whether by court appointment or not, is not an advocate for either parent, even if paid by them. [Citation.] The job of third parties such as mediators, conciliators and evaluators involves impartiality and neutrality, as does that of a judge, commissioner or referee; hence, there should be entitlement to the same immunity given others who function as neutrals in an attempt to resolve disputes. In a sense, those persons are similar to a judge who is handling a voluntary or mandatory settlement conference, no matter whether they are (1) making binding decisions (such as referees acting pursuant to Code Civ. Proc., § 638, subd. (1), and arbitrators), (2) making recommendations to the court (such as referees acting under Code Civ. Proc., § 639 or mediators acting under Civ. Code, § 4607), or (3) privately attempting to settle disputes, such as the defendant here. [¶] We therefore hold that absolute quasi-judicial immunity is properly extended to these neutral third parties for their conduct in performing dispute resolution services which are connected to the judicial process and involve either (1) the making of binding decisions, (2) the making of findings or recommendations to the court or (3) the arbitration, mediation, conciliation, evaluation or other similar resolution of pending disputes. As the defendant was clearly engaged in this latter activity, she is

> entitled to the protection of such quasi-judicial immunity." (Howard, *supra,* 222 Cal. App. 3d at pp. 859–860, 271 Cal. Rptr. 893.)

Bergeron v. Boyd, 223 Cal. App. 4th at 884-85. The Howard decision referred to by the Bergeron Court explained the public policy rationale, as quoted by the Bergeron court:

> As the Howard court explained later in its opinion, it is the *function* being exercised by the immunized individual that is the focus of the privilege's application and not the status or capacity of the individual that controls. (Howard, *supra,* 222 Cal. App. 3d at pp. 853–855, 271 Cal. Rptr. 893.) The reasons for doing so are clear: "We are persuaded that the approach of the federal courts is consistent with the relevant policy considerations of attracting to an overburdened judicial system the independent and impartial services and expertise upon which that system necessarily depends. Thus, we believe it appropriate that these 'nonjudicial persons who fulfill quasi-judicial functions intimately related to the judicial process' [citation] should be given absolute quasi-judicial immunity for damage claims arising from their performance of duties in connection with the judicial process. **Without such immunity, such persons will be reluctant to accept court appointments or provide work product for the courts' use. Additionally, the threat of civil liability may affect the manner in which they perform their jobs.** [Citation.]"

Bergeron v. Boyd, 223 Cal. App. 4th at 887, 167 Cal. Rptr. 3d at 431 (emphasis added).

This echoes the Idaho Supreme Court's discussion of policy concerns in the McKay decision, which ruling does not suggest avenues to sue individuals appointed by the Court because of alleged defects at any time during the appointment and service of that individual: "It is absolutely essential that guardians are free to make such a determination, without fear that a parent, seeking a larger award or settlement amount, will later sue the guardian for legal malpractice." McKay, 130 Idaho at 158. Ensuring that the cloak of immunity also encapsulates the

appointment process advances the ultimate goal intended by the Idaho Supreme Court. Undermining this policy, by allowing the kind of "creative pleading" warned of in La Serena, would invite chaos in the form of lawsuits against court-appointed individuals based simply upon bare allegations of defects in the appointment process and likely cripple the ability of Idaho courts (especially those in rural counties with limited expert pools to draw from) to secure the aid of guardians, evaluators, and similar personnel who are critical in aiding the courts to make sound and well-informed determinations, especially in family law matters.

Moreover, the emphasis on ensuring that evaluators are protected by quasi-judicial immunity was also discussed by the Alaska Supreme Court in Lythgoe v. Gunn, 884 P.2d 1085 (Alaska 1994). In that matter, a court-appointed custody investigator was appointed in a divorce and custody proceeding. *Id.* at 1086. During the course of the proceeding, the investigator's reports and testimony were ultimately stricken apparently based upon qualification concerns, and one party sued the investigator:

> In early 1992 the superior court Judge Andrews appointed Dr. Janet Guinn as an independent custody investigator in a divorce and custody proceeding involving Jacqueline Lythgoe, her ex-husband Paul Wellman, and their six-year-old son, [redacted] Under the terms of this appointment, the parties were each required to pay half of the costs and fees incurred by the investigator. The court further ordered the parties to fully cooperate with Dr. Guinn's investigation. Dr. Guinn's report recommended that Wellman be given sole custody of the child.
>
> Lythgoe filed a motion requesting that a separate evaluation be performed, which was granted. Judge Andrews also ordered an *in camera* review of files maintained by the State Division of Occupational Licensing pertaining to an investigation of Dr. Guinn "to determine if there are any relevant documents . . . relating to Guinn's

