EXHIBIT 1

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DISTRICT COURT

CLARK COUNTY, NEVADA

VIVIAN MARIE LEE HARRISON,

Plaintiff,

v.

NORTON A. ROITMAN, M.D.; DOES I-X and ROE CORPORATIONS I-X,

Defendants.

Case No.: A-13-687300-C
Dept. No.: I

DEFENDANT NORTON A. ROITMAN, M.D.'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Defendant Norton A. Roitman, M.D. (hereinafter "Defendant"), by and through his counsel of record John H. Cotton, Esq. and Brianna Smith, Esq., of the law firm of COTTON, DRIGGS, WALCH, HOLLEY, WOLOSON, & THOMPSON, hereby submits this Motion to Dismiss Plaintiff's Complaint based upon NRCP 12(b)(5), for failure to state a claim for relief.

This Motion is made and based on NRC 12(b)(5), the accompanying Memorandum of Points and Authorities, and any oral argument of counsel that the Court may entertain at the time of hearing.

Dated this 4th day of September 2013.

COTTON, DRIGGS, WALCH
HOLLEY, WOLOSON & THOMPSON

JOHN H. COTTON, ESQ.
BRIANNA SMITH, ESQ.
NEVADA BAR NO. 11795
Attorneys for Defendant Norton A. Roitman, M.D.

NOTICE OF MOTION

PLEASE TAKE NOTICE that the undersigned counsel will appear at Clark County Regional Justice Center, Eighth Judicial District Court, Las Vegas, Nevada, on the 08 day of OCTOBER, 2013, at 9:00A.m., in Department 1, or as soon thereafter as counsel may be heard, to bring the foregoing DEFENDANT NORTON A. ROITMAN, M.D.'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT PURSUANT TO NRCP 12(b)(5) for hearing.

Dated this 4th day of September, 2013.

COTTON, DRIGGS, WALCH
HOLLEY, WOLOSON & THOMPSON

JOHN H. COTTON, ESQ.
BRIANNA SMITH, ESQ.
Nevada Bar No. 11795
Attorneys for Defendant Norton A. Roitman, M.D.

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

This matter arises from a family court divorce proceeding in which expert opinions were disclosed by the Plaintiff/wife Vivian Harrison and Defendant/husband Kirk Harrison. In a transparent attempt to circumvent the litigation privilege, Plaintiff Vivian Harrison ("Plaintiff") has sued Mr. Harrison's expert from the divorce proceeding, Norton Roitman, M.D., for alleged medical malpractice, negligent infliction of emotional distress, intentional emotional distress and conspiracy. The frivolous nature of this Complaint aside, Plaintiff has failed to plead any cognizable claim for relief for any of her alleged causes of action. Consequently, Plaintiff's Complaint must be dismissed in its entirety.

II.

STATEMENT OF FACTS PER COMPLAINT

Per the Complaint, in and during years 2011 and 2012, Plaintiff Vivian Harrison ("Plaintiff") was a party to a family court divorce case against her then-husband, Kirk Harrison (herein "the divorce proceeding"). (*Complaint,* ¶7). During the divorce proceeding, Mr. Harrison retained a forensic psychiatric expert, Norton Roitman, M.D., to render a preliminary psychiatric analysis of Ms. Harrison. As is standard practice in litigation proceedings, both parties disclosed experts and their expert's respective opinions. In summary, Plaintiff alleges that Mr. Harrison's expert, Dr. Roitman, analysis dated June 9, 2011, diagnosed Plaintiff with narcissistic personality disorder and provided an analysis, conclusions and diagnosis regarding Plaintiff without having met Plaintiff. (*Complaint,* ¶¶9-14). By rendering these opinions, Plaintiff claims Dr. Roitman fell below the standard of care and caused injury and harm to Plaintiff.

III.

ARGUMENT

A. Motion to Dismiss Standard.

NRCP 12(b)(5) allows a district court to dismiss a complaint for failure to state a claim upon which relief can be granted. A court must accept Plaintiff's factual allegations as true, but the allegations must be legally sufficient to constitute the elements of the claims asserted. *Sanchez ex rel. Sanchez v. Wal-Mart Stores, Inc.*, 125 Nev. 818, 823, 221 P.3d 1276, 1280 (2009). "Dismissal under NRCP 12(b) is appropriate where the allegations in a complaint, 'taken at 'face value,' ... [and] construed favorably in the [plaintiffs'] behalf,' fail to state a cognizable claim for relief." *Morris v. Bank of Am. Nevada*, 110 Nev. 1274, 1276, 886 P.2d 454, 456 (1994) (*quoting Edgar v. Wagner*, 101 Nev. 226, 227-28, 699 P.2d 110, 111-12 (1985). There must be "specific allegations sufficient to constitute the elements of a claim on which this court can grant relief." *Malfabon v. Garcia*, 111 Nev. 793, 796, 898 P.2d 107, 108 (1995).

Although the Nevada Supreme Court has not explicitly adopted the federal standard, it has not declined to do so either. *See Garcia v. Prudential Ins. Co. of Am.*, 129 Nev. Adv. Op. 3, 293 P.3d 869, 871 n.2 (2013). Under current federal pleading standards, a threadbare recitation of the cause of action's elements without supporting factual allegations that demonstrate that the pleader is plausibly entitled to relief will not suffice. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Moreover, even though all factual allegations are presumed to be true, legal conclusions couched as facts do not need to be accepted. *Id.*

A complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Id.* A complaint has facial plausibility when the party pleads factual content that allows the court to draw the reasonable inference that the movant is liable for the alleged misconduct. *Id.* In other words, for the nonmovant to succeed, "the non-conclusory

'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009).

B. Plaintiff Failed to State a Claim for Relief for Medical Malpractice Because Dr. Roitman Did Not Owe Any Duty To Plaintiff.

Plaintiff's first cause of action against Dr. Roitman is for medical malpractice. Medical malpractice, like any other form of negligence, involves a breach of duty which causes injury. To be tortiously liable, a physician must owe a duty which departed from the accepted standard of medical care in a manner that results in injury to their patient. *Fernandez v. Admirand*, 108 Nev. 963, 843 P.2d 354 (1992).

In the Complaint, Plaintiff entirely fails to plead the foremost element of a medical malpractice cause of action: duty. Indeed, Plaintiff could not in good faith argue that Dr. Roitman owed a duty to Plaintiff. Dr. Roitman was retained as an expert in the divorce proceeding by then-husband Mr. Kirk Harrison. It is uncontroverted that at no point did Dr. Roitman establish a physician-patient relationship with Ms. Harrison and has never been retained as an expert by Plaintiff. Accordingly, Dr. Roitman could not breach a duty of care to Ms. Harrison because no duty ever existed. Thus, Plaintiff has failed to state a claim for relief pursuant to NRCP 12(b)(5).

C. Plaintiff's Derivative Claims for Negligent Infliction of Emotional Distress and Intentional Infliction of Emotional Distress Also Fail.

The Nevada Supreme Court has held that claims for negligent infliction and intentional infliction of emotional distress are derivative of the primary claim for medical malpractice. See *Fierle v. Perez*, 125 Nev. 728, 129 P.3d 906, 909 (2009)(derivative claims cannot stand alone without a valid cause of action). Because Plaintiff's claim for medical malpractice fails to state a claim pursuant to NRCP 12(b)(5), these causes of action cannot be maintained and must be

dismissed.

D. Plaintiff Fails to State a Cognizable Claim for Civil Conspiracy.

An actionable civil conspiracy consists of "a combination of two or more persons who, by some concerted action, intend to accomplish an unlawful objective for the purpose of harming another, and damage results from the act or acts." *Dow Chemical Co. v. Mahlum*, 114 Nev. 1468, 1489, 970 P.2d 98, 112 (1998), *overruled in part on other grounds, GES, Inc. v. Corbett*, 117 Nev. 265, 21 P.3d 11 (2001). Intent to harm another must be specifically pled. *Jordan v. State ex rel. Dept. of Motor Vehicles and Public Safety*, 121 Nev. 44, 75, 110 P.3d 30, 51 (2005), *abrogated on other grounds, Buzz Stew, LLC v. City of North Las Vegas*, 124 Nev. 224, 228 n. 6, 118 P.3d 670, 672 n. 6 (2003). In addition, mere proof of an agreement is insufficient "because it is essential that the conduct of each tortfeasor be in itself tortious." *Id.*

A civil conspiracy is a serious tort, alleged by Plaintiff to entitle her to an award of punitive damages against Dr. Roitman. (*Complaint*, pg. 7). As a result, a generalized pleading of conspiracy is inadequate to state a claim and is properly dismissed. *See e.g., Nevada Associateion Services, Inc. v. First American Title Insurance Co.*, 2012 WL 9096706, *5-6 (D.Nev. 2012), explaining why a general assertion of a civil conspiracy must be dismissed:

> To establish a civil conspiracy claim, a plaintiff must demonstrate that: 1) the defendants were part of a combination of two or more persons: 2) the defendants intended to achieve an unlawful objective for the purpose of harming another; 3) damage resulted from the action; 4) defendants committed an underlying tort; and 5) an agreement existed between the defendants to commit that tort. [...]

Plaintiff does not allege that Dr. Roitman intended to harm or injure Plaintiff. Instead, Plaintiff alleges that "Dr. Roitman and the adverse party to Ms. Harrison in the Harrison litigation intended to advance Dr. Roitman's 'psychiatric analysis' of Ms. Harrison for purposes of harming Ms. Harrison in the Harrison litigation and in order give the adverse party to Ms. Harrison an undue, unfair and unlawful advantage in that case." (*Complaint*, ¶38). Where a

conspiracy claim fails to allege an agreement, intent, purpose and act to bring about the harm complained of – here injury and emotional distress to Plaintiff – it is insufficiently pled and must be dismissed. *See Consolidated Generator-Nevada, Inc. v. Cummins Engine Co.*, 114 Nev. 1304, 1311, 971 P.2d 1251, 1256 (1998)(affirming district court's dismissal by summary judgment of a conspiracy claim where there was no evidence of defendants' intent to harm plaintiff).

E. The Statute of Limitations Has Long Expired.

Even assuming, *arguendo*, that Dr. Roitman owed a duty to Plaintiff, which is indisputable that he did not, the statute of limitations on any such claim has expired. The statute of limitations for medical malpractice cases is governed by NRS 41A.097, which provides, that a plaintiff has one year from the day they knew or should have known of a potential cause of action.

NRS 41A.097(2) governs the instant matter because Plaintiff has alleged medical malpractice. In the Complaint, Plaintiff alleges that Dr. Roitman committed malpractice when he submitted a "June 9, 2011, Report...in which he provided a 'psychiatric analysis' of Ms. Harrison." (*Complaint*, ¶8). Thus, the statute of limitations commenced on June 9, 2011, and ran on June 12, 2012. This Complaint was filed June 26, 2013, over two years after the report was disclosed and over one year after the statute limitations expired.

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IV.

CONCLUSION

For the reasons stated above, Plaintiff has failed to state a viable claim for all of her causes of actions. Consequently, Plaintiff's Complaint must be dismissed.

Dated this 4th day of September, 2013.

COTTON, DRIGGS, WALCH
HOLLEY, WOLOSON & THOMPSON

JOHN H. COTTON, ESQ.
BRIANNA SMITH, ESQ.
NEVADA BAR NO. 11795
Attorneys for Defendant Norton A. Roitman, M.D.

CERTIFICATE OF MAILING

I hereby certify that on this 4th day of Septmber 2013, I sent a true and correct copy of the foregoing **DEFENDANT NORTON A. ROITMAN, M.D.'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT** by U.S. Mail, postage prepaid, addressed to the following:

John Ohlson, Esq.
275 Hill Street, Suite 230
Reno, Nevada 89501
Attorneys for Plaintiff

An Employee of Cotton, Driggs, Walch, Holley, Woloson & Thompson, Ltd.

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CLERK OF THE COURT

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Attorney for Plaintiff
Vivian Marie Lee Harrison

DISTRICT COURT

CLARK COUNTY, NEVADA

** ** **

VIVIAN MARIE LEE HARRISON,

Plaintiff,

vs.

NORTON A. ROITMAN, M.D.; DOES I-X and ROE CORPORATIONS I-X,

Defendants

Case No. A-13-687300

Dept. No. 1

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Plaintiff, VIVIAN MARIE LEE HARRISON, by and through her attorney, JOHN OHLSON, opposes the motion by Defendant Norton A. Roitman, M.D. ("Dr. Roitman"). This opposition is made and based upon the rigorous standard applied to motions to dismiss pursuant to NRCP 12(b)(5), and is further supported by the following points and authorities.

SUPPORTING POINTS AND AUTHORITIES

I. OVERVIEW

Plaintiff Vivian Harrison ("Ms. Harrison") has sued Defendant Norton A. Roitman ("Dr. Roitman") for medical malpractice, negligent and intentional emotional distress, and civil conspiracy as it concerns a June 9, 2011, psychological report prepared by Dr. Roitman that provided a psychological analysis and conclusions concerning Ms. Harrison, and diagnosed Ms. Harrison with narcissistic personality disorder. It was a report that was prepared and written by Dr. Roitman (despite that he had never, and has never, met or seen Ms. Harrison) and was

submitted in litigation to which Ms. Harrison was a party ("the Harrison litigation") by the adverse party in that case.

Dr. Roitman prepared and submitted his report for the Harrison litigation based solely on the information provided to him by the adverse party to Ms. Harrison in the Harrison litigation, who had requested that psychiatric analysis of Ms. Harrison to advance his position in the case and gain an advantage over Ms. Harrison. Ms. Harrison, in response to Dr. Roitman's report, voluntarily underwent comprehensive and direct clinical and psychometric assessments by other mental health professionals. The opinions of those professionals about Ms. Harrison were contrary to those stated by Dr. Roitman. Nonetheless, Dr. Roitman's report regarding Ms. Harrison did significant damage to Ms. Harrison in the Harrison litigation and to her reputation generally, caused her emotional and physical suffering, and caused unnecessary delays in and substantially increased the attorneys fees and expert costs to Ms. Harrison in the Harrison litigation. The extent of those damages could not have been not known to or discovered by Ms. Harrison until the Harrison litigation concluded July 12, 2012, and formed the basis of Ms. Harrison's June 26, 2013, lawsuit against Dr. Roitman.

Dr. Roitman has moved to dismiss Ms. Harrison's complaint pursuant to NRCP 12(b)(5) for failing to state a claim upon which relief can be granted. Dr. Roitman asserts that, by suing him, Ms. Harrison is attempting to circumvent the litigation privilege, and substantively challenges each of Ms. Harrison's causes of action. Dr. Roitman's motion, however, is without merit. Initially, his report is not subject to the litigation privilege. Moreover, Dr. Roitman's motion is fraught with citations to authority that are misleading and misstated, are otherwise inapposite. As a consequence, Ms. Harrison requests that this Court deny Dr. Roitman's motion.

II. ARGUMENT

Under NRCP 12(b)(5)'s failure-to-state-a-claim dismissal standard, a complaint should not be dismissed unless it appears ***to a certainty*** that the plaintiff could prove no set of facts that would entitle him or her to relief. *Holcomb Condo. Homeowners' Ass'n, Inc. v. Stewart Venture, LLC,* 129 Nev. ___ (Adv. Op. No. 18) (2013), *citing Cohen v. Mirage Resorts, Inc.,* 119 Nev. 1, 22, 62 P.3d 720, 732 (2003). This is a *rigorous standard,* as the reviewing court construes the

pleading liberally, drawing every inference in favor of the nonmoving party. *Holcomb Condo. Homeowners' Ass'n, supra, citing Citizens for Cold Springs v. City of Reno,* 125 Nev. 625, 629, 218 P.3d 847, 850 (2009); *see also Lubin v. Kunin,* 117 Nev. 107, n. 1, 17 P.3d 422, n. 1 (2001) (reciting the well-recognized standard for considering motions to dismiss), *citing Vacation Village v. Hitachi America,* 110 Nev. 481, 484, 874 P.2d 744 (1994).

In this case, the litigation privilege does not apply. Ms. Harrison has stated a valid claim for medical malpractice based upon the statutory duty of care imposed upon Dr. Roitman. Because her claim for medical malpractice is valid, so are her derivative claims for negligent and intentional emotional distress. Ms. Harrison has also sufficiently and adequately alleged her cause of action for civil conspiracy. Finally, Ms. Harrison filed her lawsuit against Dr. Roitman within the applicable statute of limitations. Thus, Dr. Roitman is not entitled to an order dismissing Ms. Harrison's lawsuit against him.

A. The litigation privilege is not applicable to this case.

While Dr. Roitman does not make any substantive or supported challenge to Ms. Harrison's complaint based upon the litigation privilege, rather relegating that reference to a one-liner in reference to her efforts to circumvent it by way of her claims against him, it is nonetheless an issue requiring disposal. To the extent Dr. Roitman is raising the litigation privilege as a basis on which the complaint should be dismissed, it is not applicable in this case. Notwithstanding that Ms. Harrison has not asserted a claim against Dr. Roitman for defamation, Dr. Roitman was not a party in the Harrison litigation. *Clark County Sch. Dist. V. Virtual Educ.,* 125 Nev. 374, 213 P.3d 496, 502-3 (2009) (the privilege applies to attorneys and parties to litigation). Thus, there is not basis on which Dr. Roitman can assert the litigation privilege in this case.

B. Ms. Harrison has stated a valid claim for medical malpractice based upon Dr. Roitman's statutory duty of care.

Dr. Roitman asserts that Ms. Harrison's first cause of action against him for medical malpractice should be dismissed because Dr. Roitman and Ms. Harrison did not have a physician-patient relationship and, therefore, Dr. Roitman had no duty to Ms. Harrison that he could breach. In support of his assertion, Dr. Roitman cites *Fernandez v. Admirand,* 108 Nev. 963, 843 P.2d 354

(1992) as stating that a physician must owe a duty which departed from the accepted standard of medical care that results in injury to their patient.

Dr. Roitman, however, misstates the standard for medical malpractice claims as it was stated in *Fernandez,* and ignores that the standard of care imposed on him is applicable under the circumstances of this case.

1. Nevada's statutory scheme governing medical malpractice cases is based on general negligence principles and does not require a physician-patient relationship.

In *Fernandez,* the Court recited the definition of medical malpractice as "the failure of a physician, hospital or employee of a hospital, in rendering services, to use the reasonable care, skill, or knowledge ordinarily used under similar circumstances." *Fernandez,* 108 Nev. at 968, *quoting* NRS 41A.009.[1] The Court went on to explain that in order to prove medical malpractice, the claimant must establish the *accepted standard of medical care or practice*, and then must show that the doctor's conduct departed from that standard and legally caused the injuries suffered. *Fernandez,* 108 Nev. at 968-9, *citing Orcutt v. Miller,* 95 Nev. 408, 411, 595 P.2d 1191, 1193 (1979) and NRS 41A.100.[2]

Indeed, that standard was recited and applied in *Fernandez* in the context of a medical malpractice case regarding the care doctors gave to a patient with whom they had personally interacted. Contrary to Dr. Roitman's suggestion, however, nothing in *Fernandez* limits the broad language of the general definition and standard that governs medical malpractice cases as prescribed by NRS 41A.009 and 41A.100 *only* to circumstances in which the doctor has personally or directly interacted with the patient or has an established doctor-patient relationship.

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[1] The language of NRS 41A.009 as quoted by the *Fernandez* Court has remained the same since 1989.

[2] The current version of NRS 41A.100 states the same standard, as follows:

> "Liability for personal injury or death is not imposed upon any provider of medical care based upon alleged negligence in the performance of that care unless evidence consisting of expert medical testimony, material from recognized medical texts or treatises or the regulations of the licensed medical facility wherein the alleged negligence occurred is presented to demonstrate *the alleged deviation from the accepted standard of care in the specific circumstances of the case and to prove causation of the alleged personal injury* or death...."

Nevada's statutory scheme does not require a physician-patient relationship as a predicate to a medical malpractice claim. Chapter 41A of the Nevada Revised Statutes (entitled "Actions for Medical or Dental Malpractice") generally governs actions for medical malpractice. The Chapter defines "medical malpractice" as the failure of a physician, hospital, or employee of a hospital, in rendering services, to use the reasonable care, skill or knowledge ordinarily used under similar circumstances (NRS 41A.009). "Professional negligence" as the negligent act or omission to act by a provider of health care in the rendering of professional services, which act or omission is the proximate cause of a personal injury (NRS 41A.015).

To prevail in a medical malpractice action, the plaintiff must establish that: (1) the doctor's conduct departed from the accepted standard of medical care or practice; (2) that the doctor's conduct was both the actual and proximate cause of the plaintiff's injury; and (3) that the plaintiff suffered damages. *Prabhu v. Levine,* 112 Nev. 1538, 1543, 930 P.2d 103 (1996), *citing Perez v. Las Vegas Medical Center,* 107 Nev. 1, 4, 805 P.2d 589, 590-91 (1991) and *Orcutt v. Miller,* 95 Nev. 408, 411-12, 595 P.2d 1191, 1193 (1979). To that end, claims for medical malpractice in Nevada are based on general negligence principles. *Id.*

The statutes governing medical malpractice cases in Washington are similarly stated to those in Nevada. Section 7.70.030 of the Revised Code of Washington defines three separate causes of action for medical malpractice, one of which, like Nevada, is based upon the failure to follow the accepted standard of care. *See* RCW § 7.70.030(1).

Pursuant to RCW § 7.70.040, proof that injury resulted from the failure of a health care provider to follow the accepted standard of care requires that: (1) the health care provider failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he or she belongs acting in the same or similar circumstances; and (2) that failure was the proximate cause of the injury complained of. Based upon the general negligence principles of those provisions, there is no requirement that a plaintiff asserting a medical malpractice claim under them be a patient. *See Daly v. U.S.,* 946 F.2d 1467, 1469 (9th Cir. 1991) (acknowledging that the broad nature of the statutory scheme evidences the legislature's intent to impose liability beyond the context of a physician-patient

relationship); *see also Eelbode v. Chec Medical Centers, Inc* , 97 Wash.App. 462, 984 P.2d 436, 438-9 (1999) (a claim of failure to follow the accepted standards of care does not require a physician-patient relationship).

In this case, Ms. Harrison has asserted a general medical malpractice claim pursuant to the negligence principles applicable to NRS Chapter 41A. She alleges that Dr. Roitman, a licensed psychiatrist (who rendered opinions and conclusions about Ms. Harrison's mental health and diagnosed her with narcissistic personality disorder) had a *duty to meet the standard of care* required of psychiatrists and to use reasonable care, skill, or knowledge ordinarily used under similar circumstances. *See* Complaint, ¶ 16.

To that end, Ms. Harrison has alleged that, to a degree of medical certainty (*as supported by two psychiatric experts*), Dr. Roitman "*fell below the standard of care* required of psychiatrists in both his written diagnosis of Ms. Harrison and in the conclusions he reached about her without ever having met or seen Ms. Harrison and without conducting an evaluation of Ms. Harrison." *Id.* at ¶ 17 (emphasis added). Ms. Harrison has also alleged that, to a degree of medical certainty (*and also supported by two psychiatric experts*), Dr. Roitman "*fell below the standard of care* required of psychiatrists in both his written diagnoses of Ms. Harrison and in the conclusions he reached about her based solely on narratives provided to him by the adverse party to Ms. Harrison in the Harrison litigation." *Id.* at ¶ 18 (emphasis added). Ms. Harrison has further alleged that Dr. Roitman's diagnosis and conclusions about Ms. Harrison were incorrect, and that they damaged her in the Harrison litigation, the extent of which was not known until the conclusion of the Harrison litigation.

Indeed, Ms. Harrison's allegations that Dr. Roitman "fell below the standard of care" is a direct reference to the preceding allegation that Dr. Roitman "had a duty to meet the standard of care" and is an allegation that he breached that duty. *Id.* at ¶ 16. As a consequence, *and drawing every reasonable inference in her favor (see, supra)*, Ms. Harrison has adequately alleged: (1) that Dr. Roitman had a duty to her by way of her allegations that he departed from the accepted standard of medical practice; (2) that his conduct caused injury to Ms. Harrison; (3) and that Ms.

Harrison suffered damages, as required by *Prabhu, supra.* As a consequence, Ms. Harrison has adequately alleged and stated a valid claim for medical malpractice.

2. To the extent that a physician-patient relationship is required by Nevada's statutory scheme governing malpractice cases, it has been established by Dr. Roitman's conduct.

Even if Nevada's general negligence-based statutory scheme for medical malpractice cases could be construed as requiring a physician-patient relationship, that issue is subject to consideration and analysis beyond just whether a patient visited and was personally evaluated by a physician. Indeed, courts have recently begun recognizing that just because a physician does not deal directly with a patient does not necessarily preclude the existence of a physician-patient relationship. *See, i.e., Mead v. Legacy Health Sys.,* 352 Or. 267, 283 P.3d 904 (Or. 2012), *citing St. John v. Pope,* 901 S.W.2d 420, 424 (Tex. 1995) and *McKinney v. Schlatter,* 692 N.E.2d 1045, 1050-51 (Ohio Ct.App. 1997), *overruled on other grounds, Lownsbury v. VanBuren,* 762 N.E.2d 354, 362 (Ohio 2002) (it was a question of fact for the jury whether an on-call cardiologist who had discussed a patient's symptoms and test results with an emergency room physician entered into a physician-patient relationship with the person seeking treatment).

> "In light of the increasing complexity of the health care system, in which patients routinely are diagnosed by pathologists or radiologists or other consulting physicians who might not ever see the patient face-to-face, it is simply unrealistic to apply a narrow definition of the physician-patient relationship in determining whether such a relationship exists for purposes of a medical malpractice case."

Mead, 283 P.3d at 910, *quoting Kelley v. Middle Tennessee Emergency Physicians,* 133 S.W.3d 587, 596 (Tenn. 2004), *cf. Eads v. Borman,* 351 Or. 729, 743-744, 277 P.3d 503 (2012) (noting that changes in the way health care is delivered affects apparent agency analysis).

Thus, a physician-patient relationship may be implied when a *physician affirmatively undertakes to diagnose* and/or treat a patient, or affirmatively participates in such diagnosis and/or treatment. *Mead,* 283 P.3d at 910, *quoting Kelley,* 133 S.W.3d at 596. With that, the Oregon Supreme Court has held that the standard for determining whether there is a physician-patient relationship is <u>whether a physician who has not personally seen a patient either knows or reasonably should know that he or she is diagnosing a patient's condition or treating the patient</u>. *Mead,* 283 P.3d at 910. If the physician either <u>knew or reasonably should have known</u> that he or

she was diagnosing the patient's condition or providing treatment to the patient, then an implied physician-patient relationship exists and the physician owes the patient a duty of reasonable care. *Id.*

The application of Oregon's standard of determining a physician-patient relationship in the absence of having personally seen and evaluated the patient is consistent with Nevada's broad statutory standard of care, and the liability imposed on a physician who fails to use the reasonable care, skill, or knowledge ordinarily used under similar circumstances. *See supra; see also Cleghorn v. Hess*, 109 Nev. 544, 853 P.2d 1260 (1993) (embracing a "liberal definition of 'patient'" in the context of psychological evaluations of employees conducted on behalf of employers as "in harmony with the legislative intent....").

In this case, and applying the principles and contemporary realities of health care as addressed by, *i.e., Mead* and *Kelley, supra,* Dr. Roitman ***created a physician-patient relationship with Ms. Harrison*** when he undertook a *comprehensive evaluation and diagnosis* of Ms. Harrison based upon information from an third party and without ever having met or seen her. He knew that it was information that would be considered and used against Ms. Harrison in a litigation to which she was a party.

It is an interesting irony that Dr. Roitman now claims he is not liable for his actions in diagnosing Ms. Harrison without ever having laid eyes on her or ever having heard her voice. His claim that she was not a patient as a bar to the suit is similar to the prisoner who kills his parents plea for mercy because he is an orphan. Dr. Roitman violated the standard of care by diagnosing Ms. Harrison. She was not a patient in the traditional sense, but he owned her every duty nonetheless.

Based on the Ms. Harrison's supporting allegations for her medical malpractice claim (Complaint, ¶¶ 16-21, outlined above), *and drawing every reasonable inference in her favor (see, supra)*, Ms. Harrison has adequately alleged and stated a valid claim for medical malpractice.

C. Ms. Harrison's emotional distress claims are asserted as alternative claims for relief and are independent of her claim for medical malpractice.

Dr. Roitman next asserts that Ms. Harrison's claims for negligent and intentional infliction of emotional distress are derivative of her primary claim for medical malpractice, and based on his challenge to her medical malpractice claim, Ms. Harrison cannot maintain them. In support of his assertion, Dr. Roitman cites *Fierle v. Perez,* 125 Nev. 728, 129 P.3d 906 (2009) as stating that derivative claims cannot stand alone without a valid cause of action. The authority Dr. Roitman cites, however, does not support his assertion.

Initially, for the reasons stated above, Ms. Harrison has stated a valid cause of action for medical malpractice. Thus, to the extent her emotional distress claims are attendant to her medical malpractice claim, they remain viable claims.

Be that as it may, Dr. Roitman's recitation of *Fierle* is misleading. *Fierle* concerned the requirement of an affidavit in medical and professional malpractice cases, the extent to which a complaint that lacks a required affidavit can be amended, and whether an affidavit is required for claims based on the doctrine of *res ipsa loquitur*. The Court held that claims based upon *res ipsa loquitur* do not require an affidavit. That the medical malpractice claims that were asserted without a supporting affidavit could not be amended to relate back to the complaint containing the surviving *res ipsa loquitur* claims because they are void *ab initio* and, therefore, do not legally exist.[3] *Id.,* 219 P.3d at 913-914. In footnote 2 to the case, the Court addressed the plaintiff's ***husband's*** loss of consortium claim in the context of the medical malpractice claims that were dismissed based upon the lack of the required affidavits:

> "Regarding the loss of consortium claims, in *Turner v. Mandalay Sports Entm't,* we determined that ***a spouse's*** claim for loss of consortium is derivative, and thus, its success is dependent on the other spouse having a valid cause of action against the defendant. 124 Nev. ___, ____ n. 31, 180 P.3d 1172, 1178 n. 31 (2008) (citing *Gunlock v. New Frontier Hotel,* 78 Nev. 182, 185 n. 1, 370 P.2d 682, 684 n. 1 (1962)). Thus, we conclude that because of the derivative nature of the claims, only the loss of consortium claims that arise from the surviving res ipsa loquitur claims endure on remand."

Fierle, 125 Nev. 728 at n. 2 (emphasis added).

[3] *Egan v. Chambers,* 129 Nev. ___ (Adv. Op. 25) (2013) overruled the holding in *Fierle* that the affidavit requirement applied to all professional negligence actions.

Nothing in *Fiere* states, or even suggests, that a plaintiff's emotional distress claims in a medical malpractice case are "derivative" of the primary malpractice claim. And in this case, Ms. Harrison has not asserted derivative claims of others as *Fiere* contemplates them. Rather, Ms. Harrison has asserted several different causes of action based on injury to her, which she is entitled to do. *See Countrywide Home Loans v. Thitchener,* 124 Nev. 725, 192 P.3d 243, 248 (2008) (plaintiffs are permitted to plead alternative or different theories of relief based on the same facts), *citing Topaz Mut. Co., Inc. v. Marsh*, 839 P.2d 606, 108 Nev. 845, 852 (Nev., 1992) (a plaintiff may assert several claims for relief and be awarded damages on different theories). Thus, Ms. Harrison's emotional distress claims are independent claims. As a consequence, *Fiere* is not applicable as cited by Dr. Roitman.

D. Ms. Harrison has sufficiently and adequately alleged her cause of action for civil conspiracy.

In his challenge to Ms. Harrison's civil conspiracy claim, Dr. Roitman asserts that the supporting allegations in the complaint fail to allege that Dr. Roitman intended to harm or injure Ms. Harrison and, therefore, the claim is not sufficiently pled. In support of his challenge, Dr. Roitman cites various cases that recite the elements of an actionable civil conspiracy claim and, on those bases, concludes that the claim, as alleged, must be dismissed. Dr. Roitman's challenge, however, is without merit.

Indeed, the authority on which Dr. Roitman relies is helpful. In fact, it is determinative. *But it is helpful and determinative in favor of Ms. Harrison.* For instance, in *Nevada Association Services, Inc. v. First American Title Insurance Co.,* 2012 WL 9096706 (D.Nev. 2012), the Federal District Court of Nevada, stated that:

> (1) a plaintiff pleading conspiracy must plead enough facts to raise a reasonable expectation that discovery will reveal evidence of the existence of a conspiracy (*Id., quoting Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 556 (2007)); and (2) that the cause of action must be pled with particular specificity as to "the manner in which a defendant joined in the conspiracy and how he participated in it (*Id.,*

quoting Arroyo v. Wheat, 591 F.Supp.141, 144 (D. Nev. 1984) and *Futch v. BAC Home Loans Servicing, LP,* 2011 WL 4544006 (D.Nev. 2011).

There does not appear to be any dispute by Dr. Roitman that Ms. Harrison has satisfied those pleading requirements.

Jordan v. State ex. Rel. Dept. of Motor Vehicles and Public Safety, 121 Nev. 44, 110 P.3d 30 (2005), which was also cited by Dr. Roitman,[4] requires that "[i]ntent must be specifically alleged." *Jordan,* 121 Nev. at 51. The complaint, on its face, specifically alleges the requisite intent by Dr. Roitman. For instance, the introductory paragraph to Ms. Harrison's civil conspiracy claim incorporates by reference all of the preceding paragraphs of the complaint. Complaint, ¶ 36. Included in those preceding paragraphs are the supporting factual allegations that outline, in detail, the actions of Dr. Roitman and the party adverse to Ms. Harrison in the Harrison litigation that gave rise to her civil conspiracy claim, as follows:

- In and during 2011 and 2012, Ms. Harrison was a party in a case being litigated in Clark County, Nevada ("the Harrison litigation").
- In an effort to advance his position in the case and gain an advantage over Ms. Harrison, the adverse party to Ms. Harrison in the Harrison litigation submitted to the Court a June 9, 2011, Report that was prepared and signed by Dr. Roitman, in which he provided a "psychiatric analysis" of Ms. Harrison.
- In his June 9, 2011, Report, Dr. Roitman, among other things, diagnosed Ms. Harrison as having a narcissistic personality disorder.
- In rendering his diagnosis of Ms. Harrison, Dr. Roitman concluded that Ms. Harrison's "pathological narcissistic personality disorder is near impossible to treat and her prognosis is very poor" and further stated that "if [Ms. Harrison's] character were stronger, she might have a shot at [improving with treatment], but unfortunately, she is shallow and critical, and lacks internal structure."
- Dr. Roitman's June 9, 2011, Report also offered opinions and conclusions as to what the outcome of the Harrison litigation in reference to Ms. Harrison should be.
- Dr. Roitman provided his psychiatric analysis, conclusions, and diagnosis regarding Ms. Harrison despite that Dr. Roitman had never, and has never, met or seen Ms. Harrison.
- Dr. Roitman prepared and submitted his report for the Harrison litigation based solely on the information provided to him by the adverse party to Ms. Harrison in

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[4] Dr. Roitman cites *Jordan* as stating on page 75 of 121 Nev. 44 that "intent to harm another must be specifically pled." Motion at 6:8-9. However, there is no page 75 for *Jordan,* 121 Nev. 44.

the Harrison litigation, who had requested that psychiatric analysis of Ms. Harrison to inform the court of her mental condition and functional limitations.

- Despite that Ms. Harrison, in response to Dr. Roitman's report, voluntarily underwent comprehensive and direct clinical and psychometric assessments by other mental health professionals and that the opinions of those professionals about Ms. Harrison were contrary to those stated by Dr. Roitman, Dr. Roitman's report regarding Ms. Harrison did significant damage to Ms. Harrison in the Harrison litigation and to her reputation generally, caused her emotional and physical suffering, and caused unnecessary delays in and substantially increased the attorneys fees and expert costs to Ms. Harrison of the Harrison litigation.

See Complaint, ¶¶ 7-14.

With those factual allegations as the backdrop of her civil conspiracy claim, Ms. Harrison alleges that:

> "By way of agreement with and based solely on information provided by the adverse party to Ms. Harrison in the Harrison litigation, and without ever having met, seen, or personally evaluated Ms. Harrison, Dr. Roitman, in violation of his duties as a practicing psychiatrist, prepared and provided a written "psychiatric analysis" of Ms. Harrington that included both a diagnosis of and conclusions he reached about her" Complaint, ¶ 37.

Clearly, Ms. Harrison is not alleging that Dr. Roitman prepared his psychiatric analysis and offered his incorrect diagnosis of her by accident. Rather, this allegation satisfies the element of civil conspiracy that requires a concerted action – an intended action – and agreement by two or more people.

> "Dr. Roitman and the adverse party to Ms. Harrison in the Harrison litigation intended to advance Dr. Roitman's "psychiatric analysis" of Ms. Harrison for the purpose of harming Ms. Harrison in the Harrison litigation and in order to give the adverse party to Ms. Harrison an advantage in that case." Complaint, ¶ 38.

This allegation – the allegation with which Dr. Roitman takes issue as insufficient to allege intent – actually alleges intent, by using the word "intent," in the context of how Dr. Roitman's written "psychiatric analysis" of Ms. Harrison was intended to harm Ms. Harrison in the Harrison litigation.

To the extent that this allegation can be technically read as omitting the requisite allegation of intent as asserted by Dr. Roitman, it can certainly be understood and implied in the context of all of the preceding factual allegations if Ms. Harrison is granted all reasonable inferences to be drawn in her favor as required by *Holcomb Condo. Homeowners' Ass'n, Inc. v.*

Stewart Venture, LLC, 129 Nev. ___ (Adv. Op. No. 18) (2013) and *Cohen v. Mirage Resorts, Inc.,* 119 Nev. 1, 22, 62 P.3d 720, 732 (2003).

> "Dr. Roitman's diagnosis of and conclusions about Ms. Harrison in his "psychiatric analysis" of her were manifestly incorrect and substantially undermined her position in the Harrison litigation." Complaint, ¶¶ 39.

In other words, and drawing all reasonable inferences in favor of Ms. Harrison (*Holcomb Condo. Homeowners' Ass'n, supra*), Dr. Roitman's "psychiatric analysis" of Ms. Harrison, which included a diagnosis and conclusions about Ms. Harrison based solely on information provided by a third party adverse to Ms. Harrison and without Dr. Roitman ever having met or seen Ms. Harrison – had its "intended" effect on Ms. Harrison. It harmed her in the Harrison litigation. It also caused severe emotional distress, physical injury, and monetary damages to Ms. Harrison based upon the harm it caused her in the Harrison litigation, all injuries that are necessarily part and parcel of harming Ms. Harrison in the Harrison litigation. Complaint, ¶ 40.

> "Dr. Roitman's conduct was intentional, malicious, and oppressive, for which Ms. Harrison is entitled to recover punitive and exemplary damages." Complaint, ¶ 42.

To sum it up, Ms. Harrison alleges that Dr. Roitman's conduct in reference to the civil conspiracy claim was "intentional," an allegation that necessarily refers to what he did – provide a psychiatric analysis of Ms. Harrison that included a diagnosis and conclusions about her based on information from an adverse third party without ever having met or seen her – and why he did it – to help advance the adverse party's position in the Harrison litigation by using that information against Ms. Harrison's in that litigation. Finally, Dr. Roitman need not have intended Ms. Harrison harm. His intention to join the conspiracy is sufficient.

E. Ms. Roitman's medical malpractice claim was filed within the applicable statute of limitations.

Finally, Dr. Roitman contends that Ms. Harrison's medical malpractice claim is barred by the statute of limitations stated in NRS 41A.097(2) because it was filed more than one year after the June 9, 2011, report. Dr. Roitman's assessment of when the statute of limitations was triggered, however, is incorrect.

NRS 41A.097(2) requires that a plaintiff bring a claim against a health care provider within 3 years after the date of the injury or 1 year after the plaintiff discovers or should have discovered the injury, whichever occurs first. The accrual date for the one-year discovery period under NRS 41A.097(2) generally presents a question of fact to be decided by the jury. *Winn v. Sunrise Hosp. & Med. Ctr.*, 128 Nev. ____ (Adv. Op. No 23), 277 P.3d 458, 462 (2012). Dismissal on statute of limitations grounds is only appropriate when the evidence of the discovery period is uncontroverted and irrefutable. *Bemis v. Estate of Bemis,* 114 Nev. 1021, 1025, 967 P.2d 437, 440 (1998); *Nevada Power Co. v. Monsanto Co.,* 955 F.2d 1304, 1307 (9th Cir. 1992). In this case, Dr. Roitman does not offer uncontroverted evidence of when Ms. Harrison discovered her injuries, or could reasonably discover her injuries. The date of the report, itself, does not give rise to the requisite discovery by Ms. Harrison. Initially, evidence will show that Dr. Roitman's report, though dated June 9, 2011, was not known to Ms. Harrison or submitted to the court in the Harrison litigation until several months after it was dated.

Moreover, as alleged in the complaint, the extent of the actual and special injury and damages to Ms. Harrison that resulted from Dr. Roitman's malpractice were not discovered (incurred) by Ms. Harrison until it became clear that Ms. Harrison was done spending money defending her sanity. For instance, in response to Dr. Roitman's "psychiatric analysis" of Ms. Harrison, which was not known to her until several months after it was dated, Ms. Harrison voluntarily underwent comprehensive and direct clinical and psychometric assessments by other mental health professionals that made contrary findings and conclusions. Complaint, ¶ 14.

Ms. Harrison became aware of the existence of the report several months after its signature date, June 9, 2011. As soon as Ms. Harrison knew of the report she was faced with two alternatives: (1) do nothing and lose custody of her children; or (2) fight the report with real professional psychiatric analysis. She chose the second—but that was expensive. Those expenses in legal and expert costs were ongoing. They did not end until her adversary realized the Roitman ploy had failed and stipulated to joint custody. That stipulation is dated July 12, 2012—the date the statute of limitations started to run and the date of the concurrence of knowledge and injury.

III. CONCLUSION

Based on the foregoing, giving every reasonable inference in Ms. Harrison's favor and liberally construing her complaint, Ms. Harrison requests that this court deny Dr. Roitman's motion to dismiss.

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED this 20th day of September, 2013.

By: /s/ *John Ohlson*
JOHN OHLSON, ESQ.
Bar Number 1672
275 Hill Street, Suite 230
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Telephone: (775) 323-2700
Attorney for the Plaintiff
Vivian Marie Lee Harrison

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of JOHN OHLSON, and that on this date I personally served a true copy of the foregoing, **PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS** addressed to:

Brianna Smith, Esq.
Cotton, Driggs, Walch,
Holley, Woloson & Thompson
400 S. Fourth St., Third Floor
Las Vegas, NV 89101

XX Via U.S. Mail
____ Via Overnight Mail
____ Via Hand Delivery
____ Via Facsimile
____ Via ECF

Dated this 20th day of September, 2013.

/s/ Robert M. May
Robert May

Electronically Filed
10/03/2013 10:48:10 AM

CLERK OF THE COURT

JOHN H. COTTON, ESQ.
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DISTRICT COURT

CLARK COUNTY, NEVADA

VIVIAN MARIE LEE HARRISON, Plaintiff, v. NORTON A. ROITMAN, M.D.; DOES I-X and ROE CORPORATIONS I-X, Defendants.	Case No.: A-13-687300-C Dept. No.: 1 **Hearing Date: 10/8/2013** **Hearing Time: 9:00 a.m.**

DEFENDANT NORTON A. ROITMAN, M.D.'S REPLY IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S COMPLAINT WITH PREJUDICE

Defendant Norton A. Roitman, M.D. (hereinafter "Defendant"), by and through his counsel of record John H. Cotton, Esq. and Brianna Smith, Esq., of the law firm of COTTON, DRIGGS, WALCH, HOLLEY, WOLOSON, & THOMPSON, hereby submits this Reply in support of his Motion to Dismiss Plaintiff's Complaint based upon NRCP 12(b)(5), for failure to state a claim for relief. In addition, Defendant invokes witness immunity pursuant to long-standing case law and dismissal, with prejudice, is appropriate.

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This Reply is made and based on NRC 12(b)(5), the accompanying the original Motion, the below Memorandum of Points and Authorities, and any oral argument of counsel that the Court may entertain at the time of hearing.

Dated this 3rd day of October 2013.

COTTON, DRIGGS, WALCH
HOLLEY, WOLOSON & THOMPSON

JOHN H. COTTON, ESQ.
Nevada Bar No. 5268
BRIANNA SMITH, ESQ.
Nevada Bar No. 11795
Attorneys for Defendant Norton A. Roitman, M.D.

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REPLY MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The instant Motion to Dismiss before the Court is simple: Plaintiff did not plead duty, an essential element to all of Plaintiff's claims, pursuant to NRCP 12(b)(5). In Plaintiff's brief opposing Dr. Roitman's Motion to Dismiss, Plaintiff fails to cite to any case law that imposes a duty of care on Dr. Roitman, an expert witness who was retained by the opposing party (Mr. Harrison) in Plaintiff's divorce proceeding. In fact, Plaintiff could not – and does not – in good faith as "warranted by existing law" adequately plead a duty of care because Dr. Roitman could never owe a duty to Plaintiff as any duty is absolved by witness immunity. NRCP 11(b)(2).

II. PERTINENT FACTS CITED IN COMPLAINT

Per the Complaint, in and during years 2011 to 2012, Plaintiff was a party to a family court divorce proceeding against her then-husband, Kirk Harrison (herein "the divorce proceeding"). (*Complaint* ¶7). During the divorce proceeding, both parties retained psychiatric experts. Mr. Harrison retained forensic psychiatric expert, (now Defendant) Norton Roitman, M.D., to render a preliminary psychiatric analysis. (*Complaint* ¶8). Both parties disclosed their experts and their experts' respective opinions. Plaintiff alleges in her Complaint that Dr. Roitman's psychiatric analysis "did significant damage to Ms. Harrison" "and to her reputation generally, caused her emotional and physical suffering, and caused unnecessary delays in and substantially increased the attorneys fees and expert costs to Ms. Harrison" in the divorce proceeding. (*Complaint* ¶14).