> qualifications or the weight to give her report or testimony." Following this inspection, the court ordered that "all reports and testimony produced by Dr. Guinn be stricken from the record." The court further directed that none of the documents produced by Dr. Guinn be provided to the new custody evaluator.
>
> In October 1992 Lythgoe filed suit against Dr. Guinn, alleging that she performed the custody investigation negligently, willfully and wantonly, that she intentionally or negligently misrepresented statements of third parties in her report, that she failed to conform to the minimum professional standards for licensed psychologists in the State of Alaska, that she violated statutes governing such professionals, and that she breached her fiduciary duties to Lythgoe. In an amended complaint, Lythgoe further alleged that Dr. Guinn acted as an advocate for Wellman, thereby forfeiting any immunity she might have had.

Id. The court granted immunity to the appointed psychologist, irrespective of the ultimate exclusion of her opinions and report, confirming the underlying public policy grounds for the granting of immunity:

> On the contrary, several courts have noted that adequate remedies and safeguards, other than civil liability, exist to hold court-appointed experts accountable for their actions. For example, in LaLonde [Eissner, 539 N.E.2d 538, 541 (Mass. 1989)], the court stated that "[w]hile we are cognizant of the need to prevent negligently performed evaluations, our judicial system has inherent safeguards that minimize the risk of decisions based on inaccurate, misleading, or negligently conducted evaluations." In particular, the court noted that, where the expert testifies or the expert's report is presented to the court, the complaining party has the opportunity to examine the expert and bring to the judge's attention any alleged deficiencies in the evaluation. In addition, the court further noted that the complaining party is "free to seek appellate review or . . . request a modification of the [trial court's] order."
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> . . .
>
> In the present case, Lythgoe successfully availed herself of such alternative remedies. She deposed Dr. Guinn and presented her objections to the trial court, which issued an order that Dr. Guinn's report be stricken from the record. She additionally would have had

> the opportunity to seek appellate review had the trial court denied her motion to exclude Dr. Guinn's report. These alternative mechanisms for review are "largely free of the harmful side-effects inevitably associated with exposing judges [and quasi-judicial officers] to personal liability." Thus, Lythgoe's public policy argument is unpersuasive.

Id. at 1091 (internal citations omitted). Lythgoe is factually similar to this matter, and demonstrates that, as here, the remedy for allegedly unqualified individuals and/or deficient evaluations is through exclusion of the witness, appeal, etc.[8] In fact, here, appellant Colafranceschi even specifically asserts that Robinson was excluded as an expert on Rule 702 grounds, precisely the kind of remedy contemplated by Lythgoe in lieu of civil litigation.[9] (R. at 150, ¶30.)

Similarly, Colafranceschi complains that Robinson was "converted to the defense expert witness," both in light of her testimony and alleged preparation by

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[8] As an aside, this Court recently affirmed a lower court's partial rejection of a custody evaluator's recommendations on Rule 702 grounds. Clair v. Clair, 153 Idaho 278, 286-287, 281 P.3d 115, 123-124 (2012). Interestingly, the Clair decision quotes the magistrate in the underlying proceeding, who himself appeared to question what standards (AFCC, APA, or otherwise) might apply to evaluations (which AFCC standards were also discussed in the exclusion of Ms. Robinson): "The foundation for some opinion testimony at this point is lacking in my view because I don't think we quite got there to whether there are or are not commonly accepted criteria or standards in the counseling field on how to conduct a child custody evaluation whether nationally or locally. Our State Legislature and our Supreme Court has not gone along yet with the Association of Family and Conciliation Courts to adopt the model Standards of Practice. I don't know at this juncture what the American Psychological Association or any other national association say the guidelines for the conduct of child custody evaluations are or what they should be in comparison to what Dr. Vereen has done here." *Id.* at 287; R. at 150, ¶30.