Plaintiff now sues Dr. Roitman, Mr. Harrison's expert witness from the divorce proceeding, for medical malpractice, negligent infliction of emotional distress, intentional infliction of emotional distress, and conspiracy.

II. ARGUMENT

A. Failure to State a Claim for Relief for Medical Malpractice.

1. Plaintiff Did Not Plead Duty.

As previously set forth in Defendant's original Motion, to prevail on a negligence theory, including medical malpractice, a plaintiff must show that: (1) the defendant had a duty to exercise due care towards the plaintiff; (2) the defendant breached the duty [to plaintiff]; (3) the breach was an actual cause of the plaintiff's injury; (4) the breach was the proximate cause of the injury; and (5) the plaintiff suffered damage. *Perez v. Las Vegas Med. Ctr.*, 107 Nev. 1, 4-5, 905 P.2d 589, 590-91 (1991).

As this Court is aware, this Motion is brought pursuant to NRCP 12(b)(5) for failure to state a claim upon which relief could be granted. In Plaintiff's Complaint, she pleads "In rendering his services as a licensed psychiatrist in the State of Nevada, Dr. Roitman had a duty to meet the standard of care required of psychiatrists and use reasonable care, skill, or knowledge used under similar circumstances." (*Complaint* ¶23). Just like Plaintiff's Complaint, Plaintiff omits from her opposition where it is plead in Plaintiff's Complaint that Dr. Roitman owed a duty to Plaintiff or that Dr. Roitman breached the duty owed to Plaintiff. That's because long-standing precedent providing witness immunity instructs us that Dr. Roitman did not -- and could never -- owe a duty to Plaintiff.

2. Dr. Roitman Never Owed a Duty Because of Witness Immunity.

Dr. Roitman never owed a duty to Plaintiff because he is absolutely immune from this lawsuit. "Absolute immunity [is granted] to all statements made in the course of, or incidental to, a judicial proceeding, so long as they are relevant to the proceedings." *Sahara Gaming Corp. v. Culinary Workers Union Local 226,* 115 Nev. 212, 218, 984 P.2d 164, 168 (1999)(citations omitted). "This has been the policy and rule in Nevada for the last seventy years and the

privilege includes administrative hearings, quasi-judicial proceedings as well as judicial actions. It is in the public's right to know what transpires in the legal proceedings of this state and that is paramount to the fact someone may occasionally make false and malicious statements." *Id.*, 115 Nev. at 219, 984 P.2d at 168.

Like Nevada, other jurisdictions similarly hold that "[w]itnesses in judicial pleadings are absolutely immune from suit based on their testimony." *Bruce v. Byrne-Stevens & Associates Engineers, Inc. et al.*, 113 Wn.2d 123, 776 P.2d 666 (1989)(case attached hereto). "The immunity of parties and witnesses from subsequent damages liability for their testimony in judicial proceedings was well established in English common law." *Id.* (*citing Cutler v. Dixon*, 4 Co. Rep. 14b, 76 Eng. Rep. 886 (Q. B. 1585); *Anfield v. Feverhill,* 2 Bulst. 269, 80 Eng. Rep. 1113 (K. B. 1614); *Henderson v. Broomhead*, 4 H. & N. 569, 578, 157 Eng. Rep. 964, 968 (Ex. 1859); *see Dawkins v. Lord Rokeby*, 4 F. & F. 806, 833-834, 176 Eng. Rep. 800, 812 (C. P. 1866). *Briscoe v. LaHue*, 460 U.S. 325, 330-31, 75 L. Ed. 2d 96, 103 S. Ct. 1108 (1983). "The rule is equally well established in American common law." *Id.* (*citing Lawson v. Hicks*, 38 Ala. 279, 285-88 (1862); *Myers v. Hodges*, 53 Fla. 197, 208-10, 44 So. 357, 357-61 (1907); *Smith v. Howard*, 28 Iowa 51, 56-57 (1869); *Gardemal v. McWilliams,* 43 La. Ann. 454, 457-58, 9 So. 106, 108 (1891); *Burke v. Ryan*, 36 La. Ann. 951, 951-52 (1884); *McLaughlin v. Cowley,* 127 Mass. 316, 319-20 (1879); *Cooper v. Phipps*, 24 Or. 357, 363-64, 33 P. 985, 986-87 (1893); *Shadden v. McElwee*, 86 Tenn. 146, 149-54, 5 S.W. 602, 603-05 (1887); *Cooley v. Galyon*, 109 Tenn. 1, 13-14, 70 S.W. 607, 610 (1902); *Chambliss v. Blau,* 127 Ala. 86, 89-90, 28 So. 602, 603 (1900)). The immunity extends not only to expert testimony, but also acts, communications and expert reports which occur in connection with the preparation of their testimony. *Bruce v. Byrne-Stevens & Associates Engineers, Inc. et al.*, 113 Wn.2d at 136, 776 P.2d at 673 (1989).

It is immaterial that the expert witness is retained by a party. *Id.* 113 Wn.2d at 129, 776

P.2d at 669. This principle was established in *Kahn v. Burman*, 673 F. Supp. 210 (E.D. Mich. 1987)(cited in *Byrne, supra*) where the court granted immunity to a medical doctor who was retained as an expert in a medical malpractice case and who allegedly made defaming statements in reports to the attorney investigating the case. *Id.* The court held that witness immunity extends to reports prepared by both potential and retained expert witnesses. *Id.* The immunity not only extends to the expert's testimony, but also to acts and communications which occur in connection with the preparation of that testimony. *Id.*, 113 Wn.2d at 136, 776 P.2d at 673.

In this case, Plaintiff is suing an expert witness for authoring a psychiatric analysis and testimony in the divorce proceeding. While Plaintiff did not even plead the basic elements to establish a malpractice claim against Dr. Roitman, Dr. Roitman is shielded from liability by the absolute witness immunity doctrine. Accordingly, dismissal is warranted.

2. Strong Public Policy Favors Dismissal with Prejudice.

Strong public policy favors dismissal of this case with prejudice. The "purpose of witness immunity is to preserve the integrity of the judicial process by encouraging full and frank testimony." *Bruce v. Byrne-Stevens & Associates Engineers, Inc. et al., supra*, 113 Wn.2d at 126, 776 P.3d at 667. There are several significant policy concerns that derive from the fundamental policy of ensuring frank and objective testimony. First, the *Bruce* court states that there will be a loss of objectivity which is contrary to the fundamental reason for expert testimony, which is to assist the finder of fact in a matter which is beyond its capabilities. *Id.*, 113 Wn.2d at 130, 776 P.2d at 670. Second, the threat of civil liability will discourage expert witnesses from testifying in all areas of litigation. *Id.*, 113 Wn.2d at 130, 776 P.2d at 670. The fear of a potential lawsuit would certainly discourage non-professional expert witnesses from testifying because they would need to carry professional liability insurance to guard against such liability. *Id.* It would discourage the one-time expert, like a university professor for example,

who ordinarily approach their duty to the court with great objectivity and professionalism. *Id.*, 113 Wn.2d at 130-131, 776 P.2d at 670.

To allow the instant case to go forward in the face of absolute witness immunity would certainly open the floodgates to litigation against lay witnesses, expert witnesses, jurors, and it could be a slippery slope into the penetration of the litigation privilege enjoyed by attorneys and judges. Consequently, and in light of the grave policy concerns this specious lawsuit implicates, Plaintiff's Complaint must be dismissed with prejudice.

C. Plaintiff's Derivative Claims for Negligent Infliction of Emotional Distress Intentional Infliction of Emotional Distress, and Civil Conspiracy Also Fail.

1. Dr. Roitman is also Immune from Plaintiff's Claims for NIED, IED and Conspiracy.

In her Complaint, Plaintiff recites the same allegations set forth in Plaintiff's claim for medical malpractice for her other three causes of action. Accordingly, those claims all stem from Dr. Roitman's psychiatric analysis of Plaintiff. There is nothing in the policy rationale underlying witness immunity which would limit its applicability to any specific type of cause of action. *Bruce v. Byrne-Stevens & Associates Engineers, Inc. et al.*, 113 Wn.2d 123, 132, 776 P.2d 666, 670 (1989). "Witness immunity is premised on the chilling effect of the threat of subsequent litigation. The threat of subsequent litigation is the same regardless of the theory on which that subsequent litigation is based." *Id.* Consequently, Dr. Roitman is also immune from these derivative claims and they are also subject to dismissal with prejudice.

D. The Statute of Limitations Has Long Expired.

Due to Dr. Roitman's immunity from this lawsuit, his argument pertaining to the statute of limitation is withdrawn at this time.

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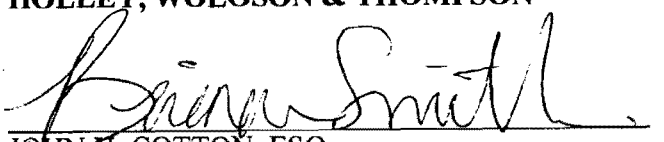
III. CONCLUSION

For the reasons stated above, Plaintiff has failed to state a viable claim for all of her causes of actions. Consequently, Plaintiff's Complaint must be dismissed in its entirety, with prejudice.

Dated this 3rd day of October, 2013.

COTTON, DRIGGS, WALCH
HOLLEY, WOLOSON & THOMPSON

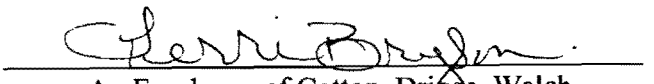


JOHN H. COTTON, ESQ.
BRIANNA SMITH, ESQ.
Nevada Bar No. 11795
Attorneys for Defendant Norton A. Roitman, M.D.

CERTIFICATE OF MAILING

I hereby certify that on this 3rd day of October 2013, I sent a true and correct copy of the foregoing **DEFENDANT NORTON A. ROITMAN, M.D.'S REPLY IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S COMPLAINT** by U.S. Mail, postage prepaid, addressed to the following:

John Ohlson, Esq.
275 Hill Street, Suite 230
Reno, Nevada 89501
Attorneys for Plaintiff



An Employee of Cotton, Driggs, Walch,
Holley, Woloson & Thompson, Ltd.

Caution
As of: Oct 01, 2013

Robert L. Bruce, et al, Respondents, v. Byrne-Stevens & Associates Engineers, Inc., et al, Petitioners

No. 55250-9

SUPREME COURT OF WASHINGTON

113 Wn.2d 123; 776 P.2d 666; 1989 Wash. LEXIS 92

July 20, 1989

CASE SUMMARY:

PROCEDURAL POSTURE: Respondent landowners filed an action against petitioner engineer that alleged that the engineer was negligent in his analysis and testimony during their trial against another landowner who caused damage to their lands. The trial court granted summary judgment in favor of the engineer based on witness immunity. The landowners appealed. The Court of Appeals (Washington) reversed, and the engineer appealed.

OVERVIEW: The landowners filed an action against the engineer that alleged he was negligent in preparing his analysis and testimony in a previous action against another landowner for causing damage to their land. The court held that the engineer who testified as an expert witness on behalf of the landowners was entitled to immunity based on his testimony. The fact that an expert witness was retained by a party had no bearing on the underlying rationale of witness immunity. The court rejected the argument that witness immunity was restricted to defamation cases. The immunity of expert witnesses extended not only to their testimony, but also to acts and communications that occurred in connection with the preparation of that testimony. The policies that justified witness immunity applied. The court held that the engineer was entitled to the absolute privilege accorded statements made in the course of or preliminary to judicial proceedings that formed the basis of his courtroom testimony.

OUTCOME: The court reversed the appellate court's decision that reversed the trial court's grant of summary judgment in favor of the engineer. The court reinstated the trial court's order of dismissal.

LexisNexis(R) Headnotes

Evidence > Testimony > General Overview
Torts > Negligence > Defenses > General Overview
Torts > Public Entity Liability > Immunity > Judicial Immunity
[HN1] Witnesses in judicial proceedings are absolutely immune from actions against them based on their testimony.

Criminal Law & Procedure > Witnesses > Presentation
Evidence > Testimony > General Overview
Torts > Negligence > Defenses > General Overview
[HN2] The scope of witness immunity is broad.

Criminal Law & Procedure > Witnesses > Presentation
Evidence > Testimony > Experts > Admissibility
Evidence > Testimony > Experts > Helpfulness

[HN3] As a matter of law the expert serves the court. The admissibility and scope of the expert's testimony is a matter within the court's discretion. That admissibility turns primarily on whether the expert's testimony will be of assistance to the finder of fact. *Wash. R. Evid. 702.* The court retains the discretion to question expert witnesses. *Wash. R. Evid. 614(b).* The mere fact that the expert is retained and compensated by a party does not change the fact that, as a witness, he is a participant in a judicial proceeding. It is that status on which witness immunity rests.

Criminal Law & Procedure > Witnesses > Presentation
Torts > Intentional Torts > False Imprisonment > General Overview
Torts > Intentional Torts > Intentional Infliction of Emotional Distress > General Overview
[HN4] Psychiatrists and physicians are immune from actions against them based on diagnoses rendered in the course of judicial proceedings.

Evidence > Testimony > General Overview
Torts > Negligence > Defenses > General Overview
[HN5] The privilege or immunity is not limited to what a person may say under oath while on the witness stand. It extends to statements or communications in connection with a judicial proceeding.

Criminal Law & Procedure > Witnesses > Presentation
Evidence > Testimony > Experts > General Overview
Torts > Negligence > Defenses > General Overview
[HN6] The immunity of expert witnesses extends not only to their testimony, but also to acts and communications that occur in connection with the preparation of that testimony.

Evidence > Testimony > Experts > General Overview
Torts > Negligence > Defenses > General Overview
[HN7] Absolute immunity extends to acts and statements of experts that arise in the course of or preliminary to judicial proceedings.

SUMMARY:

[***1] **Nature of Action:** After restoring lateral support on their land, the plaintiffs sought damages from an engineer who, in a previous action, had testified on their behalf that the cost of the restoration work would be half of what it turned out to be.

Superior Court: The Superior Court for Pierce County, No. 84-2-02763-6, Donald H. Thompson, J., on June 27, 1986, dismissed the action for failure to state a claim

Court of Appeals: *At 51 Wn. App. 199*, the court held that the engineer's statements as a witness were not immune from a negligence claim and *reversed* the judgment.

Supreme Court: Holding that the witness was absolutely immune from liability for any negligence in his testimony or work preliminary to it, the court *reverses* the decision of the Court of Appeals and *reinstates* the judgment.

HEADNOTES

WASHINGTON OFFICIAL REPORTS HEADNOTES

[1] Witnesses -- Immunity -- Scope -- Expert Testimony -- Retained Witness The absolute immunity generally accorded witnesses from liability resulting from their testimony serves to preserve the integrity of the judicial process, encourages objective testimony, applies to any type of action, and is applicable to an expert retained by one of the parties to an action.

[2] Evidence -- Opinion Evidence -- Expert Testimony -- Purpose Whether an expert witness is retained by a party to an action or appointed by the court, such a witness acts on the court's behalf to assist the trier of fact in understanding the evidence and [***2] is immune from liability resulting from the testimony given.

[3] Witnesses -- Immunity -- Scope -- Defamation Action The absolute immunity generally accorded witnesses from liability resulting from their testimony is not restricted to actions for defamation.

[4] Witnesses -- Immunity -- Scope -- Expert Testimony -- Preliminary Activities The absolute immunity generally accorded witnesses from liability resulting from their testimony includes any acts or communications by an expert witness which arose in the course of preparing to testify in judicial proceedings.

[Note: Only 4 Justices concur in all of the above statements.]

COUNSEL: *Kane, Vandeberg, Hartinger & Walker*, by *Harold T. Hartinger*, for petitioners.

Sinnitt & Sinnitt, P.S., by *Paul Sinnitt*, for respondents.

Russell C. Love on behalf of Washington Defense Trial Lawyers, amicus curiae for petitioners.

Robert H. Whaley and *Bryan P. Harnetiaux* [***3] on behalf of Washington State Trial Lawyers Association, amici curiae for respondents.

JUDGES: En Banc. Dore, J. Durham and Smith, JJ., and Quinn, J. Pro Tem., concur. Andersen, J., concurs in the result only; Pearson, Utter, Brachtenbach, and Dolliver, JJ., dissent by separate opinion; Callow, C.J., did not participate in the disposition of this case.

OPINION BY: DORE

OPINION

[*124] [**666] We hold that an engineer who testified as an expert witness on behalf of respondents at a previous trial is entitled to immunity from suit based on his testimony.

Facts

Respondents Bruce and Smallwood own separate parcels of property on Clear Lake in Pierce County. In 1979 a neighbor, John Nagle, conducted excavation work on his property, resulting in subsidence in the soil of the Bruce and Smallwood properties. They sued Nagle and retained petitioner Byrne-Stevens & Associates Engineers, Inc. (Byrne-Stevens) to calculate and testify as to the cost of stabilizing the soil on their land. The principal of the firm, Patrick J. Byrne, testified at the trial that the cost of restoring lateral support would be $ 10,020 on the Bruce property and $ 11,020 on the Smallwood property. The respondents obtained a judgment against Nagle [***4] for damages of $ 10,020 to Bruce and $ 11,020 to Smallwood.

[*125] Bruce and Smallwood sued Byrne-Stevens and Byrne alleging that the cost of restoring lateral support later proved to be double the amount of Byrne's estimate at trial. They contend that Byrne was negligent in preparing his analysis and testimony and that, but for Byrne's low estimate [**667] of the cost of restoring lateral support, they would have obtained judgment against Nagle for the true cost of the restoration.

The trial court granted the defendants' motion to dismiss based on witness immunity. The Court of Appeals reversed. *Bruce v. Byrne-Stevens & Assocs. Eng'rs, Inc., 51 Wn. App. 199, 752 P.2d 949, review granted, 111 Wn.2d 1001 (1988)*. We reverse the Court of Appeals and dismiss the suit.

Witnesses Are Absolutely Immune From Suit

[1] As a general rule, [HN1] witnesses in judicial proceedings are absolutely immune from suit based on their testimony.

> The immunity of parties and witnesses from subsequent damages liability for their testimony in judicial proceedings was well established in English common law. *Cutler* v. *Dixon*, 4 Co. Rep. 14b, 76 Eng. Rep. 886 (Q. B. 1585); [***5] *Anfield* v. *Feverhill*, 2 Bulst. 269, 80 Eng. Rep. 1113 (K. B. 1614); *Henderson* v. *Broomhead*, 4 H. & N. 569, 578, 157 Eng. Rep. 964, 968 (Ex. 1859); see *Dawkins* v. *Lord Rokeby*, 4 F. & F. 806, 833-834, 176 Eng. Rep. 800, 812 (C. P. 1866).

(Footnotes omitted.) *Briscoe v. LaHue, 460 U.S. 325, 330-31, 75 L. Ed. 2d 96, 103 S. Ct. 1108 (1983)*. The rule is equally well established in American common law. *See Lawson v. Hicks, 38 Ala. 279, 285-88 (1862)*; *Myers v. Hodges, 53 Fla. 197, 208-10, 44 So. 357, 357-61 (1907)*; *Smith v. Howard, 28 Iowa 51, 56-57 (1869)*; *Gardemal v. McWilliams, 43 La. Ann. 454, 457-58, 9 So. 106, 108 (1891)*; *Burke v. Ryan, 36 La. Ann. 951, 951-52 (1884)*; *McLaughlin v. Cowley, 127 Mass. 316, 319-20 (1879)*; *Cooper v. Phipps, 24 Or. 357, 363-64, 33 P. 985, 986-87 (1893)*; *Shadden v. McElwee, 86 Tenn. 146, 149-54, 5 S.W. 602, 603-05 (1887)*; [***6] *Cooley v. Galyon, 109 Tenn. 1, 13-14, 70 S.W. 607, 610 (1902)*; *Chambliss v. Blau, 127 Ala. 86, 89-90, 28 So. 602, 603 (1900)*.

[*126] The purpose of the rule is to preserve the integrity of the judicial process by encouraging full and frank testimony.

> In the words of one 19th-century court, in damages suits against witnesses, "the claims of the individual must yield to the dictates of public policy, which requires that the paths which lead to the ascertainment of truth should be left as free and unobstructed as possible." *Calkins v. Sumner, 13 Wis. 193, 197 (1860)*. A witness' apprehension of subsequent damages liability might induce two forms of self-censorship. First, witnesses might be reluctant to come forward to testify. See *Henderson* v. *Broomhead*, [4 H. & N. 569, 578-79] 157 Eng. Rep., at 968. And once a witness is on the stand, his testimony might be distorted by the fear of subsequent liability. See *Barnes v. McCrate, 32 Me. 442, 446-447 (1851)*. Even within the constraints of the witness' oath there may be various ways to give an account [***7] or to state an opinion. These alternatives may be more or less

> detailed and may differ in emphasis and certainty. A witness who knows that he might be forced to defend a subsequent lawsuit, and perhaps to pay damages, might be inclined to shade his testimony in favor of the potential plaintiff, to magnify uncertainties, and thus to deprive the finder of fact of candid, objective, and undistorted evidence.

Briscoe, at 332-33.

In addition to the benefits obtained by extending immunity, the rule also rests on the safeguards against false or inaccurate testimony which inhere in the judicial process itself. A witness' reliability is ensured by his oath, the hazard of cross examination and the threat of prosecution for perjury. *Briscoe, at 332. See Engelmohr v. Bache, 66 Wn.2d 103, 401 P.2d 346* (witness immunity not applicable to statements made in administrative hearing which did not resemble a judicial proceeding), *cert. dismissed, 382 U.S. 950 (1965).* In light of these safeguards, the detriments of imposing civil liability on witnesses outweigh the benefits.

[HN2] The scope of witness immunity is broad. Immunity has been [***8] extended to witnesses before grand juries. *Macko v. Byron, 760 F.2d 95, 97* [**668] *(6th Cir. 1985)*; *Kincaid v. Eberle, 712 F.2d 1023* (7th Cir.), *cert. denied, 464 U.S. 1018 (1983).* Witnesses in other pretrial proceedings are also absolutely immune. *Holt v. Castaneda, 832 F.2d 123, 125 (9th Cir. 1987)*; *Williams v. Hepting, 844 F.2d 138 (3d Cir. 1988).*

[*127] Guardians, therapists and attorneys who submit reports to family court are absolutely immune. *Myers v. Morris, 810 F.2d 1437, 1466* (8th Cir.), *cert. denied, 484 U.S. 828 (1987).* Probation officers who allegedly include false statements in pretrial bond reports have been held immune. *Tripati v. United States Immigration & Naturalization Serv., 784 F.2d 345, 348 (10th Cir. 1986), cert. denied, 484 U.S. 1028 (1988).*

The respondents and amicus curiae on behalf of Washington State Trial Lawyers Association have offered three reasons why the general rule of witness immunity should not apply: (a) the expert is retained and compensated by a party for his testimony; [***9] (b) witness immunity is limited to defamation cases; and, (c) witness immunity is limited to statements made at trial. None of these arguments has merit.

Privately Retained and Compensated Expert Witnesses Are Immune

The Washington case most on point here is *Bader v. State, 43 Wn. App. 223, 716 P.2d 925 (1986).* In *Bader*, Eastern State Hospital evaluated a criminal defendant, Morris Roseberry, for the purpose of determining whether he was competent to stand trial. Roseberry was diagnosed as paranoid schizophrenic and manic depressive, but was found competent to stand trial. Roseberry was acquitted and released, conditioned on his submitting to treatment. He later murdered a neighbor and the victim's estate sued Eastern State for negligence in its evaluation of Roseberry.

Division Three of the Court of Appeals held Eastern State immune from suit on grounds of judicial immunity. *Bader, at 226. Accord, Tobis v. State, 52 Wn. App. 150, 758 P.2d 534 (1988)*; *Moses v. Parwatikar, 813 F.2d 891, 892 (8th Cir. 1987)*; *Burkes v. Callion, 433 F.2d 318, 319 (9th Cir. 1970)*; *Bartlett v. Weimer, 268 F.2d 860 (7th Cir. 1959)*; [***10] *In re Scott Cy. Master Docket, 618 F. Supp. 1534, 1575 (D. Minn. 1985)*; *Kravitz v. State, 8 Cal. App. 3d 301, 87 Cal.* [*128] *Rptr. 352 (1970)*; *Linder v. Foster, 209 Minn. 43, 45, 295 N.W. 299 (1940).*

The Court of Appeals found *Bader* distinguishable, arguing: "Such immunity certainly would not apply to an expert retained by a party to litigation, because such an expert does not act on the court's behalf." *Bruce, 51 Wn. App. at 201 n.1.* Reasoning along the same lines, the Court of Appeals held that the general rule of witness immunity should not apply here because:

> Byrne is a professional, with a pecuniary motive for testifying. He voluntarily undertook to render his expert opinion in the original action, knowing that the parties and the court would rely on that opinion. He was not merely a bystander who fortuitously came to have information relevant to the claim, nor was he subject to contempt of court if he refused to assume this undertaking.

Bruce, 51 Wn. App. at 201.

The fact that Byrne was retained and compensated [***11] by a party does not deprive him of witness immunity. The Court of Appeals assumed that participants in adversarial judicial proceedings derive their immunity from their relationship to the judge, who is himself immune from suit. In many instances, that is correct. *See Adkins v. Clark Cy., 105 Wn.2d 675, 717 P.2d 275 (1986)* (immunity of bailiff). However, the rationale behind quasi-judicial immunity, as set out in *Briscoe*, sweeps more broadly. The purpose of granting immunity to participants in judicial proceedings is to preserve and enhance the judicial process. "The central focus of our analysis has been the nature of the judicial

proceeding itself." *Briscoe, 460 U.S. at 334.* The various grants of immunity for judges and witnesses, as well as for prosecutors and bailiffs, are all particular [**669] applications of this central policy. They are best described as instances of a single immunity for participants in judicial proceedings. [1]

> 1 Arizona courts use this terminology. *See, e.g., Western Technologies, Inc. v. Sverdrup & Parcel, Inc., 154 Ariz. 1, 4, 739 P.2d 1318, 1321 (Ct. App. 1986).* The Arizona Supreme Court has written:
>
> > The socially important interests promoted by the absolute privilege in this area include the fearless prosecution and defense of claims which leads to complete exposure of pertinent information for a tribunal's disposition. . . .
>
> The privilege protects judges, parties, lawyers, witnesses and jurors. *Green Acres Trust v. London, 141 Ariz. 609, 613, 688 P.2d 617 (1984).*

[***12]

> [*129] The principles set forth in *Pierson* v. *Ray* [, *386 U.S. 547, 18 L. Ed. 2d 288, 87 S. Ct. 1213 (1967)]* to protect judges and in *Imbler* v. *Pachtman* [, *424 U.S. 409, 47 L. Ed. 2d 128, 96 S. Ct. 984 (1976)]* to protect prosecutors also apply to witnesses, who perform a somewhat different function in the trial process but whose participation in bringing the litigation to a just -- or possibly unjust -- conclusion is equally indispensable.

Briscoe v. LaHue, 460 U.S. 325, 345-46, 75 L. Ed. 2d 96, 103 S. Ct. 1108 (1983). In the *Bader* case, Eastern State was immune, not because it partook of the judge's immunity, but because it took part in judicial proceedings.

In this light, it is immaterial that an expert witness is retained by a party rather than appointed by the court. The basic policy of ensuring frank and objective testimony obtains regardless of how the witness comes to court. This was recognized recently in *Kahn v. Burman, 673 F. Supp. 210 (E.D. Mich. 1987)* in which the court granted immunity to a medical [***13] doctor who was retained as an expert in a medical malpractice case and who allegedly made defaming statements in reports to the attorney investigating the case.

> As a matter of policy, also, witness immunity should extend to reports prepared by both potential and retained expert witnesses. Justice Stevens reasoned in *Briscoe* that damage suits against witnesses must "yield to the dictates of public policy, which requires that the paths which lead to the ascertainment of truth should be left as free and unobstructed as possible." This policy of providing for reasonably unobstructed access to the relevant facts and issues mandates the extension of immunity to Dr. Burman for all statements that he made in his reports to Attorney Gray. The overriding concern for disclosure of pertinent and instructive expert opinions before and during medical malpractice actions is no less significant than the clearly-recognized need for all relevant factual evidence during the course of litigation.

(Citation omitted.) *Kahn, at 213.*

[2] In addition, the Court of Appeals is simply wrong to say that an expert witness "does not act on the court's behalf." *51 Wn. App. at 201 n.1.* [***14] While it may be that many [*130] expert witnesses are retained with the expectation that they will perform as "hired guns" for their employer, [HN3] as a matter of law the expert serves the court. The admissibility and scope of the expert's testimony is a matter within the court's discretion. *Orion Corp. v. State, 103 Wn.2d 441, 462, 693 P.2d 1369 (1985).* That admissibility turns primarily on whether the expert's testimony will be of assistance to the finder of fact. *ER 702.* The court retains the discretion to question expert witnesses. *ER 614(b).* The mere fact that the expert is retained and compensated by a party does not change the fact that, as a witness, he is a participant in a judicial proceeding. It is that status on which witness immunity rests.

The Court of Appeals noted the fact that an expert witness is compensated for his testimony, but did not explain how that affects the basic rationale for witness immunity. Contrary to that court's conclusion, the economics of expert testimony dictate in favor of granting immunity to retained expert witnesses for at least two reasons. Both derive from the fundamental policy of ensuring frank and [***15] objective testimony, as stated in *Briscoe.*

[**670] First, unless expert witnesses are entitled to immunity, there will be a loss of objectivity in expert testimony generally. The threat of civil liability based on an inadequate final result in litigation would encourage experts to assert the most extreme position favorable to the party for whom they testify. It runs contrary to the fundamental reason for expert testimony, which is to assist the finder of fact in a matter which is beyond its capabilities. To the extent experts function as advocates rather than impartial guides, that fundamental policy is undermined.

Second, imposing civil liability on expert witnesses would discourage anyone who is not a full-time professional expert witness from testifying. Only professional witnesses will be in a position to carry insurance to guard against such liability. The threat of liability would discourage the 1-time expert -- the university professor, for example -- from [*131] testifying. Such 1-time experts, however, can ordinarily be expected to approach their duty to the court with great objectivity and professionalism.

The main argument to the contrary is that the threat of liability [***16] would encourage experts to be more careful, resulting in more accurate, reliable testimony. While there is some merit to this contention, possible gains of this type have to be weighed against the threatened losses in objectivity described above. We draw that balance in favor of immunity. Civil liability is too blunt an instrument to achieve much of a gain in reliability in the arcane and complex calculations and judgments which expert witnesses are called upon to make. The threat of liability seems more likely to result in experts offering opinions motivated by litigants' interests rather than professional standards and in driving all but the full-time expert out of the courtroom.

In sum, the fact that an expert witness is retained by a party has no bearing on the underlying rationale of witness immunity. That basic rationale -- ensuring objective, reliable testimony -- dictates in favor of immunity for experts. As a policy matter, the economics of expert testimony generally also favor immunity as a means of ensuring that a wide cross section of impartial experts are not deterred from testifying by the threat of liability.

Witness Immunity Is Not Limited to Defamation Cases

[***17] Amicus curiae on behalf of Washington State Trial Lawyers Association argues at length that the rule of witness immunity applies only to defamation actions. Amicus is incorrect.

First, the leading case on witness immunity, *Briscoe v. LaHue, supra*, is not a defamation case. In *Briscoe*, two criminal defendants sued police officers under *42 U.S.C. § 1983*, alleging that the police officers' false testimony violated their civil rights. Amicus fails even to cite *Briscoe*, much less account for it.

[*132] [3] Second, there is nothing in the policy rationale underlying witness immunity which would limit its applicability to defamation cases. Witness immunity is premised on the chilling effect of the threat of subsequent litigation. The threat of subsequent litigation is the same regardless of the theory on which that subsequent litigation is based.

Third, a rule limiting witness immunity to defamation cases would be easy to evade by recasting one's claim under other theories. The New Jersey court noted this fact over 30 years ago in holding that the immunity available in a defamation case is equally applicable to allegations [***18] of malicious prosecution and tortious interference.

> If the policy, which in defamation actions affords an absolute privilege or immunity to statements made in judicial and *quasi*-judicial proceedings, is really to mean anything then we must not permit its circumvention by affording an almost equally unrestricted action under a different label.

Rainier's Dairies v. Raritan Vly. Farms, Inc., 19 N.J. 552, 564, 117 A.2d 889 (1955). See also Lone v. Brown, 199 N.J. Super. 420, 429-30, 489 A.2d 1192 (1985); Procacci v. Zacco, 402 So. 2d 425, 427 (Fla. Dist. Ct. App. 1981).

[**671] Fourth, as the above citations suggest, there are a large number of cases in a wide range of jurisdictions in which witness immunity has been granted to bar causes of action other than defamation. *See Brody v. Montalbano, 87 Cal. App. 3d 725, 738, 151 Cal. Rptr. 206, 215 (1978)* (malicious prosecution, conspiracy to interfere with contract, conspiracy to intentionally inflict emotional distress); *O'Barr v. Feist, 292 Ala. 440, 296 So. 2d 152 (1974)* (negligence, [***19] false imprisonment); *Bencomo v. Morgan, 210 So. 2d 236 (Fla. Dist. Ct. App. 1968)* (intentional infliction of emotional distress); *Snyder v. Faget, 295 Ala. 197, 326 So. 2d 113 (1976)* (negligence); *Dunbar v. Greenlaw, 152 Me. 270, 128 A.2d 218 (1956)* (negligence); *Fisher v. Payne, 93 Fla. 1085, 113 So. 378 (1927)* (malicious prosecution); *Hurley v. Towne, 155 Me. 433, 156 A.2d 377 (1959)* (false imprisonment); *Dabkowski v. Davis, 364 Mich. 429, 111 N.W.2d 68 (1961)* (false imprisonment, assault and battery).

[*133] Amicus cites one case to the contrary. *James v. Brown, 637 S.W.2d 914 (Tex. 1982). James* arose out of a commitment proceeding against Marguerite James in which three psychiatrists filed reports with the probate court stating that Mrs. James was mentally ill and likely to cause injury. Mrs. James later was freed on a writ of habeas corpus and brought suit against the psychiatrists for negligence, false imprisonment and malicious prosecution. The trial court dismissed [***20] the action, relying on *Clark v. Grigson, 579 S.W.2d 263 (Tex. Civ. App. 1978).* [2] The Texas court repudiated *Clark* in *James*, limiting witness immunity to defamation actions.

> 2 Clark, a criminal defendant, retained a psychiatrist, Grigson, to examine him for purposes of advancing an insanity plea. Clark did not advance the plea and was convicted. Grigson was called by the State at the sentencing phase. Clark later brought suit against Grigson alleging that the psychiatrist was negligent in his diagnosis and related testimony. The appeals court held that Grigson was entitled to witness immunity:
>
> > Consequently, we hold that no civil liability exists on the part of an expert witness who forms an opinion and states that opinion in the course of his testimony in a judicial proceeding, even though he may have been negligent in the process.
>
> *Clark, 579 S.W.2d at 265.*

> While the doctors' communications to the court of their diagnoses of Mrs. James' mental condition, regardless [***21] of how negligently made, cannot serve as the basis for a defamation action, the diagnoses themselves may be actionable on other grounds. In this regard we disapprove the language of *Clark v. Grigson* . . . inasmuch as it extended to psychiatrists testifying in mental health proceedings a blanket immunity from all civil liability. The unavailability of a defamation action does not preclude a plaintiff from pursuing other remedies at law. Mrs. James is not prevented from recovering from the doctors for negligent misdiagnosis-medical malpractice merely because their diagnoses were later communicated to a court in the due course of judicial proceedings.

(Citations omitted.) *James, at 917-18.*

We see no reason to follow the Texas court's holding in *James*. The opinion is contrary to the majority rule. As indicated above, a majority of courts have held that psychiatrists are entitled to witness immunity where their diagnoses are offered in the course of judicial proceedings. [*134] *James* discusses neither those cases nor their logic, failing to consider that the policies which justify witness immunity in defamation cases apply equally to other subsequent suits. [***22] Most significantly, *James* turns on a specific Texas statute which preempted the common law rule of immunity. Tex. Rev. Civ. Stat. Ann. art. 5547-18 (Vernon supp. 1989) grants immunity to persons who "without negligence" perform examinations and other acts required by Texas' mental health code. The Texas court reasoned that: "The plain implication of art. 5547-18 is that persons acting . . . negligently in connection with mental health proceedings are not free from liability." *637 S.W.2d at 918.* Therefore, *James* is distinguishable from the present case, where there is no such preempting statute.

[**672] We reject the argument that witness immunity is restricted to defamation cases.

Immunity Extends to Actions Forming the Basis of the Testimony

Respondents and amicus argue that the mere fact that Byrne testified on the basis of his engineering work should not insulate him from liability for negligence in the performance of that work. Put another way, it has been argued that Bruce and Smallwood are suing for negligent engineering, not for negligent testifying.

We disagree. Suppose Bruce and Smallwood relied on Byrne-Stevens' engineering work in restoring their property, [***23] that the restoration was not successful and that Bruce and Smallwood sued for negligence, claiming as damages the cost of new engineering studies and further work on the land. In that case, it could be said that Bruce and Smallwood were suing Byrne-Stevens for negligent engineering.

Here, however, the damage Bruce and Smallwood complain of is an inadequate recovery in litigation. They do not allege that Byrne-Stevens' engineering work would not enable a contractor to restore their land; they allege that the firm's estimate of the cost of such work was too low. However, that low estimate would not

have damaged Bruce [*135] and Smallwood *but for* the fact that they relied on it in litigation. In short, it simply is not the case that the defendants were sued for negligent engineering. Bruce and Smallwood complain of negligence in providing expert testimony.

Furthermore, the "negligent engineering" argument is inconsistent with witness immunity even in those cases in which respondents and amicus concede it is justified. For example, *Bader* represents the majority rule that [HN4] psychiatrists and physicians are immune from suit based on diagnoses rendered in the course of judicial [***24] proceedings. *Bader v. State, 43 Wn. App. 223, 716 P.2d 925 (1986)*. The cases so holding include claims for negligence, *Snyder v. Faget, supra; Dunbar v. Greenlaw, supra*, as well as for intentional infliction of emotional distress, false imprisonment and defamation. In each of these cases, one could argue that the wrong complained of was the erroneous diagnosis, rather than the testimony or report to the court. However, that argument has rarely been made and has never prevailed.

There is a good reason for this. Witness immunity must extend to the basis of the witness' testimony, or the policies underlying such immunity would be undermined. An expert's courtroom testimony is the last act in a long, complex process of evaluation and consultation with the litigant. There is no way to distinguish the testimony from the acts and communications on which it is based. Unless the whole, integral enterprise falls within the scope of immunity, the chilling effect of threatened litigation will result in the adverse effects described above, regardless of the immunity shielding the courtroom testimony.

[***25] The New Jersey court recognized this long ago in *Middlesex Concrete Prods. & Excavating Corp. v. Carteret Indus. Ass'n, 68 N.J. Super. 85, 172 A.2d 22 (1961)*. Middlesex sued Carteret over progress payments on a sewage treatment plant. Carteret retained Philip B. Streander as a consulting engineer. Middlesex subsequently added Streander as a defendant, alleging tortious interference [*136] based on Streander's negative reports. The trial court dismissed the suit against Streander on grounds of witness immunity. Middlesex appealed and argued that Streander's report to Carteret:

> was not a step in a judicial proceeding and it afforded those harmed by it none of the protection which a judicial proceeding affords in that the report was not under oath; its author was not subject to prosecution for perjury; and the truth or falsity of its contents was not subject to the "searching light" of cross-examination.

Middlesex, 68 N.J. Super. at 90. Nevertheless, the court held that Streander did fall within the broad scope of immunity for participants in judicial proceedings:

> [HN5] The privilege or immunity is not limited [***26] to what a person may say under oath [**673] while on the witness stand. It extends to statements or communications in connection with a judicial proceeding. . . .
>
> . . .
>
> If this were not so, every expert who acts as a consultant for a client with reference to proposed or actual litigation, and thereafter appears as an expert witness, would be liable to suit at the hands of his client's adversary on the theory that while the expert's testimony was privileged, his preliminary conferences with and reports to his client were not, and could form the basis of a suit for tortious interference.

Middlesex, 68 N.J. Super. at 92. See also Western Technologies, Inc. v. Sverdrup & Parcel, Inc., 154 Ariz. 1, 739 P.2d 1318 (Ct. App. 1986); Adams v. Peck, 43 Md. App. 168, 403 A.2d 840 (1979).

[4] In sum, [HN6] the immunity of expert witnesses extends not only to their testimony, but also to acts and communications which occur in connection with the preparation of that testimony. Any other rule would be unrealistically narrow, would not reflect the realities of litigation and would undermine the gains in forthrightness [***27] on which the rule of witness immunity rests.

Respondents and amicus argue that Byrne-Stevens should not be shielded from liability merely because its calculations were later used in court. If the issue is stated that way, we agree; but that is not the issue before us. We do not hold that any professional negligence is immunized [*137] whenever an expert later relies on it in court. In accord with existing law, we hold only that [HN7] absolute immunity extends to acts and statements of experts which arise in the course of or preliminary to judicial proceedings.

It may be helpful to contrast this case with our holding in *Twelker v. Shannon & Wilson, Inc., 88 Wn.2d 473, 564 P.2d 1131 (1977)*. Twelker, a soils engineer, was retained to evaluate the risk of subsidence on certain property for the insurer of a contractor who had been retained to perform work there. Following a landslide, the contractor's insurer, fearing litigation, hired Shannon & Wilson to prepare a report on the same property.

That report allegedly defamed Twelker. Twelker sued and Shannon & Wilson asserted absolute immunity based on the fact that its report was used in a subsequent [***28] lawsuit against Twelker and the contractor. We refused to grant absolute witness immunity to Shannon & Wilson because the statements at issue were uttered before the initiation of judicial proceedings. We cited *Middlesex* with approval and distinguished it on the ground that, in the New Jersey case, judicial proceedings were already underway when the tortious conduct allegedly took place.

> The extraordinary breadth of absolute privilege seems to us to require some compelling public policy justification for its existence. Where a lawsuit has been filed, the court in *Middlesex* found the need for uninhibited preliminary conferences and reports sufficient to establish such a justification. . . . [W]e decline to apply the absolute privilege accorded statements made in the course of or preliminary to judicial proceedings to the circumstances of this case.

Twelker, at 478.

The present case is clearly more like *Middlesex* than *Twelker*. Byrne-Stevens was hired specifically for litigation purposes. As we have explained above, the policies which justify witness immunity apply here, and Byrne-Stevens is entitled to "the absolute privilege accorded statements made [***29] in the course of or preliminary to judicial proceedings . . ." *Twelker, at 478.* Byrne-Stevens' background work, [*138] which formed the basis of Byrne's courtroom testimony, therefore falls within the scope of the absolute privilege.

Since immunity must extend to the basis of the witness' testimony, Byrne-Stevens cannot be held liable for negligence in engineering in disregard of the fact that that work formed the basis of its principal's courtroom testimony.

Conclusion

Byrne-Stevens and Byrne are immune from suit under the general rule of witness [**674] immunity. We therefore reverse the Court of Appeals and reinstate the trial court's order of dismissal.

DISSENT BY: PEARSON

DISSENT

Pearson, J.

I dissent. The question in this case is not whether an expert witness is immune from subsequent suit for defamatory statements made in a court of law. That question is well settled. Rather, today we are asked whether a professional's act of malpractice outside the courtroom is somehow immunized by the subsequent articulation of that negligently formed opinion in a judicial proceeding. Neither the law of absolute immunity nor sound public policy dictates the result reached by the majority. I would hold [***30] that a client's action for malpractice is not barred by the defense of absolute immunity merely because the professional subsequently publishes his or her opinion in a court of law at the client's request. Accordingly, I would affirm the unanimous decision of the Court of Appeals.

The majority properly states the common law rule that a witness is absolutely immune from suit for *defamatory statements* uttered in a judicial proceeding. *McClure v. Stretch, 20 Wn.2d 460, 147 P.2d 935 (1944)*; *Johnston v. Schlarb, 7 Wn.2d 528, 110 P.2d 190, 134 A.L.R. 474 (1941)*. Unfortunately, with a broad cite to the general rule of immunity for *defamation*, and with no legal authority for the present proposition, the majority extends the rule to shield otherwise actionable professional malpractice.

[*139] 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. In *James v. Brown, 637 S.W.2d 914 (Tex. 1982)*, the court affirmed the dismissal of a libel action against three doctors who had previously [***31] testified against the plaintiff in a competency proceeding. However, the court reversed the dismissal of the plaintiff's cause of action based upon the doctors' acts of malpractice in negligently assessing the plaintiff's mental condition:

> While the doctors' communications to the court of their diagnoses of Mrs. James' mental condition, regardless of how negligently made, cannot serve as the basis for a defamation action, the diagnoses themselves may be actionable on other grounds. . . . The unavailability of a defamation action does not preclude a plaintiff from pursuing other remedies at law. . . . Mrs. James is not prevented from recovering from the doctors for negligent misdiagnosis-medical malpractice merely because their diagnoses were later communicated to a court in the due course of judicial proceedings.

James v. Brown, 637 S.W.2d at 917-18.

In *Steck v. Sakowitz, Inc., 659 S.W.2d 91 (Tex. Ct. App. 1983), rev'd on other grounds, 669 S.W.2d 105 (Tex. 1984)*, while dismissing the plaintiff's libel cause of action, the court permitted the plaintiff to proceed on her claim for tortious interference with her employment [***32] relationship, even though that cause of action arose out of the same allegedly libelous publication. In essence, merely because a defamation action is precluded by immunity, the rule does not sweep so broadly as to extinguish all causes of action.