[9] Appellant Colafranceschi offers the inapposite hypothetical analogue of a non-lawyer somehow becoming a judge, thereby lacking "judicial immunity." (Appellant's Brief at 7.) While such a person is likely still considered to have acted as a judge (*see, e.g.,* Rosell v. Cent. W. Motor Stages, Inc., 89 S.W.3d 643, 651 (Tex. App. 2002) (regarding challenge to judge alleged to lack a law license: "When a judge is holding office under the color of law and discharging his duties of office, his acts are conclusive as to all parties and cannot be attacked in an appeal, even though the person acting as judge lacks the necessary qualifications and is incapable of legally holding the office.")), a more correct analogy in this instance would be an attorney who secured a family law magistrate seat, having told the magistrate commission of his/her experience in family law, but is ultimately revealed (after taking the bench) to have only done adoptions and uncontested divorces, but never any contested child custody proceedings. While there certainly might be an investigation by the Idaho Judicial Council, and appellate review of those matters handled by the judge, the lack of on-point experience does not invalidate the person's position on the bench so as to waive his/her immunity.

opposing counsel, thereby having "no jurisdiction in this matter"—presumably a waiver argument. (R. at 155, ¶¶42, 51-52, & 59.) This argument, in essence, contends that Robinson waived quasi-judicial immunity through advocacy for the defendants. The Lythgoe court, however, also rejected a similar "waiver by advocacy" argument:

> Lythgoe also argues that Dr. Guinn abandoned her neutral role and assumed the role of an advocate for Wellman, thereby waiving any immunity to which Guinn was entitled. ... In the present case, all of Lythgoe's allegations arise from Dr. Guinn's role as a court-appointed custody investigator. ... To accept Lythgoe's argument would render quasi-judicial immunity meaningless and defeat the purposes underlying the doctrine, as it would open the door to allegations of waiver by advocacy in every case where the quasi-judicial officer makes a recommendation contrary to a party's position.

Id. at 1092. Thus, appellant's argument on this point fails, as well.

b. *Other appropriate remedies—other than loss of immunity—can address conduct by, and/or deficiencies with, court-appointed personnel.*

Concerns about failures by such court-appointed personnel are adequately addressed through other mechanisms, which keep such personnel professionally responsible and further ensure that the integrity of the court actions they serve in is maintained. As noted above, Judge Schroeder explained that, in Idaho, "there are remedial avenues short of exposing an evaluator to open ended litigation if there is a perceived flaw in the appointment process." (R. at 297.) Remedial measures that could be applied to court-appointed personnel were discussed in another California decision, as well, in the context of guardians ad litem:

> The countervailing policy present here is the accountability of guardians ad litem, but there are sufficient mechanisms in place to

> address such concerns. First, immunity is limited to acts within the scope of the guardian's authority. Second, in addition to a guardian ad litem, wards generally have legal counsel as well, as was the case here. Third, as we have noted, guardians ad litem are appointed by and subject to the supervision of the trial court. The trial court can remove a guardian if he or she is not performing responsibly, either on its own motion or at a party's request. Fourth, the trial court's decisions are ultimately subject to review by an appropriate writ or appeal. Ultimately, both the parties and the judicial system are best served by addressing any issues with the guardian ad litem's performance during the initial case, rather than by a subsequent lawsuit collaterally attacking the original judgment.

McClintock v. W., 219 Cal. App. 4th 540, 552, 162 Cal. Rptr. 3d 61, 70 (2013).

The availability of remedial avenues in an action such as appellant's is even born out by the fact that Colafranceschi's argument remains predicated on the court's ultimate rejection of Robinson as an expert by Judge Comstock based upon Rule 702 concerns. (R. at 150, ¶30.)[10] Thus, immunity is appropriately afforded, given that the more appropriate avenue for challenging the ability of an expert to testify on experience grounds is via a motion to exclude based upon Rule 702, not via a lawsuit. *See* Lythgoe v. Gunn, 884 P.2d at 1091 ("On the contrary, several courts have noted that adequate remedies and safeguards, other than civil liability, exist to hold court-appointed experts accountable for their actions. ... These alternative mechanisms for review are 'largely free of the harmful side-effects inevitably associated with exposing judges [and quasi-judicial officers] to personal liability.'").

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[10] Note that the rejection of appellee Robinson as an expert under Rule 702, as alleged, was not predicated on any kind of misrepresentation regarding her history of performing custodial evaluations prior to her appointment, but instead is alleged to have been based upon Judge Comstock's finding that additional experience in a specific subset of custodial evaluations was required. (R. at 150, ¶30.)