Finally, in *Levine v. Wiss & Co., 97 N.J. 242, 478 A.2d 397 (1984)*, the court held immunity was not available to shield an accountant's malpractice, even though the professional was hired to prepare an appraisal for a judicial proceeding:

> [Immunity] should not be available to shield from liability for negligence appraisers or other experts performing limited functions, as part of their regular professional responsibilities, in the context of judicial proceedings. . . . To do so would not only stretch beyond social need and utility the policy that encourages arbitration, but would also create an additional [*140] legal immunity -- a consequence contrary to our prevailing philosophy and practice that strive to provide redress for wrongful injury.

[**675] *Levine v. Wiss & Co., 97 N.J. at 251*; *accord*, Annot., *Accountant's Malpractice Liability to Client, 92 A.L.R.3d 396, 409 (1979)*. [***33]

The case law cited by the majority simply does not support the extension of immunity to the situation at bench. The Court of Appeals in considering the question properly distinguished *Bader v. State, 43 Wn. App. 223, 716 P.2d 925 (1986)*. That case was not a malpractice action brought against the party's own expert witness. Rather, a victim, who was not a party to the first action brought suit, not against his own expert but against an expert *hired by the court*. Accordingly, immunity was appropriate since, as will be discussed, the rigors of cross examination protect against negligently formed opinions *except* as to the party hiring the expert. Additionally, in *Bader* there is no privity between the victim and the expert witness.

The majority holds that the policies underlying witness immunity for defamation actions apply equally to an expert's act of malpractice. In reality, a distinction must be drawn between defamation and acts of professional malpractice subsequently published in the courtroom. Despite the professed reliance upon the policies underlying immunity, in the end the majority holds that immunity stems merely from taking [***34] "part in judicial proceedings." Majority opinion, at 129. A simple analogy demonstrates the invalidity of this holding: There is no question that an attorney's defamatory statement during a judicial proceeding is shielded from subsequent attack under the doctrine of immunity. However, the same attorney remains liable to his or her own client for any acts of malpractice that occur in that very forum. Accordingly, from this day forward under the majority's new rule, professionals, particularly attorneys, are provided with a new defense in malpractice actions.

[*141] The basis for the majority's extension of the rule of immunity is the claimed desire to promote "full and frank testimony." Majority opinion, at 126. A careful analysis of an expert witness's role reveals that such a rule provides no such impetus. Again, distinctions must be drawn between a lay witness and a party's hired expert. Eyewitnesses, while possessing knowledge essential to the action, possess no professional expertise and have no incentive to testify. Faced with the prospect of civil liability for defamation, an eyewitness's unavailability might severely hamper the fact-finding function of the court. [***35] Such is not the case with hired experts. First, an expert does not possess unique knowledge. Accordingly, even if malpractice liability intimidates some experts, others will rise to fill the need. Second, the majority's argument assumes that these professionals are not otherwise subject to liability. In point of fact, it is merely fortuitous whether an expert is hired to prepare his or her opinion for testimony, or merely for purposes of an amicable settlement. Only under the majority's new rule would a different result attach, depending on a circumstance outside the expert's control.

Additionally, the majority argues, "the hazard of cross examination and the threat of prosecution for perjury" remove the justification for malpractice liability. Majority opinion, at 126. Such an analysis misses the mark. The threat of perjury and the rigors of cross examination only protect against intentional misstatements and those negligent statements the *opponent* wishes to expose. Thus, these safeguards, in addition to other considerations, do justify the rule of immunity for eyewitnesses. For eyewitnesses are subject to attack from both sides in those areas where their testimony [***36] discredits either party's theory. In addition, when an expert overvalues his client's claim, the opponent of course will attempt to discredit the testimony. However, in an instance where an expert negligently reaches his opinion and undervalues his client's claim, as in this case, if cross examination bears that out, not only has [*142]

the expert committed malpractice, but arguably the opponent's attorney has as well.

In *Jarrard v. Seifert, 22 Wn. App. 476, 479, 591 P.2d 809 (1979)*, the court stated:

> The defendants were employed as professional engineers and land surveyors because of their superior knowledge in [**676] that field. The plaintiffs were entitled to rely on that superior knowledge and to expect that such professionals would fulfill the duty of reasonable diligence, skill, and ability.

Today, the majority holds that such a rule is inapplicable to a negligent engineer who prepared his opinion anticipating its use as testimony at trial. However, in the case at hand, had the engineer merely been hired for the purpose of obtaining a settlement with the tortfeasor, the plaintiff's subsequent malpractice action against the engineer would [***37] not be barred. I fail to grasp any basis upon which the majority can rightfully distinguish the two situations. Both the law and common sense do not support such a judicially created rule. I would hold that the doctrine of absolute immunity does not bar the client's action against his or her own expert for a negligently rendered professional opinion that is subsequently published in a judicial proceeding. Accordingly, I dissent.

DISTRICT COURT
CLARK COUNTY, NEVADA

Negligence - Medical/Dental COURT MINUTES October 08, 2013

A-13-687300-C Vivian Lee Harrison, Plaintiff(s)
vs.
Norton Roitman, M.D., Defendant(s)

October 08, 2013 **9:00 AM** **Motion to Dismiss**

HEARD BY: Cory, Kenneth COURTROOM: RJC Courtroom 16A

COURT CLERK: Michele Tucker

RECORDER: Beverly Sigurnik

PARTIES PRESENT:	Lee Harrison, Vivian Marie	Plaintiff
	Ohlson, John	Attorney for Plaintiff
	Smith, Brianna	Attorney for Defendant

JOURNAL ENTRIES

- Court disclosed its step son had treated with Dr. Roitman years ago. Counsel advised there was no issue and they could proceed. Ms. Smith gave summary of case wherein Dr. Roitman was hired as a forensic doctor by the Plaintiff's ex-husband during their divorce. Ms. Smith argued the Dr. is immune from this loss suit as to anything during the prior proceedings. Mr. Ohlson gave summary of divorce proceedings and ex-husband hiring Dr. Roitman to do a mental evaluation of the Plaintiff. A draft was given to Dr. Roitman, he made some changes signed off on it and it was used during the custody hearing. Mr. Ohlson argued the Dr. should have never signed off as he never evaluated the Plaintiff. Statements by the Court as to this going before the Court in which this happened. Mr. Ohlson argued the Plaintiff has seen a psychologist who has cleared her of the things in the report. Dr. Roitman violated the standard. Statements by the Court. Ms. Smith argued the facts will not change, the Dr. rendered an opinion. Further argued immunity and they could have waived to exclude the Dr. from trial. COURT ORDERED, Counsel to supplement their briefs as to immunity. Ms. Smith argued as to having a medical malpractice case if not under the care of the Dr. Plaintiff has not pled any duty by the Dr. Mr. Ohlson argued NRS 41(A).009. COURT ORDERED, matter CONTINUED to this Court's Chamber calendar.

CONTINUED TO: 10/21/13 CHAMBERS

JOHN OHLSON, ESQ.
Bar Number 1672
275 Hill Street, Suite 230
Reno, Nevada 89501
Telephone: (775) 323-2700
Attorney for Plaintiff
Vivian Marie Lee Harrison

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CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

** ** **

VIVIAN MARIE LEE HARRISON,	Case No.	A-13-687300
Plaintiff,	Dept. No.	1

vs.

NORTON A. ROITMAN, M.D.; DOES I-X and ROE CORPORATIONS I-X,

Defendants.
_____/

SUPPLEMENTAL POINTS AND AUTHORITIES

The Parties appeared before this Court on October 8, 2013 and argued Defendant's motion to dismiss Plaintiff's complaint. This Court ordered supplemental points and authorities on the issue of witness immunity at the conclusion of the hearing. Accordingly, the following is submitted:

CURRENT STATE OF NEVADA LAW

In *State of Nevada v. Second Judicial District Court, 118 Nev. 609, 55 P.3d 420 (2002).* The Court applied the protection to "various non-judicial" participants in a proceeding only when those "participants" were acting in an official or quasi-judicial capacity. In this case foster parents and State agencies. The Court described judicial immunity as follows:

> The initial purpose of judicial immunity was to "discourag[e] collateral attacks [against judges] and thereby help [] to establish appellate procedures as the standard system for correcting judicial error." Absolute judicial immunity has been extended to various non-judicial participants in the judicial process. The application of absolute judicial immunity to a non-judicial officer depends not on the status of the individual, but on the function the individual serves with respect to the judicial process.

The Court then went on to explain its very limited history in granting absolute quasi-judicial immunity to non-judicial officers. In *Duff v. Lewis, 114 Nev. 564, 958 P.2d 84 (1998)* the Court extended this protection to **court appointed** psychologists. In *Foster v. Washoe County, 114 Nev. 936, 943, 964 P.2d 788, 793 (1998)* to CASA (court **appointed** special advocates) volunteers. Again, *In The Matter of Fine, 116 Nev. 1001, 1015, 13 P.3d 400, 409 (2000)* to **court appointed** experts.

Subsequently, in *Clark County School District v. Virtual Education Software, Inc. 125 Nev. Advance Opinion 31 (2009)* the Court again extended the privilege against defamation suits that protected attorneys[1] to parties to litigation.

In *Sahara Gaming v. Culinary Workers, 115 Nev. 212, 984 P.2d 164 (1999)* our Court applied immunity to defendants who "republished" a judicial proceeding containing false and malicious statements. In so doing the Court stated:

> The law has long recognized a special privilege of absolute immunity from defamation given to the news media and the general public to report newsworthy events in judicial proceedings. Although the courts are open to the public, not everyone can attend hearings. The news media acts as an agent of the people to inform the public what transpires in the courtroom and to ensure the fairness of the proceedings. In exchange for this absolute privilege, comes the requirement and responsibility that the report be fair, accurate, and impartial. Opinions must be left to the editorial pages or editorial segments of television broadcasts.
>
> Although the privilege is usually directed toward the news media and others engaged in reporting the news to the public, it is not limited to republication by these publishers, but extends to any person who makes a republication of a judicial proceeding from material that is available to the general public. See Restatement (Second) of Torts § 611 cmt. c (1977). Here, the complaint was readily available for public inspection as a pleading in a judicial proceeding.

In *Marvin v. Fitch, 126 Nev. 18, 232 P.3d 425 (2010)* the Court again granted immunity to yet another quasi-judicial governmental body, a board of equalization, and adopted a "functional approach" to deciding whether to extend the grant. One of the factors considered by the Court was whether the "...individual is performing many of the same functions as a judicial officer." Finally, the Supreme Court extended absolute immunity to "...one who is required by law to publish defamatory matter..." (accounting firm required to publish financial data regarding a registered security). *Cucinotta v. Deloitte & Touche, LLP, 129 Nev., Advance Opinion 35 (2013).*

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[1] *See Bull v. McCuskey, 96 Nev. 706 (1980)* for an example of outrageous defamatory statements of counsel, protected by immunity.

Our Court has carefully explained the nature and history of judicial immunity. Its purpose is to protect judicial officers in the performance of their official duties so that they may discharge those duties without fear of reprisal. The Court has extended this immunity carefully, but never to a private person, voluntarily participating in a judicial proceeding (without Court appointment) for compensation. Dr. Roitman was not court appointed herein. If he had been, he would be entitled to immunity as a quasi-judicial officer.

EXTENSION AND MODIFICATION

Should this Court act to extend and modify existing case law to apply quasi-judicial immunity where the Supreme Court has not gone? The Court has been careful, and extended the doctrine on a case-by-case basis. So far, it has not expanded the protections of immunity to a private, non-governmental witness for hire. It is respectfully submitted that it is the Supreme Court's province to do so, and not that of this Honorable Court. The motion to dismiss should be denied. If after trial, the defendant wishes to ask the Supreme Court to extend the immunity doctrine to Dr. Roitman (in the face of this Court's adherence to precedent) it can do so.

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED this 9th day of October, 2013.

By: */s/ John Ohlson*
JOHN OHLSON, ESQ.
Bar Number 1672
275 Hill Street, Suite 230
Reno, Nevada 89501
Telephone: (775) 323-2700
Attorney for the Plaintiff
Vivian Marie Lee Harrison

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of JOHN OHLSON, and that on this date I personally served a true copy of the foregoing, **SUPPLEMENTAL POINTS AND AUTHORITIES** addressed to:

Brianna Smith, Esq. Cotton, Driggs, Walch, Holley, Woloson & Thompson 400 S. Fourth St., Third Floor Las Vegas, NV 89101	XX ____ ____ ____ ____	Via U.S. Mail Via Overnight Mail Via Hand Delivery Via Facsimile Via ECF

Dated this 9th day of October, 2013.

/s/ Robert M. May
Robert May

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CLERK OF THE COURT

JOHN OHLSON, ESQ.
Bar Number 1672
275 Hill Street, Suite 230
Reno, Nevada 89501
Telephone: (775) 323-2700
Attorney for Plaintiff
Vivian Marie Lee Harrison

DISTRICT COURT

CLARK COUNTY, NEVADA

** ** **

VIVIAN MARIE LEE HARRISON,

Plaintiff,

vs.

NORTON A. ROITMAN, M.D.; DOES I-X and ROE CORPORATIONS I-X,

Defendants.

Case No. A-13-687300

Dept. No. 1

AMENDED COMPLAINT

(Exempt from Arbitration pursuant to NAR 3(A)
Cause of Action for Medical Malpractice)

Plaintiff, VIVIAN MARIE LEE HARRISON, by and through her attorney, JOHN OHLSON, state and allege as follows:

GENERAL AND FACTUAL ALLEGATIONS

1. Plaintiff, VIVIAN MARIE LEE HARRISON ("Ms. Harrison"), is a resident of Boulder City, Clark County, Nevada.

2. Defendant, NORTON A. ROITMAN, M.D. ("Dr. Roitman"), is, and at all relevant times was, a resident of Las Vegas, Clark County, Nevada.

3. Dr. Roitman is a psychiatrist who is licensed to practice in Nevada by the Nevada State Board of Medical Examiners pursuant to NRS Chapter 630.

4. Dr. Roitman is in private practice in Las Vegas, Nevada.

5. Dr. Roitman's private practice includes child, adolescent, and adult psychiatry.

6. The true names and capacities, whether individual, corporate, associate or otherwise of Defendants Does and Corporations 1 through 10, inclusive, are unknown to Plaintiff, who therefore sues those Defendants by such fictitious names. Plaintiffs are informed, believe, and allege that each of the Defendants designated by such a fictitious name are in some manner responsible for the events and happenings referred to and proximately caused foreseeable damage to Plaintiff. Plaintiff will seek leave of the Court to amend this Complaint to show their true names and capacities when the true identities of the fictitious Defendants have been ascertained.

FACTUAL ALLEGATIONS

7. In and during 2011 and 2012, Ms. Harrison was a party in a case being litigated in Clark County, Nevada ("the Harrison litigation").

8. In an effort to advance his position in the case and gain an advantage over Ms. Harrison, the adverse party to Ms. Harrison in the Harrison litigation submitted to the Court a June 9, 2011, Report that was signed by Dr. Roitman, in which he provided a "psychiatric analysis" of Ms. Harrison.

9. In his June 9, 2011, Report, Dr. Roitman, among other things, diagnosed Ms. Harrison as having a narcissistic personality disorder.

10. In rendering his diagnosis of Ms. Harrison, Dr. Roitman concluded that Ms. Harrison's "pathological narcissistic personality disorder is near impossible to treat and her prognosis is very poor" and further stated that "if [Ms. Harrison's] character were stronger, she might have a shot at [improving with treatment], but unfortunately, she is shallow and critical, and lacks internal structure."

11. Dr. Roitman's June 9, 2011, Report also offered opinions and conclusions as to what the outcome of the Harrison litigation in reference to Ms. Harrison should be.

12. Dr. Roitman provided his psychiatric analysis, conclusions, and diagnosis regarding Ms. Harrison despite that Dr. Roitman had never, and has never, met or seen Ms. Harrison.

13. Dr. Roitman submitted his report for the Harrison litigation based solely on the information provided to him by the adverse party to Ms. Harrison in the Harrison litigation, who

had requested that psychiatric analysis of Ms. Harrison to inform the court of her mental condition and functional limitations.

14. Despite that Ms. Harrison, in response to Dr. Roitman's report, voluntarily underwent comprehensive and direct clinical and psychometric assessments by other mental health professionals and that the opinions of those professionals about Ms. Harrison were contrary to those stated by Dr. Roitman, Dr. Roitman's report regarding Ms. Harrison did significant damage to Ms. Harrison in the Harrison litigation and to her reputation generally, caused her emotional and physical suffering, and caused unnecessary delays in and substantially increased the attorneys fees and expert costs to Ms. Harrison of the Harrison litigation.

FIRST CAUSE OF ACTION
(Medical Malpractice)

15. The preceding paragraphs of this Complaint are alleged and incorporated by reference as if fully stated here.

16. In rendering his services as a licensed psychiatrist in the State of Nevada, Dr. Roitman had a duty to meet the standard of care required of psychiatrists and use reasonable care, skill, or knowledge ordinarily used under similar circumstances. At all times herein, Dr. Roitman owed a duty of due care to Plaintiff.

17. To a reasonable degree of medical certainty, Dr. Roitman fell below the standard of care required of psychiatrists in both his written diagnosis of Ms. Harrison and in the conclusions he reached about her without ever having met or seen Ms. Harrison and without conducting an evaluation of Ms. Harrison. *See* Affidavit of Paul S. Appelbaum, M.D., Exhibit "1" and Affidavit of Ole J. Thienhaus, M.D., M.B.A., FACPsych, Exhibit "2."

18. To a reasonable degree of medical certainty, Dr. Roitman fell below the standard of care required of psychiatrists in both his written diagnosis of Ms. Harrison and in the conclusions he reached about her based solely on narratives provided to him by the adverse party to Ms. Harrison in the Harrison litigation. *See* Affidavit of Paul S. Appelbaum, M.D., Exhibit "1" and Affidavit of Ole J. Thienhaus, M.D., M.B.A., FACPsych, Exhibit "2."

19. Dr. Roitman's diagnosis of and conclusions about Ms. Harrison in his "psychiatric analysis" of her were manifestly incorrect.

20. As a direct and proximate result of Dr. Roitman's conduct, Ms. Harrison has suffered actual and special injury and damages in an amount in excess of ($10,000.00), the full extent of which was not discovered and realized until the conclusion of the Harrison litigation, as follows:

a. Severe emotional distress and physical injury and illness and resulting damages in an amount to be proven at trial;

b. Monetary damages in excess of $525,000.00 in additional attorneys' fees and expert costs in the defense of the claims made in the Harrison litigation supported by Dr. Roitman's allegations.

21. As a further direct and proximate result of Dr. Roitman's conduct, Ms. Harrison was required to hire an attorney to represent her in this matter and seeks an award of her attorneys' fees and costs.

SECOND CAUSE OF ACTION
(Negligent Infliction of Emotional Distress)

22. The preceding paragraphs of this Complaint are alleged and incorporated by reference as if fully stated here.

23. In rendering his services as a licensed psychiatrist in the State of Nevada, Dr. Roitman had a duty to meet the standard of care required of psychiatrists and use reasonable care, skill, or knowledge ordinarily used under similar circumstances.

24. Dr. Roitman breached that duty by providing to the Court in the Harrison litigation a written "psychiatric analysis" of Ms. Harrison that included both a diagnosis of and conclusions he reached about her without ever having met or seen Ms. Harrison and without conducting an evaluation of Ms. Harrison.

25. Dr. Roitman breached that duty by providing to the Court in the Harrison litigation a written "psychiatric analysis" of Ms. Harrison that included both a diagnosis of and conclusions

he reached about her based solely on narratives provided to him by the adverse party in the Harrison litigation.

26. Dr. Roitman's diagnosis of and conclusions about Ms. Harrison as stated in his "psychiatric analysis" of Ms. Harrison were patently incorrect.

27. As a direct and proximate result of Dr. Roitman's conduct, Ms. Harrison has suffered actual and special injury and damages in an amount in excess of ($10,000.00), the full extent of which was not discovered and realized until the conclusion of the Harrison litigation, as follows:

a. Severe emotional distress and physical injury and illness and resulting damages in an amount to be proven at trial;

b. Monetary damages in excess of $525,000.00 in additional attorneys' fees and expert costs in the defense of the claims made in the Harrison litigation supported by Dr. Roitman's allegations.

28. As a further direct and proximate result of Dr. Roitman's conduct, Ms. Harrison was required to hire an attorney to represent her in this matter and seeks an award of her attorneys' fees and costs.

THIRD CAUSE OF ACTION
(Intentional Infliction of Emotional Distress)

29. The preceding paragraphs of this Complaint are alleged and incorporated by reference as if fully stated here.

30. At the direction of and based solely on information provided by the adverse party to Ms. Harrison in the Harrison litigation, and without ever having met, seen, or personally evaluated Ms. Harrison, Dr. Roitman provided a written "psychiatric analysis" of Ms. Harrison that included both a diagnosis of and conclusions he reached about her that substantially undermined her position in the Harrison litigation.

31. Dr. Roitman's diagnosis of and conclusions about Ms. Harrison in his "psychiatric analysis" of her were manifestly incorrect.

32. Dr. Roitman's conduct was extreme and outrageous, and his efforts on behalf of the adverse party to Ms. Harrison in the Harrison litigation was with the intention of, or reckless disregard for, causing emotional distress to Ms. Harrison.

33. As a direct and proximate result of Dr. Roitman's conduct, Ms. Harrison has suffered actual and special injury and damages in an amount in excess of ($10,000.00), the full extent of which was not discovered and realized until the conclusion of the Harrison litigation, as follows:

a. Severe emotional distress and physical injury and illness and resulting damages in an amount to be proven at trial;

b. Monetary damages in excess of $525,000.00 in additional attorneys' fees and expert costs in the defense of the claims made in the Harrison litigation supported by Dr. Roitman's allegations.

34. As a further direct and proximate result of Dr. Roitman's conduct, Ms. Harrison was required to hire an attorney to represent her in this matter and seeks an award of her attorneys' fees and costs.

35. Dr. Roitman's intentional conduct was intentional, malicious, and oppressive, for which Ms. Harrison is entitled to recover punitive and exemplary damages in excess of Ten Thousand dollars ($10,000.00).

FOURTH CAUSE OF ACTION
(Civil Conspiracy)

36. The preceding paragraphs of this Complaint are alleged and incorporated by reference as if fully stated here.

37. By way of agreement with and based solely on information provided by the adverse party to Ms. Harrison in the Harrison litigation, and without ever having met, seen, or personally evaluated Ms. Harrison, Dr. Roitman, in violation of his duties as a practicing psychiatrist, provided a written "psychiatric analysis" of Ms. Harrison that included both a diagnosis of and conclusions he reached about her.

38. Dr. Roitman and the adverse party to Ms. Harrison in the Harrison litigation intended to advance Dr. Roitman's "psychiatric analysis" of Ms. Harrison for the purpose of harming Ms. Harrison in the Harrison litigation and in order to give the adverse party to Ms. Harrison an undue, unfair and unlawful advantage in that case.