The allegations of the Second Amended Complaint, and appellant Colafranceschi's arguments on appeal, both highlight the concerns about open-ended litigation, and the availability of alternative remedies. Contrary to appellant Colafranceschi's assertions, this litigation does not merely assert that Ms. Robinson (and Ms. Briley) fraudulently obtained an evaluator appointment that resulted in a paid-for home study to be thrown out; instead, the Second Amended Complaint contains far more wide-ranging allegations, including:

- A complaint about the process for transporting the child to interviews (R. 151, ¶37);
- A broad string-citation to multiple sections of the "Association of Family and Conciliation Courts Model Standards of Practice for Child Custody Evaluation" (R. at 152, ¶38);
- Complaints about Robinson's pre-hearing preparation with attorney Todd Wilcox (R. at 153, ¶¶39 & 42);
- The assertion that Robinson launched a "negligence and defamation campaign" during her appointment (R. at 153, ¶40);
- Complaints about Robinson's payment policy (R. 153-154, ¶¶45-47);
- Complaints about Robinson contacting McCall police regarding harassment by Colafranceschi (R. at 155, ¶50);
- A dispute regarding the contents of the Robinson's report re: the likelihood of Colafranceschi to kidnap his children (R. at 157, ¶¶59, 84, & 87);

- Allegations that co-defendant/appellee Shawn Briley "has a long history of domestic violence and fabricating frivolous claims against the father of her own child," including alleged details of an arrest for domestic violence (R. at 158, ¶¶64-65; 160, ¶77);
- An allegation that co-defendant/appellee Shawn Briley offered him beer in 2010 (R. at 160, ¶78);
- A dispute regarding the handling of an alleged statement by Robinson that one child wanted to kill his father (R. at 161, ¶¶85-86);
- A complaint that Robinson (and Briley) had "failed to investigate the majority of instances of abuse directed to child by mother, along with parental alienation by mother and harassment of plaintiff" (R. at 162, ¶88);
- Complaints regarding alleged coaching of a child's testimony by the mother, and an asserted lack of consistency between Colafranceschi's "pleadings/complaint" and "the statements made by child in interview with Ashley Robinson" (R. at 162-163, ¶¶91-92)
- A dispute regarding a particular course of events reported in Robinson's report involving an alleged school disruption by Colafranceschi in 2006 (R. at 163, ¶93); and
- A dispute regarding the suitability of certain babysitters. (R. at 163, ¶94.)

Thus, the allegations of the Second Amended Complaint do, in fact, seek to essentially revisit several disputes in the underlying family law action—despite the fact that such complaints, disputes, and allegations are more appropriately raised

in that family law action. Indeed, Robinson's expert status itself was successfully challenged on Rule 702 grounds in the underlying family law action.

Appellant Colafranceschi, apparently recognizing the fact that there are, in fact, other remedial measures, instead argues that this action is forced by the lack of ability to recover home study costs: "The home studies were ultimately not used in either child custody case and are therefore deemed a waste of money for plaintiff. . . . In the case of a magistrate excluding a home study where the evaluators attained the position correctly there is no recourse to recoup the money for the evaluation that was not used. . . . Plaintiff has not been able to recover from the financial loss of paying for home evaluations." (Appellants' Brief at 6 & 13.) Of course, this is unfounded—the family law court sets responsibility for costs for the home evaluation, can reserve the right to reapportion, and has the presumptive discretionary power to direct a return of payments by the evaluator or otherwise excuse payment by the parties) if appropriate (e.g., failure to complete evaluation, termination of appointment based on conduct, etc.). (R. at 169 & 171.)[11]

The sole authority cited by appellant Colafranceschi—an unpublished[12] decision from the Minnesota Court of Appeals, Kuberka v. Anoka Mediation, Inc., No. A05-2490, 2007 WL 3525 (Minn. Ct. App. Jan. 2, 2007)—does not dictate a

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[11] While not part of the record in this matter, the Court can take judicial notice of the fact that, after the instant appeal was filed, appellant Colafranceschi sought a return of home study fees in the *Schoonover* matter (Valley County Case No. 10-312) via motion filed January 14, 2014, as reflected in the Repository. In light of the District Court decision and appeal in this instant action, Robinson (and Briley) intervened, opposing such motion. As per the Repository, the District Court ultimately denied Colafranceschi's motion, and awarded fees and costs to Robinson and Briley. The Repository does not appear to reflect any similar motion made at any time in the *Ericson* matter.