39. Dr. Roitman's diagnosis of and conclusions about Ms. Harrison in his "psychiatric analysis" of her were manifestly incorrect and substantially undermined her position in the Harrison litigation.

40. As a direct and proximate result of Dr. Roitman's conspiracy with the party adverse to Ms. Harrison in the Harrison litigation, Ms. Harrison has suffered actual and special injury and damages in excess of Ten Thousand dollars ($10,000.00), as follows:

a. Severe emotional distress and physical injury and illness and resulting damages in an amount to be proven at trial;

b. Monetary damages in excess of $525,000.00 in additional attorneys' fees and expert costs in the defense of the claims made in the Harrison litigation supported by Dr. Roitman's allegations.

41. As a further direct and proximate result of Dr. Roitman's conduct, Ms. Harrison was required to hire an attorney to represent her in this matter and seeks an award of her attorney's fees and costs.

42. Dr. Roitman's conduct was intentional, malicious, and oppressive, for which Ms. Harrison is entitled to recover punitive and exemplary damages.

WHEREFORE, Ms. Harrison prays for:

1. Judgment in her favor and against the Defendants on all claims in this Complaint;

2. An award of damages in her favor and against the Defendants, according to proof.

3. An award of exemplary and punitive damages in her favor and against the Defendants, according to proof, on all applicable claims in this Complaint.

4. An award to her and against the Defendants of her interests, costs and attorney's fees;

////

5. For such other and further relief as the Court deems just and proper.

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED this 9th day of October, 2013.

By: */s/ John Ohlson*

JOHN OHLSON, ESQ.
Bar Number 1672
275 Hill Street, Suite 230
Reno, Nevada 89501
Telephone: (775) 323-2700
Attorney for the Plaintiff
Vivian Marie Lee Harrison

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of JOHN OHLSON, and that on this date I personally served a true copy of the foregoing, **AMENDED COMPLAINT** addressed to:

Brianna Smith, Esq.
Cotton, Driggs, Walch,
Holley, Woloson & Thompson
400 S. Fourth St., Third Floor
Las Vegas, NV 89101

XX Via U.S. Mail
___ Via Overnight Mail
___ Via Hand Delivery
___ Via Facsimile
___ Via ECF

Dated this 9th day of October, 2013.

/s/ Robert M. May
Robert May

SCHEDULE OF EXHIBITS

EXHIBIT 1: Affidavit of Paul S. Appelbaum, M.D.

EXHIBIT 2: Affidavit of Ole J. Thienhaus, M.D., M.B.A., FACPsych

EXHIBIT 1

EXHIBIT 1

AFFIDAVIT OF PAUL S. APPELBAUM, M.D.

STATE OF NEW YORK)
: ss.
COUNTY OF NEW YORK)

I, PAUL S. APPELBAUM, M.D., having first been duly sworn and under penalty of perjury, hereby state as follows:

1. I am a psychiatrist, board certified by the American Board of Psychiatry and Neurology, with a subspecialty certification in Forensic Psychiatry.

2. I earned my medical degree from Harvard Medical School in 1976, completed an internship at Soroka Medical Center in 1977, and did my residency at Massachusetts Mental Health Center/Harvard Medical School from 1977-1980. I was a Harvard Law School, Special Student from 1979-1980, and a Graduate School of Public Health, University of Pittsburgh, Special Student from 1983-1984.

3. I am currently the Elizabeth K. Dollard Professor of Psychiatry, Medicine and Law, and Director of the Division of Law, Ethics and Psychiatry at Columbia University. I also perform forensic evaluations in civil and criminal cases, and treat patients with a broad variety of problems, including depression, anxiety, and adjustment problems.

4. Previously, I was A.F. Zeleznik Distinguished Professor and Chairman for the Department of Psychiatry, and Director of the Law and Psychiatry Program at the University of Massachusetts Medical School.

5. I also currently Chair the American Psychiatric Association's Committee on Judicial Action, and am a member of the Standing Committee on Ethics for the World Psychiatric Association.

6. I am the Past President of the American Psychiatric Association, the American Academy of Psychiatry and the Law, and the Massachusetts Psychiatric Society, and I have served as Chair of the Council on Psychiatry and Law for the American Psychiatric Association.

7. I have received the Isaac Ray Award of the American Psychiatric Association for "outstanding contributions to forensic psychiatry and the psychiatric aspects of jurisprudence,"

was the Fritz Redlich Fellow at the Center for Advanced Study in the Behavioral Sciences, and have been elected to the Institute of Medicine of the National Academy of Sciences.

8. I have authored numerous articles and books on law and ethics in clinical practice.

9. In June 2013, I was asked to review documents and materials that related to the opinions offered by Norton A. Roitman, MD regarding Vivian Marie Harrison ("Ms. Harrison") in connection with litigation in which Ms. Harrison was a party ("the Harrison litigation"). In particular, I was asked to consider whether Dr. Roitman met the standard of care of a psychiatrist in reaching and offering his diagnostic assessment of Ms. Harrison and in drawing certain conclusions about her related to the Harrison litigation.

10. After reviewing all of the documents and information related to and associated with Dr. Roitman's June 9, 2011, Report and the applicable ethical guidelines, it is my opinion, based on more than 30 years experience as a psychiatrist and forensic psychiatrist and my expertise in the ethics of psychiatry and forensic psychiatry, that Dr. Roitman's evaluation and formulation of his opinions fell below the standard of care of psychiatrists in two respects:

- His diagnosis of Ms. Harrison as having narcissistic personality disorder; and
- His conclusions that Ms. Harrison's "pathological narcissistic personality disorder is near impossible to treat and her prognosis is very poor" and his statement that "if her character were stronger, she might have a shot at [improving with treatment], but unfortunately, she is shallow and critical, and lacks internal structure."

11. Dr. Roitman fell below the standard of care of psychiatrists in those respects because: (1) he never met Ms. Harrison; and (2) because he based his diagnosis entirely on the information provided to him by the adverse party to Ms. Harrison in the Harrison litigation, whom he described as anticipating court proceedings and requested Dr. Roitman's psychiatric evaluation of Ms. Harrison "to inform the court of Ms. Harrison's mental condition and functional limitations."

- In the best of circumstances, diagnoses made exclusively on the basis of information provided by third parties are of dubious reliability. When psychiatrists cannot conduct an examination, they are unable to ask the questions necessary to elicit the

information necessary to confirm diagnoses and to rule out alternative explanations for a person's behavior.

- In the context of litigation, to rely exclusively on information provided by an adverse party with an interest in portraying the other person in an unfavorable light is to fall below the standard of care with regard to diagnostic practices. When the only information that an evaluator has been provided comes from a party with a direct interest in the evaluator reaching a judgment adverse to the person whose condition is being described, no reliable opinion can be rendered.

- Although the ethics guidelines of the American Academy of Psychiatry and the Law (AAPL) acknowledge that "if, after appropriate effort, it is not feasible to conduct a personal examination, an opinion may nonetheless be rendered n the basis of other information," that statement presumes that other objective data are available to render that judgment. Such data might include records of psychiatric evaluation and treatment by other psychiatrists, affidavits of non-party witnesses, police records, school records, military records, and the like.

- While Dr. Roitman included a statement in his June 9, 2011, Report that the opinions rendered by him were preliminary and subject to change based upon a psychiatric examination of Ms. Harrison, that limitation disclaimer does not conform to the guidelines of the American Academy of Psychiatry and the Law that certain comments about someone who has not been interviewed be qualified and the data for the opinion clearly indicated.

    - o Rather than "qualifying" his conclusions, i.e., limiting them appropriately given the biased source of the data available to him, Dr. Roitman expressed his conclusions with reasonable medical certainty – a degree of certainty unobtainable in these circumstances.

    - o In the "Discussion" section of his report, the cautionary clause "given the limitations of a reconstructive analysis" is followed by five pages of firmly stated conclusions regarding, among other things, Ms. Harrison's diagnosis,

character flaws, and a firm opinion regarding what the outcome of the Harrison litigation should be in reference to Ms. Harrison.

- Reaching such conclusions without examining the person in question does not constitute appropriately qualifying one's conclusions and falls below the profession's clear standard of care.

DATED this 17 day of June, 2013.

PAUL S. APPELBAUM, M.D.

STATE OF NEW YORK)
: ss.
COUNTY OF NEW YORK)

Signed and sworn to before me
by PAUL S. APPELBAUM, M.D. on June 17, 2013.

Notarial Officer

AVIGAIL A. CHARNOV
NOTARY PUBLIC-STATE OF NEW YORK
No. 01CH6270023
Qualified in New York County
My Commission Expires October 09, 2016

EXHIBIT 2

EXHIBIT 2

AFFIDAVIT OF OLE J. THIENHAUS, M.D., M.B.A., FACPsych

STATE OF ARIZONA)
: ss.
COUNTY OF PIMA)

I, Ole J. Thienhaus, M.D., M.B.A., FACPsych, having first been duly sworn and under penalty of perjury, hereby state as follows:

1. I am a psychiatrist, certified by the American Board of Psychiatry and Neurology, with an additional qualification in geriatric psychiatry, and licensed by the Arizona Board of Medical Examiners.

2. I earned my medical degree from the Free University of Berlin, West Germany, in 1978, and my MBA in marketing and management from the University of Cincinnati in 1985. I completed an internship in general surgery in Germany in 1979, a residency in psychiatry at the University of Cincinnati in 1983, and a fellowship in geriatric psychiatry in 1984.

3. I am currently the head of the Department of Psychiatry at the University of Arizona College of Medicine in Tuscon, Arizona.

4. Previously, I was a professor and chairman of the Department of Psychiatry and Behavioral Sciences at the University of Nevada School of Medicine in Las Vegas and Reno, where I also temporarily served as dean of the School of Medicine from 2008 to 2010.

5. Prior to joining the University of Nevada, I was with the University of Cincinnati, where I served as chief clinical officer of University Hospital Cincinnati, associate professor of psychiatry and emergency medicine and vice chair of the Department of Psychiatry at the University of Cincinnati College of Medicine, and director of the Psychiatric Emergency Service at the University of Cincinnati Medical Center. I was also a psychiatric consultant to the Cincinnati V.A. Medical Center.

6. I serve as a senior examiner for specialty board examinations and as a member of the Maintenance of Certification Committee of the American Board of Psychiatry and Neurology.

7. I am also a consultant to the Center for Medicare and Medicaid Services of the Hospital Accreditation Program in the U.S. Department of Health and Human Services, and an ad

hoc study section reviewer for the National Institutes of Health (epidemiology) and the National Institute of Mental Health (geriatrics).

8. I am a distinguished fellow of the American Psychiatric Association and a fellow of the American College of Psychiatrists and the Arnold P. Gold Humanism Honor Society.

9. I have received numerous awards and honors, including the Cancro Academic Leadership Award of the American Academy of Child and Adolescent Psychiatry, presented in 2011; and the *Nevada Business Journal*'s Healthcare Hero Award, the Senatorial Recognition for Service on the Sanford Center for Aging Scholarship Committee and the U.S. Senate Certificate of Commendation: Celebration of Scholars in Aging, all presented in 2010. I was elected to the Alpha Omega Alpha national medical honor society in 2009. And, I have been a visiting professor at Phramongkutklao College of Medicine, Bangkok, the University of Chang Mai School of Medicine, Chang Mai, Thailand, and the University of Kyrgyzstan College of Medicine in Bishkek.

10. I am the author or editor of several books, including "Correctional Psychiatry, Volumes I and II;" "Manual of Hospital Psychiatry" and, in a different vein altogether, "Jewish-Christian Dialogue – The Example of Gilbert Crispin." My scientific journal articles have appeared in many publications, including the *Journal of Clinical Psychiatry*, *American Family Physician*, *American Journal of Psychiatry*, *Psychiatric Services*, *Journal of Psychoactive Drugs*, *Harvard Mental Health Letter* and *Psychiatric Times*. I serve on the editorial boards of the *International Journal of Offender Therapy and Comparative Criminology* and the *Annals of Pharmacotherapy*.

11. My professional memberships include the Maricopa County Medical Society, the American Medical Association, the American Psychiatric Association and the American College of Psychiatrists.

12. On August 11, 2011, I conducted a psychiatric examination of Vivian Harrison in the context of litigation in which she was a party ("the Harrison litigation"). I again evaluated Ms. Harrison on September 19, 2011, in specific response to a June 9, 2011, "psychiatric analysis" of Ms. Harrison that was prepared by Dr. Norton Roitman and submitted to the court by

the adverse party in the Harrison litigation. Dr. Roitman's "psychiatric analysis" included certain conclusions about Ms. Harrison, including a diagnosis of narcissistic personality disorder, even though Dr. Roitman had never met or personally evaluated Ms. Harrison.

13. Based on my personal examinations and evaluations of Ms. Harrison, she did not meet the diagnostic criteria for any mental disorder defined in the Diagnostic and Statistical Manual of Mental Disorders and, specifically, she did not have a personality disorder.

14. In May 2013, I again reviewed Dr. Roitman's "psychiatric analysis" of Ms. Harrison and the associated documents that had been submitted to the court in the Harrison litigation in the context of whether Dr. Roitman met or fell below the standard of care of a psychiatrist in formulating and publishing an opinion or diagnosis of Ms. Harrison for use in the Harrison litigation.

15. Based on my review of those documents and information, it is my opinion that Dr. Roitman fell below the standard of care of a psychiatrist in formulating and publishing a diagnosis of and offering his derivative opinions and conclusions about Ms. Harrison based on that diagnosis for use in litigation in which Ms. Harrison was a party, as follows:

- In relevant part, the American Association of Psychiatry and the Law (AAPL) states in its professional ethics guidelines (www.aapl.org/ethics.htm) that:

> *Psychiatrists should not distort their opinion in the service of the retaining party. Honesty, objectivity and the adequacy of the clinical evaluation may be called into question when an expert opinion is offered without a personal examination. For certain evaluations (such as record reviews for malpractice cases), a personal examination is not required. In all other forensic evaluations, if, after appropriate effort, it is not feasible to conduct a personal examination, an opinion may nonetheless be rendered on the basis of other information. Under these circumstances, it is the responsibility of psychiatrists to make earnest efforts to ensure that their statements, opinions and any reports or testimony based on those opinions, clearly state that there was no personal examination and note any resulting limitations to their opinions.*

- Dr. Roitman did not directly examine or evaluate Ms. Harrison.
  - o No one should make a psychiatric diagnosis without examining the individual whose mental illness is alleged.

- While Dr. Roitman appropriately mentions that the failure to evaluate Ms. Harrison directly constitutes "a weakness" in his "psychiatric analysis," he proceeds to treat his inferences as though they had first-rate validity.
- At a minimum, an expert who decides not to examine the person he diagnoses should elaborate on the reasons that prompted him to forego a direct assessment. I do not find such an explanation in the material I reviewed.
- Dr. Roitman's claim that his conclusions have greater validity than those by other mental health professionals who based their opinions on direct clinical or psychometric assessments of Mr. Harrison is astounding.

- Dr. Roitman based his "psychiatric analysis" on narratives provided by the adverse party in the Harrison litigation, who is arguably the least objective observer imaginable. This is especially disturbing. While Dr. Roitman's argument that collateral information is an important source of information in the absence of a direct interview is plausible, the collateral information on which he relied – the adverse party in the Harrison litigation and two witnesses whose affidavits are virtually identical and used much of the same phraseology as the adverse party's information – were not reliably objective sources of information.

DATED this 17 day of June, 2013.

Ole J. Thienhaus, M.D., M.B.A., FACPsych

STATE OF ARIZONA)
: ss.
COUNTY OF PIMA)

Signed and sworn to before me
by Ole J. Thienhaus, M.D., M.B.A., FACPsych on June 17th, 2013.

Notarial Officer

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DISTRICT COURT

CLARK COUNTY, NEVADA

VIVIAN MARIE LEE HARRISON, Plaintiff, v. NORTON A. ROITMAN, M.D.; DOES I-X and ROE CORPORATIONS I-X, Defendants.	Case No.: A-13-687300-C Dept. No.: 1 **Hearing Date; 10/21/2013 (In Chambers)**

DEFENDANT NORTON A. ROITMAN, M.D.'S SUPPLEMENTAL REPLY IN SUPPORT OF HIS MOTION TO DISMISS PLAINTIFF'S COMPLAINT WITH PREJUDICE

Defendant Norton A. Roitman, M.D. (hereinafter "Defendant"), by and through his counsel of record John H. Cotton, Esq. and Brianna Smith, Esq., of the law firm of COTTON, DRIGGS, WALCH, HOLLEY, WOLOSON, & THOMPSON, hereby submits this Supplemental Reply in support of his Motion to Dismiss Plaintiff's Complaint based upon NRCP 12(b)(5), for failure to state a claim for relief. In addition, Defendant seeks dismissal, with prejudice, because Dr. Roitman is immune from this lawsuit.

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This Supplement is made and based on NRC 12(b)(5), the accompanying the original Motion to Dismiss and Reply, the below Memorandum of Points and Authorities.

Dated this 15th day of October 2013.

COTTON, DRIGGS, WALCH
HOLLEY, WOLOSON & THOMPSON

JOHN H. COTTON, ESQ.
Nevada Bar No. 5268
BRIANNA SMITH, ESQ.
Nevada Bar No. 11795
Attorneys for Defendant Norton A. Roitman, M.D.

SUPPLEMENTAL AUTHORITY REGARDING WITNESS IMMUNITY

The legal issue before the Court is whether Dr. Roitman, an expert retained in another judicial proceeding to render a psychiatric analysis, is entitled to absolute witness immunity.

A. LEGAL STANDARD

Absolute privilege is a question of law for the Court to decide. *Clark County School Dist. V. Virtual Education Software, Inc.*, 125 Nev. 374, 213 P.3d 496 (2009)("The applicability of the absolute privilege is a matter of law for the court to decide [...]"); *Circus Circus Hotels v. Witherspoon*, 99 Nev. 56, 657 P.2d 101 (1983)("the district court also erred in leaving to the jury the question of whether the letter's content was sufficiently relevant to fall within the absolute privilege").

B. REPLY TO PLAINTIFF'S "SUPPLEMENTAL" AUTHORITY

On October 9, 2013, Plaintiff filed a pleading entitled "Supplemental Points and Authorities." In Plaintiff's supplement, she highlights various cases pertaining to questions of judicial immunity in judicial and quasi-judicial proceedings. Quasi-judicial proceedings are actions involving public administrative agencies or bodies that are obliged to investigate or ascertain facts for official actions. *See State of Nevada v. Second Judicial District Court*, 118 Nev. 609, 615, 55 P.3d 420, 424 (2002)("Judicial immunity serves to "provide [] absolute immunity from subsequent damages liability for all persons-governmental or otherwise-who [are] integral parts of the judicial process."). The case at bar is not a quasi-judicial proceeding and, therefore, none of the cases cited by Plaintiff in her Supplement are applicable to this case which involves witness immunity. Immediately below is a brief analysis of the cases cited by Plaintiff:

- *Duff v. Lewis*, 114 Nev. 564, 958 P.2d 84 (1998): This matter involved a court-appointed psychologist was granted quasi-judicial immunity in a negligence action. Notably, the court stated:

> [HN2] **The common law doctrine of absolute immunity extends to all person who are an integral part of the judicial process.** *See Briscoe v. LaHue*, 460 U.S. 325, 335, 75 L. Ed. 2d 96, 103 S. Ct. 1108 (1983). The purpose [*569] behind a grant of absolute immunity is to preserve the independent decision-making and truthfulness of critical judicial participants without subjecting them to the fear and apprehension that may result from a threat of personal liability. *See Imbler v. Pachtman*, 424 U.S. 409, 422-24, 47 L. Ed. 2d 128, 96 S. Ct. 984 (1976). **"Absolute immunity is thus necessary to assure that judges, advocates, and witnesses can perform their respective functions without harassment or [***9] intimidation."** *Butz v. Economou*, 438 U.S. 478, 512, 57 L. Ed. 2d 895, 98 S. Ct. 2894 (1978). Additional reasons for allowing absolute judicial immunity include: "(1) the need to save judicial time in defending suits; (2) the need for finality in the resolution of disputes; (3) to prevent deterring competent persons from taking office; (4) to prevent the threat of lawsuit from discouraging inde-pendent action; and (5) the existence of adequate proce-dural safeguards such as change of venue and appellate review." Lavit, 839 P.2d at 1144 (*citing Grimm v. Arizona Bd. of Pardons & Paroles*, 115 Ariz. 260, 564 P.2d 1227, 1231-32 (Ariz. 1977)).
>
> > [HN3] These policy reasons apply equally to court-appointed officials such as psychologists and psychiatrists who assist the court in making decisions. Without immunity, [**86] these professionals risk exposure to lawsuits whenever they perform quasi-judicial duties. Exposure to liability could deter their acceptance of court appointments or color their recommendations.
> >
> > *Id* (*citing Seibel v. Kemble*, 63 Haw. 516, 631 P.2d 173, 180 (Haw. 1981)). Indeed, "immunity removes the possibility that a professional who is delegated judicial du-ties to aid the [***10] court will become a 'lightning rod for harassing litigation.'" *Id. (quoting Acevedo v. Pima County Adult Probation Dept.*, 142 Ariz. 319, 690 P.2d 38, 40 (Ariz. 1984)).

- *Foster v. Washoe County*, 114 Nev. 936, 964 P.2d 788 (1998): Court-appointed special advocates were entitled to absolute quasi-judicial immunity for the services they performed for the court.

- *In the Matter of Fine*, 116 Nev. 1001, 1015, 13 P.3d 400, 409 (2000): Involved court-appointed experts.

- *State of Nevada v. Second Judicial District Court*, 118 Nev. 609, 55 P.3d 420 (2002): State employee was not granted quasi-judicial immunity when the non-judicial officer/state employee placed child in foster home that was allegedly negligent.

- *Marvin v. Fitch*, 232 P.3d 425, 126 Nev. Adv. Rep. 18 (2010): Taxpayers challenged whether the individual members of the State Board were entitled to absolute immunity. The Court examined whether certain judicial officers can be afforded judicial immunity.

- *Clark County School District v. Virtual Education Software, Inc.*, 125 Nev. 374, 213 P.3d 496 (2009). In this case, the Court considered whether the absolute privilege applied to communications made by a non-lawyer in anticipation of a judicial proceeding. The court held that "the absolute privilege affords parties to litigation the same protection

from liability that exists for an attorney for defamatory statements made during, or in anticipation of, judicial proceedings." *Id.*, 125 Nev. at 378, 213 P.3d at 499.

C. LAW ON ABSOLUTE WITNESS IMMUNITY WHICH IS APPLICABLE TO THIS CASE.

In connection with and supplemental to Defendants' Motion to Dismiss and Reply in Support of Motion to Dismiss, Dr. Roitman further supplies the court with additional case law on the doctrine of witness immunity immediately below.

There is a "long-standing common law rule that communications uttered or published in the course of judicial proceedings are absolutely privileged so long as they are in some way pertinent to the subject of controversy." *Circus Circus Hotels v. Witherspoon*, 99 Nev. 56, 60, 657 P.2d 101, 104 (1983)(citing *Drummond v. Stahl*, 618 P.2d 616 (Ariz.App. 1980), cert. denied, 450 U.S. 967 (1981); Prosser, Handbook of the Law of Torts, § 114 at 777-79 (4th ed. 1971). "The absolute privilege precludes liability even where the defamatory statements are published with knowledge of their falsity and personal ill will toward the plaintiff." *Id.* (*citing Skinner v. Pistoria*, 633 P.2d 672 (Mont. 1981); *Stafford v. Garrett*, 613 P.2d 99 (Or.App. 1980); Prosser, supra, at 777. The policy underlying the privilege is that in certain situations the public interest in having people speak freely outweighs the risk that individuals will occasionally abuse the privilege by making false and malicious statements. *Circus*, 99 Nev. at 61, 657 P.2d at 104.

In *Clark County School District, supra*, the Court announced:

> **It is a "long-standing common law rule that communications [made] in the course of judicial proceedings [even if known to be false] are absolutely privileged."** *Circus Circus Hotels v. Witherspoon*, 99 Nev. 56, 60, 657 P.2d 101, 104 (1983). In addition, [HN5] the applicability of the absolute privilege is a matter of law for the court to decide, which this court will review de novo. *Id.* at 62, 657 P.2d at 105. *Fink v. Oshins*, 118 Nev. 428, 432, 49 P.3d 640, 643 (2002). Further, [HN6] because the scope of the absolute privilege is broad, a court determining whether the privilege applies should resolve any doubt in favor of a broad application. *Fink*, 118 Nev. at 433-34, 49 P.3d at 644.
>
> In *Fink v. Oshins*, we determined that an attorney's statements made to his client were absolutely privileged after his client began seriously

considering commencing proceedings to remove the defendant as cotrustee of a trust. *Id.* at 434, 49 P.3d at 644. **In order to support the interpretation of the absolute privilege in *Fink* and in other cases, we have relied on the Restatement (Second) of Torts section 587, which does not limit the application of the absolute privilege to attorney communications.** *Fink*, 118 Nev. at 433 n.13, 49 [*383] P.3d at 644 n.13; 3 *see also Pope v. Motel* 6, 121 Nev. 307, 316, 114 P.3d 277, 283 (2005); [***12] *K-Mart Corporation v. Washington*, 109 Nev. 1180, 1191 n.7, 866 P.2d 274, 282 n.7 (1993), receded from on other grounds by Pope, 121 Nev. at 316-17, 114 P.3d at 283. [HN7] The purpose of the absolute privilege is to afford all persons freedom to access the courts and freedom from liability for defamation where civil or criminal proceedings are seriously considered. Restatement (Second) of Torts § 587 cmts. a, e (1977). Therefore, the absolute privilege affords parties the same protection from liability as those protections afforded to an attorney for defamatory statements made during, or in anticipation of, judicial proceedings. Restatement (Second) of Torts § 587 cmt. d (1977).

> 3 Although in *Fink*, 118 Nev. at 435 n.16, 49 P.3d at 645 n.16, we also cite and rely on Re-statement (Second) of Torts section 586, which discusses the absolute privilege as it applies to attorneys, comment e of Restatement (Second) of Torts section 587 explicitly makes clear that the protection from liability for defamation accorded to an attorney under section 586 applies equally to parties to litigation. Restatement (Second) of Torts § 587 cmt. e (1977).

Thus, where a judicial proceeding has commenced or is, in good faith, under serious consideration, we determine no need to limit the absolute privilege to communications made by attorneys. *See Hall v. Smith*, 214 Ariz. 309, 152 P.3d 1192, 1195-96 (Ariz. Ct. App. 2007) ("The privilege applies to both attorneys and parties to litigation."). In *Hall v. Smith*, an Arizona Court of Appeals also relied on the Restatement (Second) of Torts section 587 to conclude that the absolute privilege applies to both attorneys and parties to litigation. *Id.* We concur for two reasons. First, there is no good reason to distinguish between communications between lawyers and nonlawyers. Second, it is anticipated that potential parties to litigation will communicate before formally retaining counsel.

Consequently, we extend the protections of the absolute privilege to instances where a nonlawyer asserts an alleged defamatory communication in response to threatened litigation or during a judicial proceeding. **Thus, just as we announced in *Fink*, for the privilege to apply (1) a judicial proceeding must be contemplated in good faith and under serious consideration, and (2) the communication must be related to the litigation.** 118 Nev. at 433-34, 49 P.3d at 644.

The test is whether a judicial proceeding is contemplated or under serious consideration and whether the communication is related to the litigation. The Nevada Supreme Court has

recognized the doctrine of absolute privilege to apply to communications uttered or published in the course of judicial proceedings and extended the privilege to quasi-judicial hearings, complaints filed with an internal affairs bureau against a police officer, and even letters written in anticipation of litigation. Pleadings, like a formal complaint, are covered under the rule of absolute privilege. *Sahara Gaming Corp. v. Culinary Workers Union Local 226,* 115 Nev. 212, 218, 984 P.2d 164, 167 (1999).

"Absolute immunity [is granted] to all statements made in the course of, or incidental to, a judicial proceeding, so long as they are relevant to the proceedings." *Sahara Gaming Corp. v. Culinary Workers Union Local 226,* 115 Nev. 212, 218, 984 P.2d 164, 168 (1999)(citing *Vasquez v. Courtney*, 276 Ore. 1053, 557 P.2d 672, 673 (Or. 1976). "This court has also held that the absolute privilege rule applies to letters written in anticipation of litigation. Specifically such letters are 'subject to both an absolute and qualified privilege.'" *Id.* (citing *Richards v. Conclin*, 94 Nev. 84, 84-85, 575 P.2d 588, 589 (1978)(*citing Romero v. Prince*, 85 N.M. 474, 513 P.2d 717, 791-20 (N.M. App. 1973)(holding that "[i]t is not absolutely essential, in order to obtain the benefits of absolute privilege, that the language claimed to be defamatory be spoken in open court or contained in a pleading, brief, or affidavit." *Zirn v. Cullom*, 187 Misc. 241, 63 N.Y.S.2d 439 (1946). If the statement is made to achieve the objects of the litigation, the absolute privilege applies even though the statement is made outside the courtroom and no function of the court or its officers is invoked. *See Smith v. Hatch*, 271 Cal.App.2d 39, 76 Cal.Rptr. 350 (1969)).

"Defamatory words, published by parties, counsel **or witnesses** in the course of a judicial procedure" and which are "connected with, or relevant or material to, the cause in hand or subject of inquiry," constitute an absolutely privileged communication, and "no action will lie therefor, however false or malicious they may in fact be." *Sahara Gaming Corp. v. Culinary*

Workers Union Local 226, 115 Nev. 212, 218, 984 P.2d 164, 168 (1999)(*citing Hammett v. Hunter*, 189 Okla. 455, 117 P.2d 511, 512 (Okla. 1941)(holding that **"[a]n absolutely privileged communication is defined as words spoken by a party or a witness in due course of a judicial proceeding or any other proceeding authorized by law that are connected with, relevant, pertinent, or material to the subject of inquiry;** and such communication will in no event support an action for slander).

Here, Plaintiff is suing Dr. Roitman for a report containing a psychiatric analysis that was produced during the course of a judicial proceeding. The report and any other acts or communications undertaken with respect to the report is absolutely privileged. Accordingly, Dr. Roitman is immune from liability.

C. STRONG PUBIC POLICY DICTATES DISMISSAL WITH PREJUDICE

Strong public policy favors dismissal of this case, with prejudice. The "purpose of witness immunity is to preserve the integrity of the judicial process by encouraging full and frank testimony." *Bruce v. Byrne-Stevens & Associates Engineers, Inc. et al., supra*, 113 Wn.2d at 126. The *Byrne* court said it best when it stated the important policy concerns implicated in a case like this:

> In the words of one 19th century court, in damages suits against witnesses, "the claims of the individual must yield to the dictates of public policy, which requires that the paths which lead to the ascertainment of truth should be left as free and unobstructed as possible." *Calkins v. Sumner,* 13 Wis. 193, 197 (1860). A witness' apprehension of subsequent damages liability might induce two forms of self-censorship. First, witnesses might be reluctant to come forward to testify. *See Henderson v. Broomhead,* [4 H. & N. 569, 578-79] 157 Eng. Rep., at 968. And once a witness is on the stand, his testimony might be distorted by the fear of subsequent liability. *See Barnes v. McCrate*, 32 Me. 442, 446-447 (1851). Even within the constraints of the witness' oath there may be various ways to give an account [***7] or to state an opinion. These alternatives may be more or less detailed and may differ in emphasis and certainty. A witness who knows that he might be forced to defend a subsequent lawsuit, and perhaps to pay damages, might be inclined to shade his testimony in favor of the potential plaintiff, to magnify uncertainties, and thus to deprive the finder of fact of candid,

objective, and undistorted evidence. *Briscoe*, at 332-33.

In addition to the benefits obtained by extending immunity, the rule also rests on the safeguards against false or inaccurate testimony which inhere in the judicial process itself. A witness' reliability is ensured by his oath, the hazard of cross examination and the threat of prosecution for perjury. *Briscoe*, at 332. *See Engelmohr v. Bache*, 66 Wn.2d 103, 401 P.2d 346 (witness immunity not applicable to statements made in administrative hearing which did not resemble a judicial proceeding), *cert. dismissed*, 382 U.S. 950 (1965). In light of these safeguards, the detriments of imposing civil liability on witnesses outweigh the benefits.

The scope of witness immunity is broad. Immunity has been [***8] extended to witnesses before grand juries. *Macko v. Byron*, 760 F.2d 95, 97 [**668] (6th Cir. 1985); *Kincaid v. Eberle*, 712 F.2d 1023 (7th Cir.), *cert. denied*, 464 U.S. 1018 (1983). Witnesses in other pretrial proceedings are also absolutely immune. *Holt v. Castaneda*, 832 F.2d 123, 125 (9th Cir. 1987); *Williams v. Hepting*, 844 F.2d 138 (3d Cir. 1988).

[*127] Guardians, therapists and attorneys who submit reports to family court are absolutely immune. *Myers v. Morris*, 810 F.2d 1437, 1466 (8th Cir.), *cert. denied*, 484 U.S. 828 (1987). Probation officers who allegedly include false statements in pretrial bond reports have been held immune. *Tripati v. United States Immigration & Naturalization Serv.*, 784 F.2d 345, 348 (10th Cir. 1986), cert. denied, 484 U.S. 1028 (1988).

The Washington case most on point here is *Bader v. State*, 43 Wn. App. 223, 716 P.2d 925 (1986). In *Bader*, Eastern State Hospital evaluated a criminal defendant, Morris Roseberry, for the purpose of determining whether he was competent to stand trial. Roseberry was diagnosed as paranoid schizophrenic and manic depressive, but was found competent to stand trial. Roseberry was acquitted and released, conditioned on his submit-ting to treatment. He later murdered a neighbor and the victim's estate sued Eastern State for negligence in its evaluation of Roseberry.

Division Three of the Court of Appeals held Eastern State immune from suit on grounds of judicial immunity. *Bader*, at 226. *Accord, Tobis v. State*, 52 Wn. App. 150, 758 P.2d 534 (1988); *Moses v. Parwatikar*, 813 F.2d 891, 892 (8th Cir. 1987); *Burkes v. Callion*, 433 F.2d 318, 319 (9th Cir. 1970); Bartlett v. Weimer, 268 F.2d 860 (7th Cir. 1959); [***10] *In re Scott Cy. Master Docket*, 618 F. Supp. 1534, 1575 (D. Minn. 1985); *Kravitz v. State*, 8 Cal. App. 3d 301, 87 Cal. [*128] Rptr. 352 (1970); *Linder v. Foster*, 209 Minn. 43, 45, 295 N.W. 299 (1940).

The Court of Appeals found *Bader* distinguishable, arguing: "Such immunity certainly would not apply to an expert retained by a party to litigation, because such an expert does not act on the court's behalf." *Bruce*, 51 Wn. App. at 201 n.1. Reasoning along the same lines, the Court of Appeals held that the general rule of witness immunity should not apply here because:

Byrne is a professional, with a pecuniary motive for testifying. He voluntarily undertook to render his expert opinion in the original action, knowing that the parties and the court would rely on that opinion. He was not merely a bystander who fortuitously came to have information relevant to the claim, nor was he subject to contempt of court if he refused to assume this undertaking.

Bruce, 51 Wn. App. at 201.

The fact that Byrne was retained and compensated [***11] by a party does not deprive him of witness immunity. The Court of Appeals assumed that participants in adversarial judicial proceedings derive their immunity from their relationship to the judge, who is himself immune from suit. In many instances, that is correct. *See Adkins v. Clark Cy.*, 105 Wn.2d 675, 717 P.2d 275 (1986) (immunity of bailiff). However, the rationale behind quasi-judicial immunity, as set out in *Briscoe*, sweeps more broadly. The purpose of granting immunity to participants in judicial proceedings is to preserve and enhance the judicial process. "The central focus of our analysis has been the nature of the judicial proceeding itself." *Briscoe*, 460 U.S. at 334. The various grants of immunity for judges and witnesses, as well as for prosecutors and bailiffs, are all particular [**669] applications of this central policy. They are best described as instances of a single immunity for participants in judicial proceedings. 1

> 1 Arizona courts use this terminology. *See, e.g., Western Technologies, Inc. v. Sverdrup & Parcel, Inc.*, 154 Ariz. 1, 4, 739 P.2d 1318, 1321 (Ct. App. 1986). The Arizona Supreme Court has written:

The socially important interests promoted by the absolute privilege in this area include the fearless prosecution and defense of claims which leads to complete exposure of pertinent information for a tribunal's disposition. . . .

The privilege protects judges, parties, lawyers, witnesses and jurors. *Green Acres Trust v. London*, 141 Ariz. 609, 613, 688 P.2d 617 (1984).

[***12]

[*129] The principles set forth in *Pierson v. Ray* [, 386 U.S. 547, 18 L. Ed. 2d 288, 87 S. Ct. 1213 (1967)] to protect judges and in *Imbler v. Pachtman* [, 424 U.S. 409, 47 L. Ed. 2d 128, 96 S. Ct. 984 (1976)] to protect prosecutors also apply to witnesses, who perform a somewhat different function in the trial process but whose participation in bringing the litigation to a just or possibly unjust conclusion is equally indispensable.

Briscoe v. LaHue, 460 U.S. 325, 345-46, 75 L. Ed. 2d 96, 103 S. Ct. 1108 (1983). In the *Bader* case, Eastern State was immune, not because it partook of the judge's immunity, but because it took part in judicial proceedings.

In this light, it is immaterial that an expert witness is retained by a party rather than appointed by the court. The basic policy of ensuring frank and objective testimony obtains regardless of how the witness comes to court. This was recognized recently in *Kahn v. Burman*, 673 F. Supp. 210 (E.D. Mich. 1987) in which the court granted immunity to a medical [***13] doctor who was retained as an expert in a medical malpractice case and who allegedly made defaming statements in reports to the attorney investigating the case.

As a matter of policy, also, witness immunity should extend to reports prepared by both potential and retained expert witnesses. Justice Stevens reasoned in *Briscoe* that damage suits against witnesses must "yield to the dictates of public policy, which requires that the paths which lead to the ascertainment of truth should be left as free and unobstructed as possible." This policy of providing for reasonably unobstructed access to the relevant facts and issues mandates the extension of immunity to Dr. Burman for all statements that he made in his reports to Attorney Gray. The overriding concern for disclosure of pertinent and instructive expert opinions before and during medical malpractice actions is no less significant than the clearly recognized need for all relevant factual evidence during the course of litigation.

(Citation omitted.) *Kahn*, at 213.

In addition, the Court of Appeals is simply wrong to say that an expert witness "does not act on the court's behalf." 51 Wn. App. at 201 n.1. [***14] While it may be that many [*130] expert witnesses are retained with the expectation that they will perform as "hired guns" for their employer, as a matter of law the expert serves the court. The admissibility and scope of the expert's testimony is a matter within the court's discretion. *Orion Corp. v. State*, 103 Wn.2d 441, 462, 693 P.2d 1369 (1985). That admissibility turns primarily on whether the expert's testimony will be of assistance to the finder of fact. ER 702. The court retains the discretion to question expert witnesses. ER 614(b). The mere fact that the expert is retained and compensated by a party does not change the fact that, as a witness, he is a participant in a judicial proceeding. It is that status on which witness immunity rests.

The Court of Appeals noted the fact that an expert witness is compensated for his testimony, but did not explain how that affects the basic rationale for witness immunity. Contrary to that court's conclusion, the economics of expert testimony dictate in favor of granting immunity to retained expert witnesses for at least two reasons. Both derive from the fundamental policy of ensuring frank and [***15] objective testimony, as stated in *Briscoe*.

[**670] First, unless expert witnesses are entitled to immunity, there will be a loss of objectivity in expert testimony generally. The threat of civil liability based on an inadequate final result in litigation would encourage experts to assert the most extreme position favorable to the party for whom they testify. It runs contrary to the fundamental reason

> for expert testimony, which is to assist the finder of fact in a matter which is beyond its capabilities. To the extent experts function as advocates rather than impartial guides, that fundamental policy is undermined.
>
> Second, imposing civil liability on expert witnesses would discourage anyone who is not a fulltime professional expert witness from testifying. Only professional witnesses will be in a position to carry insurance to guard against such liability. The threat of liability would discourage the 1-time expert -- the university professor, for example -- from [*131] testifying. Such 1-time experts, however, can ordinarily be expected to approach their duty to the court with great objectivity and professionalism.
>
> The main argument to the contrary is that the threat of liability [***16] would encourage experts to be more careful, resulting in more accurate, reliable testimony. While there is some merit to this contention, possible gains of this type have to be weighed against the threatened losses in objectivity described above. We draw that balance in favor of immunity. Civil liability is too blunt an instrument to achieve much of a gain in reliability in the arcane and complex calculations and judgments which expert witnesses are called upon to make. The threat of liability seems more likely to result in experts offering opinions motivated by litigants' interests rather than professional standards and in driving all but the full-time expert out of the courtroom.
>
> In sum, the fact that an expert witness is retained by a party has no bearing on the underlying rationale of witness immunity. That basic rationale -- ensuring objective, reliable testimony -- dictates in favor of immunity for experts. As a policy matter, the economics of expert testimony generally also favor immunity as a means of ensuring that a wide cross section of impartial experts are not deterred from testifying by the threat of liability.

Bruce v. Byrne-Stevens & Associates Engineers, Inc. et al., 113 Wn.2d 123, 776 P.2d 666 (1989).

To allow the instant case to go forward in the face of absolute witness immunity would certainly open the floodgates to litigation against lay witnesses, expert witnesses, jurors, and it could be a slippery slope into the penetration of the litigation privilege enjoyed by attorneys and judges. Consequently, and for good reason, Plaintiff's Complaint and Amended Complaint that was filed on October 9, 2013, must be dismissed with prejudice.

D. CONCLUSION

For the reasons stated above, Dr. Roitman is absolutely immune from this lawsuit.

Consequently, Plaintiff's Complaint and Amended Complaint filed on October 9, 2013, must be dismissed in its entirety, with prejudice.

Dated this 15th day of October, 2013.

COTTON, DRIGGS, WALCH HOLLEY, WOLOSON & THOMPSON

JOHN H. COTTON, ESQ.
BRIANNA SMITH, ESQ.
Nevada Bar No. 11795
Attorneys for Defendant Norton A. Roitman, M.D.

CERTIFICATE OF MAILING

I hereby certify that on this 15th day of October 2013, I sent a true and correct copy of the foregoing **DEFENDANT NORTON A. ROITMAN, M.D.'S SUPPLEMENTAL REPLY IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S COMPLAINT** by U.S. Mail, postage prepaid, addressed to the following:

John Ohlson, Esq.
275 Hill Street, Suite 230
Reno, Nevada 89501
Attorneys for Plaintiff

An Employee of Cotton, Driggs, Walch, Holley, Woloson & Thompson, Ltd.

DISTRICT COURT
CLARK COUNTY, NEVADA

Negligence - Medical/Dental COURT MINUTES October 21, 2013

A-13-687300-C Vivian Lee Harrison, Plaintiff(s)
vs.
Norton Roitman, M.D., Defendant(s)

October 21, 2013 **Chambers** **Motion to Dismiss**

HEARD BY: Cory, Kenneth COURTROOM: RJC Courtroom 16A

COURT CLERK: Michele Tucker

JOURNAL ENTRIES

- Defendant Norton A. Roitman, MD.'s Motion to Dismiss Complaint

In accordance with the authorities submitted by the Defendant, most particularly Bruce v. Byrne-Stevens & Associates Engineers, Inc., 113 Wash. 2d 123 (1989), the defendant enjoyed absolute immunity for his testimony. This privilege also extends to any report submitted by the witness during or in preparation for the matter in controversy. Absolute immunity extends to all the present causes of action naming Dr. Roitman, including medical malpractice, intentional infliction of emotional distress, negligent infliction of emotional distress, and civil conspiracy. Accordingly, COURT ORDERS the Motion to Dismiss the Plaintiff's Complaint GRANTED WITH PREJUDICE.

Ms. Smith to prepare the Order.

CLERK'S NOTE: The above minute order has been distributed to: Brianna Smith, Esq. and John Ohlson, Esq. via e-mail. /mlt

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CLERK OF THE COURT

ORDR
JOHN H. COTTON, ESQ.
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Telephone: 702/791-0308
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Attorneys for Defendant Norton A. Roitman, M.D.

DISTRICT COURT

CLARK COUNTY, NEVADA

VIVIAN MARIE LEE HARRISON, Plaintiff, v. NORTON A. ROITMAN, M.D.; DOES I-X and ROE CORPORATIONS I-X, Defendants.	Case No.: A-13-687300-C Dept. No.: I **Hearing Dates: 10/8/2013 (Oral Argument)** **10/21/2013 (In Chambers)**

ORDER GRANTING DEFENDANT NORTON A. ROITMAN, M.D.'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT WITH PREJUDICE

On October 8, 2013, Defendant Norton A. Roitman, M.D.'s Motion to Dismiss Plaintiff's Complaint with Prejudice came on for hearing before the Honorable Kenneth Cory in Department 1. Oral argument was entertained and Plaintiff requested the opportunity to provide supplemental briefing which was granted by the Court.

On October 9, 2013, Plaintiff submitted her Supplemental Points and Authorities. On October 15, 2013, Defendants submitted his Reply to Plaintiff's Supplemental Points and Authorities. The pleadings and papers filed, including the original Motion and Opposition thereto came on for hearing in chambers on October 21, 2013. The Court having reviewed the Defendant's Motion to Dismiss, Plaintiff's Opposition, and supplemental points and authorities

	Summary Judgment	Non-Jury Trial	FINAL DISPOSITIONS
	Default Judgment	Jury Trial	Dismissed (with or without prejudice)
	Transferred		Judgment Satisfied/Released

from both parties, hereby enters the following Findings of Fact and Conclusions of Law in granting Defendant's Motion to Dismiss with Prejudice:

FINDINGS OF FACT

1. On June 26, 2013, Plaintiff filed her Complaint. That Complaint asserted causes of action for medical malpractice, intentional infliction of emotional distress, negligent inflection of emotional distress and civil conspiracy.