[12] In Minnesota, by statute, unpublished Minnesota Court of Appeals decisions are not precedential and cannot be cited as precedent. Minn. Stat. § 480A.08(3).

different result as to application of the immunity. In Kuberka, the defendant was retained by plaintiff as a private mediator in divorce proceedings. *Id.* at *1. The defendant was subsequently selected by stipulation of the plaintiff and his wife as a time expeditor in determining child custody. *Id.* Subsequently, the court appointed defendant as a custody evaluator based upon the defendant's representation to the court that she was nearly done with her evaluation. *Id.* The plaintiff then filed suit against the defendant, alleging that she made misrepresentations concerning her evaluation in order to obtain appointment as a custody evaluator. *Id.* The defendant sought summary judgment on the basis of quasi-judicial immunity. *Id.*

The Minnesota Court of Appeals affirmed the decision of a district court to deny a summary judgment motion made on immunity grounds based upon the existence of a genuine issue of material fact regarding misrepresentations in the appointment of a custody evaluator and challenged conduct beyond the scope of the duties of the evaluator. The Kuberka court held that, in that matter, "the proper focus regarding securing the appointment is not on [defendant's] individual acts as the evaluator, but on the actions she undertook to become the evaluator, before immunity would attach." *Id.* In particular, the court expressed concern about "whether [defendant] misrepresented her qualifications to the court and the [plaintiff]" prior to her appointment. *Id.* Nothing in the Idaho decision of McKay (nor La Serena nor Lythgoe) suggest that the appointment process itself is beyond the scope of the immunity. Moreover, as discussed above, the Kuberka case is factually different in terms of the allegations regarding appointment.

Accordingly, even while appellant Colafranceschi seeks to predicate his litigation upon claimed defects in the appointment process, the scope of the quasi-judicial immunity still applies, and the District Court's dismissal of Colafranceschi's action should be affirmed.

4. Even were there an exception to immunity recognized in Idaho, appellant Colafranceschi failed to plead appropriate facts in support of such an exception.

As above, the quasi-judicial immunity extends to the appointment process, as correctly held by Judge Schroeder. Even were this Court to narrow the immunity to not include the appointment process, however, the Second Amended Complaint fails to adequately plead allegations that would sustain appellant Colafranceschi's action against appellee Robinson. *See, e.g.*, Anderson & Nafziger v. G. T. Newcomb, Inc., 100 Idaho 175, 179, 595 P.2d 709, 713 (1979) ("This Court has generally held that where an order of a lower court is correct but is based upon an erroneous theory, the order will be affirmed upon the correct theory.").

The Second Amended Complaint is devoid of allegations that Robinson proactively sought appointment to Colafranceschi's actions for the particular evaluations at issue. To the contrary, the allegations of the Complaint only assert that (1) Ms. Robinson sent a letter to the court with a resumé detailing her experience and offering her assistance (R. at 143-144, ¶¶2-3)[13]; (2) Ms. Robinson went to lunch with Judge Boomer and others in January 2011 (R. at 144, ¶¶4-6); and (3) at that lunch, did not speak about Colafranceschi's case. (*Id.*) This course

[13] The Second Amended Complaint is unclear on what specific misrepresentations were allegedly made in Ms. Robinson's letter or resumé.

of conducted can be readily contrasted with the differing fact pattern in Kuberka, discussed above, wherein the defendant made specific representations to the plaintiff and the court concerning her qualifications and the status of her evaluation in the course of obtaining appointment as the evaluator. 2007 WL 3525, at *1.

Here, the primary allegation that appears to allege misrepresentation by Robinson is confusing and would otherwise fail to satisfy the specificity requirements of Rule 9. Colafranceschi asserts that:

> 6. Early January 2011 at a lunch that included Judge Boomer, Ashley Robinson, Doug Miller and Carol Brockman, Ms. Robinson willfully misrepresented her qualifications to the court staff. Ms. Robinson claimed to have experience in home studies when in fact she had never done a home study of this sort. She had done case work with foster care children and health and welfare case [sic]. Ms. Robinson had never performed a private home study—like the one involved. Ms. Robinson perjured herself by stating otherwise under oath at the August 29th 2012 hearing.