2. Per the Complaint, in and during years 2011 and 2012, Plaintiff Vivian Harrison ("Plaintiff") was a party to a family court divorce case against her then-husband, Kirk Harrison (herein "the divorce proceeding"). (*Complaint*, ¶7).

3. During the divorce proceeding, Mr. Harrison retained a forensic psychiatric expert, Norton Roitman, M.D., to provide a psychiatric analysis of Plaintiff. (*Id.*, ¶8).

4. Plaintiff alleges that Dr. Roitman's psychiatric analysis dated June 9, 2011, diagnosed Plaintiff with narcissistic personality disorder and provided an analysis, conclusions and diagnosis regarding Plaintiff without ever having met Plaintiff. (*Id.*, ¶¶9-14).

5. Plaintiff further alleges that by rendering the psychiatric analysis, Dr. Roitman fell below the standard of care and caused injury and harm to Plaintiff. (*Id.*, ¶14).

6. Dr. Roitman filed a Motion to Dismiss on September 4, 2013.

7. On October 8, 2013, oral argument was entertained by the Court and Plaintiff requested the opportunity to provide supplemental briefing which was granted by the Court.

8. On October 9, 2013, Plaintiff filed her Supplemental Points and Authorities.

9. Also on October 9, 2013, Plaintiff filed an Amended Complaint alleging the same causes of action for medical malpractice, intentional infliction of emotional distress, negligent infliction of emotional distress and civil conspiracy all derived from the same allegations concerning Dr. Roitman's psychiatric analysis.

10. On October 15, 2013, Dr. Roitman filed his Reply to Plaintiff's Supplemental Points and Authorities, and sought dismissal of Plaintiff's Amended Complaint with prejudice on the basis of absolutely immunity.

11. A subsequent in chambers hearing on Dr. Roitman's Motion to Dismiss was held October 21, 2013.

CONCLUSIONS OF LAW

1. "Absolute immunity [is granted] to all statements made in the course of, or incidental to, a judicial proceeding, so long as they are relevant to the proceedings." *Sahara Gaming Corp. v. Culinary Workers Union Local 226*, 115 Nev. 212, 218, 984 P.2d 164, 168 (1999)(citations omitted). "This has been the policy and rule in Nevada for the last seventy years and the privilege includes administrative hearings, quasi-judicial proceedings as well as judicial actions. It is in the public's right to know what transpires in the legal proceedings of this state and that is paramount to the fact someone may occasionally make false and malicious statements." *Id.*, 115 Nev. at 219, 984 P.2d at 168.

2. This Court finds *Bruce v. Byrne-Stevens & Assocs. Eng'rs. Inc.*, 113 Wash. 2d 123 (1989) as authority on this issue.

3. The Court holds that "[w]itnesses in judicial pleadings are absolutely immune from suit based on their testimony." *Bruce v. Byrne-Stevens & Assocs. Eng'rs., Inc. et al.*, 113 Wash. 2d 123 (1989).

4. The immunity extends not only to expert testimony, but also acts, communications and expert reports which occur in connection with the preparation for the matter in controversy. *Bruce v. Byrne-Stevens & Assocs. Eng'rs., Inc.*, 113 Wash. 2d 123, 136, (1989).

5. Accordingly, absolute immunity extends to all of the present causes of action naming Dr. Roitman, including medical malpractice, intentional infliction of emotional distress,

negligent infliction of emotional distress, and civil conspiracy.

Based upon the foregoing, it is hereby ORDERED, ADJUDGED AND DECREED that Defendant's Motion to Dismiss the Plaintiff's Complaint is GRANTED WITH PREJUDICE and JUDGMENT is entered in favor of Defendant and against Plaintiff.

It is further ORDERED, ADJUGED AND DECREED that as a result of dismissal with prejudice, Plaintiff's Amended Complaint is also hereby DISMISSED WITH PREJUDICE.

DATED: Nov 15, 2013.

HONORABLE KENNETH CORY
DISTRICT COURT JUDGE

Submitted By:

COTTON, DRIGGS, WALCH,
HOLLEY, WOLOSON & THOMPSON

JOHN H. COTTON, ESQ.
Nevada Bar No. 005268
BRIANNA SMITH, ESQ.
Nevada Bar No. 11795
400 South Fourth Street, Third Floor
Las Vegas, Nevada 89101
Attorneys for Defendant Norton A. Roitman, M.D.

Approved as to Form and Content:

JOHN OHLSON, ESQ.
Nevada Bar Number 1672
275 Hill Street, Suite 230
Reno, Nevada 89501
Attorney for Plaintiff Vivian Marie Lee Harrison

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CLERK OF THE COURT

NEOJ

JOHN H. COTTON, ESQ.
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BRIANNA SMITH, ESQ.
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400 South Fourth Street, Third Floor
Las Vegas, Nevada 89101
Telephone: 702/791-0308
Facsimile: 702/791-1912
Attorneys for Defendant Norton A. Roitman, M.D.

DISTRICT COURT

CLARK COUNTY, NEVADA

VIVIAN MARIE LEE HARRISON,

Plaintiff,

v.

NORTON A. ROITMAN, M.D.; DOES I-X and ROE CORPORATIONS I-X,

Defendants.

Case No.: A-13-687300-C
Dept. No.: 1

AMENDED NOTICE OF ENTRY OF ORDER

TO: PLAINTIFF AND HER COUNSEL OF RECORD:

PLEASE TAKE NOTICE that an Order was entered in the above entitled matter on the 18th day of November 2013, a **file stamped** copy of which is attached hereto.

Dated this 19 day of November 2013.

COTTON, DRIGGS, WALCH,
HOLLEY, WOLOSON & THOMPSON

JOHN H. COTTON, ESQ.
Nevada Bar No. 005268
BRIANNA SMITH, ESQ.
Nevada Bar No. 11795
400 South Fourth Street, Third Floor
Las Vegas, Nevada 89101
Attorneys for Defendant Norton A. Roitman, M.D.

CERTIFICATE OF MAILING

I HEREBY CERTIFY that, on the 19th day of **November** 2013 and pursuant to NRCP 5(b), I deposited for mailing in the U.S. Mail a true and correct copy of the foregoing NOTICE OF ENTRY OF ORDER postage prepaid and addressed to:

JOHN OHLSON, ESQ.
275 Hill Street, Suite 230
Reno, Nevada 89501
Attorney for Plaintiff Vivian Marie Lee Harrison

An employee of Cotton, Driggs, Walch, Holley, Woloson & Thompson

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CLERK OF THE COURT

ORDR

JOHN H. COTTON, ESQ.
Nevada Bar No. 005268
BRIANNA SMITH, ESQ.
Nevada Bar No. 11795
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400 South Fourth Street, Third Floor
Las Vegas, Nevada 89101
Telephone: 702/791-0308
Facsimile: 702/791-1912
Attorneys for Defendant Norton A. Roitman, M.D.

DISTRICT COURT

CLARK COUNTY, NEVADA

VIVIAN MARIE LEE HARRISON, Plaintiff, v. NORTON A. ROITMAN, M.D.; DOES I-X and ROE CORPORATIONS I-X, Defendants.	Case No.: A-13-687300-C Dept. No.: 1 **Hearing Dates: 10/8/2013 (Oral Argument)** **10/21/2013 (In Chambers)**

ORDER GRANTING DEFENDANT NORTON A. ROITMAN, M.D.'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT WITH PREJUDICE

On October 8, 2013, Defendant Norton A. Roitman, M.D.'s Motion to Dismiss Plaintiff's Complaint with Prejudice came on for hearing before the Honorable Kenneth Cory in Department 1. Oral argument was entertained and Plaintiff requested the opportunity to provide supplemental briefing which was granted by the Court.

On October 9, 2013, Plaintiff submitted her Supplemental Points and Authorities. On October 15, 2013, Defendants submitted his Reply to Plaintiff's Supplemental Points and Authorities. The pleadings and papers filed, including the original Motion and Opposition thereto came on for hearing in chambers on October 21, 2013. The Court having reviewed the Defendant's Motion to Dismiss, Plaintiff's Opposition, and supplemental points and authorities

Default Judgment	Non-Jury Trial	FINAL DISPOSITIONS Time Limit Expired
	Jury Trial	Dismissed (see order for with or without prejudice)
		Judgment Satisfied/Paid in Full

from both parties, hereby enters the following Findings of Fact and Conclusions of Law in granting Defendant's Motion to Dismiss with Prejudice:

FINDINGS OF FACT

1. On June 26, 2013, Plaintiff filed her Complaint. That Complaint asserted causes of action for medical malpractice, intentional infliction of emotional distress, negligent inflection of emotional distress and civil conspiracy.

2. Per the Complaint, in and during years 2011 and 2012, Plaintiff Vivian Harrison ("Plaintiff") was a party to a family court divorce case against her then-husband, Kirk Harrison (herein "the divorce proceeding"). (*Complaint*, ¶7).

3. During the divorce proceeding, Mr. Harrison retained a forensic psychiatric expert, Norton Roitman, M.D., to provide a psychiatric analysis of Plaintiff. (*Id.*, ¶8).

4. Plaintiff alleges that Dr. Roitman's psychiatric analysis dated June 9, 2011, diagnosed Plaintiff with narcissistic personality disorder and provided an analysis, conclusions and diagnosis regarding Plaintiff without ever having met Plaintiff. (*Id.*, ¶¶9-14).

5. Plaintiff further alleges that by rendering the psychiatric analysis, Dr. Roitman fell below the standard of care and caused injury and harm to Plaintiff. (*Id.*, ¶14).

6. Dr. Roitman filed a Motion to Dismiss on September 4, 2013.

7. On October 8, 2013, oral argument was entertained by the Court and Plaintiff requested the opportunity to provide supplemental briefing which was granted by the Court.

8. On October 9, 2013, Plaintiff filed her Supplemental Points and Authorities.

9. Also on October 9, 2013, Plaintiff filed an Amended Complaint alleging the same causes of action for medical malpractice, intentional infliction of emotional distress, negligent infliction of emotional distress and civil conspiracy all derived from the same allegations concerning Dr. Roitman's psychiatric analysis.

10. On October 15, 2013, Dr. Roitman filed his Reply to Plaintiff's Supplemental Points and Authorities, and sought dismissal of Plaintiff's Amended Complaint with prejudice on the basis of absolutely immunity.

11. A subsequent in chambers hearing on Dr. Roitman's Motion to Dismiss was held October 21, 2013.

CONCLUSIONS OF LAW

1. "Absolute immunity [is granted] to all statements made in the course of, or incidental to, a judicial proceeding, so long as they are relevant to the proceedings." *Sahara Gaming Corp. v. Culinary Workers Union Local 226*, 115 Nev. 212, 218, 984 P.2d 164, 168 (1999)(citations omitted). "This has been the policy and rule in Nevada for the last seventy years and the privilege includes administrative hearings, quasi-judicial proceedings as well as judicial actions. It is in the public's right to know what transpires in the legal proceedings of this state and that is paramount to the fact someone may occasionally make false and malicious statements." *Id.*, 115 Nev. at 219, 984 P.2d at 168.

2. This Court finds *Bruce v. Byrne-Stevens & Assocs. Eng'rs. Inc.*, 113 Wash. 2d 123 (1989) as authority on this issue.

3. The Court holds that "[w]itnesses in judicial pleadings are absolutely immune from suit based on their testimony." *Bruce v. Byrne-Stevens & Assocs. Eng'rs., Inc. et al.*, 113 Wash. 2d 123 (1989).

4. The immunity extends not only to expert testimony, but also acts, communications and expert reports which occur in connection with the preparation for the matter in controversy. *Bruce v. Byrne-Stevens & Assocs. Eng'rs., Inc.*, 113 Wash. 2d 123, 136, (1989).

5. Accordingly, absolute immunity extends to all of the present causes of action naming Dr. Roitman, including medical malpractice, intentional infliction of emotional distress.

negligent infliction of emotional distress, and civil conspiracy.

Based upon the foregoing, it is hereby ORDERED, ADJUDGED AND DECREED that Defendant's Motion to Dismiss the Plaintiff's Complaint is GRANTED WITH PREJUDICE and JUDGMENT is entered in favor of Defendant and against Plaintiff.

It is further ORDERED, ADJUGED AND DECREED that as a result of dismissal with prejudice, Plaintiff's Amended Complaint is also hereby DISMISSED WITH PREJUDICE.

DATED: Nov 15, 2013.

HONORABLE KENNETH CORY
DISTRICT COURT JUDGE

Submitted By:

COTTON, DRIGGS, WALCH,
HOLLEY, WOLOSON & THOMPSON

JOHN H. COTTON, ESQ.
Nevada Bar No. 005268
BRIANNA SMITH, ESQ.
Nevada Bar No. 11795
400 South Fourth Street, Third Floor
Las Vegas, Nevada 89101
Attorneys for Defendant Norton A. Roitman, M.D.

Approved as to Form and Content:

JOHN OHLSON, ESQ.
Nevada Bar Number 1672
275 Hill Street, Suite 230
Reno, Nevada 89501
Attorney for Plaintiff Vivian Marie Lee Harrison

IN THE SUPREME COURT OF THE STATE OF NEVADA

INDICATE FULL CAPTION:

VIVAN MARIE LEE HARRISON,

Appellant,

vs.

NORTON A. ROITMAN, M.D.

Respondent.

No. 64569

DOCKETING STATEMENT
CIVIL APPEALS

GENERAL INFORMATION

All appellants not in proper person must complete this docketing statement. NRAP 14(a). The purpose of the docketing statement is to assist the Supreme Court in screening jurisdiction, classifying cases for en banc, panel, or expedited treatment, compiling statistical information and identifying parties and their counsel.

WARNING

This statement must be completed fully, accurately and on time. NRAP 14(c). The Supreme Court may impose sanctions on counsel or appellant if it appears that the information provided is incomplete or inaccurate. *Id.* Failure to fill out the statement completely or to file it in a timely manner constitutes grounds for the imposition of sanctions, including a fine and/or dismissal of the appeal.

A complete list of the documents that must be attached appears as Question 26 on this docketing statement. Failure to attach all required documents will result in the delay of your appeal and may result in the imposition of sanctions.

This court has noted that when attorneys do not take seriously their obligations under NRAP 14 to complete the docketing statement properly and conscientiously, they waste the valuable judicial resources of this court, making the imposition of sanctions appropriate. *See* KDI Sylvan Pools v. Workman, 107 Nev. 340, 344, 810 P.2d 1217, 1220 (1991). Please use tab dividers to separate any attached documents.

1. Judicial District Eighth Department 1

County Clark Judge Kenneth Cory

District Ct. Case No. A-13-687300

2. Attorney filing this docketing statement:

Attorney John Ohlson Telephone 775-323-2700

Firm Law Office of John Ohlson

Address

275 Hill Street, Suite 230
Reno, Nevada 89501

Client(s) Appellant Vivian Marie Lee Harrison

If this is a joint statement by multiple appellants, add the names and addresses of other counsel and the names of their clients on an additional sheet accompanied by a certification that they concur in the filing of this statement.

3. Attorney(s) representing respondents(s):

Attorney John H. Cotton, Esq. Telephone (702) 791-0308

Firm Cotton, Driggs, Walch, Holley, Woloson & Thompson

Address

400 South Fourth Street, 3rd Floor
Las Vegas, Nevada 89101

Client(s) Respondent Norton A. Roitman, M.D.

Attorney Brianna Smith, Esq. Telephone (702) 791-0308

Firm Cotton, Driggs, Walch, Holley, Woloson & Thompson

Address

400 South Fourth Street, 3rd Floor
Las Vegas, Nevada 89101

Client(s) Respondent Norton A. Roitman, M.D.

(List additional counsel on separate sheet if necessary)

4. Nature of disposition below (check all that apply):

- ☐ Judgment after bench trial
- ☐ Judgment after jury verdict
- ☐ Summary judgment
- ☐ Default judgment
- ☐ Grant/Denial of NRCP 60(b) relief
- ☐ Grant/Denial of injunction
- ☐ Grant/Denial of declaratory relief
- ☐ Review of agency determination
- ☒ Dismissal:
  - ☐ Lack of jurisdiction
  - ☒ Failure to state a claim
  - ☐ Failure to prosecute
  - ☐ Other (specify): _____
- ☐ Divorce Decree:
  - ☐ Original ☐ Modification
- ☐ Other disposition (specify): _____

5. Does this appeal raise issues concerning any of the following?

- ☐ Child Custody
- ☐ Venue
- ☐ Termination of parental rights

6. Pending and prior proceedings in this court. List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal:

N/A

7. Pending and prior proceedings in other courts. List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (*e.g.*, bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition:

N/A

8. Nature of the action. Briefly describe the nature of the action and the result below:

Appellant Vivian Harrison sued Respondent Norton A. Roitman, M.D. for medical malpractice, negligent and intentional emotional distress, and civil conspiracy based upon a psychological report prepared by the Respondent that, among other things, diagnosed Appellant with narcissistic personality disorder based solely on information provided by a third person and despite that he had never met or seen Plaintiff/Appellant, and that was used against her in litigation to which she was a party. The district court granted the Defendant's motion to dismiss the complaint with prejudice based upon witness immunity. Appellant appeals the district court's November 19, 2013, Order Granting Defendant Norton A. Roitman, M.D.'s Motion to Dismiss Plaintiff's Complaint With Prejudice.

9. Issues on appeal. State concisely the principal issue(s) in this appeal (attach separate sheets as necessary):

Whether the district court erred by dismissing the plaintiff's complaint for medical malpractice, negligent and intentional infliction of emotional distress, and civil conspiracy based upon the witness immunity/privilege as it is stated and applied in another jurisdiction to a medical diagnosis made by a physician in this state about the plaintiff/appellant that violated the applicable standard of care where it was based solely upon third party information and in the context of litigation.

10. Pending proceedings in this court raising the same or similar issues. If you are aware of any proceedings presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket numbers and identify the same or similar issue raised:

N/A

11. Constitutional issues. If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

☒ N/A

☐ Yes

☐ No

If not, explain:

12. Other issues. Does this appeal involve any of the following issues?

☐ Reversal of well-settled Nevada precedent (identify the case(s))

☐ An issue arising under the United States and/or Nevada Constitutions

☒ A substantial issue of first impression

☒ An issue of public policy

☐ An issue where en banc consideration is necessary to maintain uniformity of this court's decisions

☐ A ballot question

If so, explain:

13. Trial. If this action proceeded to trial, how many days did the trial last? _____

Was it a bench or jury trial? N/A

14. Judicial Disqualification. Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal? If so, which Justice?
No.

TIMELINESS OF NOTICE OF APPEAL

15. Date of entry of written judgment or order appealed from November 19, 2013

If no written judgment or order was filed in the district court, explain the basis for seeking appellate review:

16. Date written notice of entry of judgment or order was served November 19, 2013

Was service by:

☐ Delivery

☒ Mail/electronic/fax

17. If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52(b), or 59)

(a) Specify the type of motion, the date and method of service of the motion, and the date of filing.

☐ NRCP 50(b) Date of filing _____

☐ NRCP 52(b) Date of filing _____

☐ NRCP 59 Date of filing _____

NOTE: Motions made pursuant to NRCP 60 or motions for rehearing or reconsideration may toll the time for filing a notice of appeal. *See* AA Primo Builders v. Washington, 126 Nev. ____, 245 P.3d 1190 (2010).

(b) Date of entry of written order resolving tolling motion N/A

(c) Date written notice of entry of order resolving tolling motion was served _____

Was service by:

☐ Delivery

☐ Mail

18. Date notice of appeal filed December 3, 2013

If more than one party has appealed from the judgment or order, list the date each notice of appeal was filed and identify by name the party filing the notice of appeal:

19. Specify statute or rule governing the time limit for filing the notice of appeal, *e.g.*, NRAP 4(a) or other

NRAP 4(a)

SUBSTANTIVE APPEALABILITY

20. Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:

(a)

- ☒ NRAP 3A(b)(1)
- ☐ NRAP 3A(b)(2)
- ☐ NRAP 3A(b)(3)
- ☐ Other (specify)
- ☐ NRS 38.205
- ☐ NRS 233B.150
- ☐ NRS 703.376

(b) Explain how each authority provides a basis for appeal from the judgment or order:

The district court's order granting the defendant/respondent's motion to dismiss the plaintiff's complaint with prejudice was a final judgment entered in the action that was commenced before that court.

21. List all parties involved in the action or consolidated actions in the district court:

(a) Parties:

Appellant Vivian Marie Lee Harrison

Respondent Norton A. Roitman, M.D.

(b) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, *e.g.*, formally dismissed, not served, or other:

N/A

22. Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims, or third-party claims and the date of formal disposition of each claim.

Appellant alleged four causes of action against Dr. Roitman regarding his (incorrect) diagnosis of her without ever having met or seen her and the damages she suffered:

First Cause of Action -- Medical Malpractice
Second Cause of Action -- Negligent Infliction of Emotional Distress
Third Cause of Action -- Intentional Infliction of Emotional Distress
Fourth Cause of Action -- Civil Conspiracy

23. Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action or consolidated actions below?

☒ Yes

☐ No

24. If you answered "No" to question 23, complete the following:

(a) Specify the claims remaining pending below:

(b) Specify the parties remaining below:

(c) Did the district court certify the judgment or order appealed from as a final judgment pursuant to NRCP 54(b)?

☐ Yes

☐ No

(d) Did the district court make an express determination, pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment?

☐ Yes

☐ No

25. If you answered "No" to any part of question 24, explain the basis for seeking appellate review (*e.g.*, order is independently appealable under NRAP 3A(b)):

N/A

26. Attach file-stamped copies of the following documents:

- The latest-filed complaint, counterclaims, cross-claims, and third-party claims
- Any tolling motion(s) and order(s) resolving tolling motion(s)
- Orders of NRCP 41(a) dismissals formally resolving each claim, counterclaims, cross-claims and/or third-party claims asserted in the action or consolidated action below, even if not at issue on appeal
- Any other order challenged on appeal
- Notices of entry for each attached order

VERIFICATION

I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.

Vivian Marie Lee Harrison
Name of appellant

12-17-13
Date

Washoe County, Nevada
State and county where signed

John Ohlson
Name of counsel of record

Signature of counsel of record

CERTIFICATE OF SERVICE

I certify that on the 17 day of DECEMBER, 2013, I served a copy of this completed docketing statement upon all counsel of record:

☐ By personally serving it upon him/her; or

☑ By mailing it by first class mail with sufficient postage prepaid to the following address(es): (NOTE: If all names and addresses cannot fit below, please list names below and attach a separate sheet with the addresses.)

John Cotton, Esq.
Brianna Smith, Esq.
Cotton, Driggs, Walch,
Holley, Woloson & Thompson
400 S. Fourth St., Third Floor
Las Vegas, NV 89101

Dated this 17 day of DECEMBER, 2013

Signature