(R. at 144, ¶6.) Thus, Colafranceschi simultaneously concedes that Robinson does have casework experience (*accord*, R. at 160, ¶79), but then complains that Robinson had not done one "of this sort" or "like the one involved." Ultimately, the Second Amended Complaint is devoid of two basic allegations. First, there is no allegation that Robinson specifically misrepresented her ability to perform the specific assignments in the *Ericson* and *Schoonover* matters before the assignments. In fact, the Second Amended Complaint acknowledges that appellant Colafranceschi was not discussed prior to appointment according to appellee Robinson. (R. at 144, ¶4—"Ms. Robinson denied talking about plaintiff during lunch.") Instead, the complaint only asserts that Judge Boomer himself believed

she was qualified at the time of appointment (R. at 145-146, ¶12) based upon his own understanding (rather than any specific representation she made regarding her suitability to be appointed to those two specific matters for the specific evaluations to be made).

Second, appellant Colafranceschi's argument remains predicated on the court's ultimate rejection of Robinson as an expert by Judge Comstock based upon Rule 702 concerns. (*e.g.*, R. at 150, ¶30) The rejection of Robinson as an expert under Rule 702, as alleged, was not predicated on any kind of misrepresentation made by her based upon her history of performing custodial evaluations prior to her appointment, but instead is alleged to have been based upon Judge Comstock's finding that, based upon different legal standards, additional experience in a specific subset of custodial evaluations would be required. (*Id.*) In this context, immunity has been afforded, as the appropriate avenue for challenging an expert on experience grounds is via a motion to exclude based upon Rule 702, not via a lawsuit—which was done by Colafranceschi. *See* Lythgoe, 884 P.2d at 1091 ("On the contrary, several courts have noted that adequate remedies and safeguards, other than civil liability, exist to hold court-appointed experts accountable for their actions. . . . These alternative mechanisms for review are 'largely free of the harmful side-effects inevitably associated with exposing judges [and quasi-judicial officers] to personal liability.'").

As such, even were Idaho to recognize an exception to immunity based upon pre-appointment misrepresentations like those made in the Kuberka matter,

appellant Colafranceschi's Second Amended Complaint still fails to allege sufficient facts and the action against Robinson was appropriately dismissed. That decision by the District Court should be affirmed.

C. The District Court's decision denying the Motion to Reconsider should be affirmed.

1. Appellant Colafranceschi has waived this assignment of error.

In his Notice of Appeal (R. at 313), appellant Colafranceschi indicates that he is also appealing the "Order Denying Motion to Reconsider dated 11/05/2013" (which order is located at R. 307); however, Appellant's brief appears devoid of any argument and/or cited authority relating thereto.

For that reason, this Court should deem such assignment of error waived. *See, e.g.*, Frogley v. Meridian Joint Sch. Dist. No. 2, 155 Idaho 558, 564-65, 314 P.3d 613, 619-20 (2013) ("'When issues on appeal are not supported by positions of law, authority, or argument, they will not be considered.' An assignment of error is deemed waived, and will not be discussed if there is no argument contained in the appellant's brief. This Court holds that 'a party waives an issue cited on appeal if either argument or authority is lacking.'") (internal citations omitted).

2. The Motion to Reconsider was otherwise appropriately dismissed.

In rejecting appellant Colafranceschi's motion for reconsideration, the Court noted the lack of any new information:

> The motion is supported by a reiteration of the facts and law previously submitted to the Court in opposition to the motions to dismiss. . . .

> There are no new facts alleged or previously uncited authority brought to the attention of the Court to alter the outcome of the Court's prior rulings. The authority cited by the Plaintiff and the arguments of the Plaintiff have been considered by the Court. Oral argument has previously been made based upon those alleged facts and the cited authority. Further hearing and oral argument upon the same record and authorities would serve no purpose but would add to the expense of the litigation.

(R. at 307.)

Rule 11(a)(2)(B) of the Idaho Rules of Civil Procedure provides in pertinent part:

> A motion for reconsideration of any interlocutory orders of the trial court may be made at any time before the entry of final judgment but not later than fourteen (14) days after the entry of final judgment.

Id. When considering a motion for reconsideration, the Court may take into account any new or additional facts presented by the moving party. Coeur d'Alene Mining Co. v. First Nat'l Bank of North Idaho, 118 Idaho 812, 824, 800 P.2d 1026, 1038 (1990). In submitting a motion for reconsideration pursuant to Rule 11(a)(2)(B), the moving party has the burden of bringing to the Court's attention through affidavit, depositions or admissions, new facts bearing on the correctness of an interlocutory order. Devil Creek Ranch, Inc. v. Cedar Mesa Reservoir & Canal Co., 126 Idaho 202, 205, 879 P.2d 1135, 1138 (1994); Coeur d'Alene Mining Co., 118 Idaho at 824, 800 P.2d at 1038 ("The burden is on the moving party to bring the trial court's attention to the new facts."); *accord*, Johnson v. N. Idaho Coll., 153 Idaho 58, 62, 278 P.3d 928, 932 (2012)("A motion for reconsideration is a motion which allows the court—when new law is applied to previously presented facts, when new facts are applied to previously presented law, or any combination thereof—to reconsider the

correctness of an interlocutory order."). Even where a moving party does not present any new facts, it must still demonstrate "errors of law or fact in the initial decision." Johnson v. Lambros, 143 Idaho 468, 147 P.3d 100 (Ct. App. 2006).

Appellant Colafranceschi's motion for reconsideration (R. at 300-306) largely reiterated those contentions previously made against appellee Robinson in the Second Amended Complaint, which relate (in relevant part) to the contention that Ms. Robinson misrepresented her qualifications to a court to secure appointment as a custody evaluator in conjunction with allegations of improper conduct during appointment. (*See generally*, Second Amended Verified Complaint, R. at 143-151, ¶¶1-36 re: prior to appointment; and R. at 151-163, ¶¶37-95 re: after appointment). Appellant Colafranceschi also attempted to argue a lack of remedial avenues, but identified only claimed categories of harm with remedial avenues, akin to those already addressed by the Court's order dismissing the action, including: claimed unethical conduct (addressable through a professional board), cost of the home study (addressable through the court directing payment of such cost), and ambiguous defamation and malpractice claims (addressable through a professional board and/or through challenge to testimony and report in the handling court). (R. at 297.) Appellant Colafranceschi even reiterated the fact that he successfully excluded Ms. Robinson's reports in the underlying actions. (R. at 306.)

Moreover, appellant Colafranceschi's motion for reconsideration also failed to appropriately identify any errors of law and/or fact that would support a motion for reconsideration. First, with respect to errors of law and/or new law, appellant

Colafranceschi only re-cited Kuberka, failing to identify any error of law in the Court's Order, instead just arguing that Kuberka dictates a different result, and stating that he "disagrees" with the Court's decision regarding quasi-judicial immunity. (R. at 301.) With respect to errors of fact, appellant Colafranceschi does not identify any particular facts identified by the Court that were purportedly in error; instead, he appears to primarily assert that certain "facts" were not adequately discussed in the Order. The Order, however, evaluates the allegations of the Second Amended Verified Complaint in sufficient summary fashion (R. at 296-297), and nothing suggests that any fact was incorrectly construed by the Court.

As such, even were this Court to deem this assignment of error not waived by appellant, there is otherwise no error, and the decision of the District Court denying appellant Colafranceschi's motion for reconsideration should be affirmed.

D. Appellee Robinson is entitled to her costs on appeal.

Pursuant to Idaho Appellate Rule 40, "[c]osts shall be allowed as a matter of course to the prevailing party unless otherwise provided by law or order of the Court." In this matter, Ms. Robinson should be found to be the prevailing party because the claims asserted against by appellant Colafranceschi are precluded by the doctrine of quasi-judicial immunity and Colafranceschi's failure to plead sufficient facts to state a claim for misrepresentation as required by Idaho Rule of Civil Procedure 9(b), providing this Court with ample basis to affirm the order of

the District Court. As such, appellee Robinson is entitled to her costs on appeal in this matter, in an amount to be proven to the Court.

V. CONCLUSION

For the reasons stated above, the September 16, 2013, Order Dismissing the Second Amended Verified Complaint, and the November 5, 2013 Order Denying Motion to Reconsider, should be affirmed, and appellee Ashley Robinson should be awarded her costs on appeal pursuant to I.A.R. 40.

RESPECTFULLY SUBMITTED this 19th day of September, 2014.

DUKE SCANLAN & HALL, PLLC

By _____
Kevin J. Scanlan—Of the Firm
Bryan A. Nickels—Of the Firm
Attorneys for Defendant/Respondent
Ashley Robinson

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19th day of September, 2014, I caused to be served a true copy of the foregoing document, by the method indicated below, and addressed to each of the following:

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