

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IN THE SUPREME COURT OF NEVADA

Electronically Filed
JUN 10 2014 02:16 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

* * * * *

VIVIAN MARIE LEE HARRISON,

Appellant,

Case No. 64569

vs.

NORTON A. ROITMAN, M.D.,

Respondent.

Direct Appeal from the District Court's Order of Dismissal
Eighth Judicial District Court
Case No. A-13-687300-C
Honorable Kenneth Cory

APPELLANT'S OPENING BRIEF

John Ohlson, Esq.
275 Hill Street, Suite 230
Reno, Nevada 89501
(775) 323-2700

Counsel for Appellant
Vivian Marie Lee Harrison

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

2
3
4
5
6
7
8
9
10
11

12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

I.	JURISDICTIONAL STATEMENT.....	6
II.	STATEMENT OF THE ISSUES FOR REVIEW.....	6
III.	STATEMENT OF THE CASE.....	7-8
IV.	STATEMENT OF FACTS.....	8-13
V.	SUMMARY OF THE ARGUMENT.....	13-14
VI.	ARGUMENT.....	14-24
A.	<i>Nevada has not Extended the Application of Witness Immunity Beyond Defamation Cases and Causes of Action That Derivatively Depend on a Defamation Claim.....</i>	14-16
B.	<i>The Bruce Case on Which the District Court Relied in Dismissing Ms. Harrison's Case Based Upon Witness Immunity is Not Applicable.....</i>	16-19
C.	<i>Witness Immunity Did Not Preclude Ms. Harrison From Suing Dr. Roitman for Medical Malpractice.....</i>	19-24
VII.	CONCLUSION.....	24
	CERTIFICATE OF COMPLIANCE	25-26

TABLE OF AUTHORITIES

Case Law

<i>Bruce v. Byrne-Stevens & Assocs. Eng'rs, Inc.</i> 113 Wash.2d 123, 776 P.2d 666 (1989).....	6, 8, 13,16, 17
<i>Bruce v. Byrne-Stevens & Associates Engineers, Inc.</i> , 51 Wn.App. 199, 752 P.2d 949 (Wash.App. 1988).....	17
<i>Circus Circus Hotels v. Witherspoon</i> 99 Nev. 56, 657 P.2d 101 (1983).....	15
<i>Clark v. Grigson</i> 579 S.W.2d 263 (Tex.Civ.App. 1979).....	22
<i>Clark County School District v. Virtual Education Software, Inc.</i> 125 Nev. 374, 213 P.3d 496 (2009).....	13, 15, 16
<i>Fink v. Oshins</i> 118 Nev. 428, 49 P.3d 640 (2002).....	15
<i>James v. Brown</i> 637 S.W.2d 914 (Tex. 1982).....	19, 20, 21, 22, 23
<i>Knox v. Dick</i> 99 Nev. 514, 665 P.2d 267 (1983).....	15
<i>Levine v. Wiss & Co.</i> 97 N.J. 242, 478 A.2d 397 (1984).....	19
<i>LLMC of Michigan, Inc. v. Jackson-Cross Co.</i> 559 Pa. 297, 306, 740 A.2d 186, 191 (1999).....	18
<i>Murphy v. A.A. Mathews, a Division of CRS Group Engineers, Inc.</i> 841 S.W.2d 671 (1992).....	18
<i>Sahara Gaming Corp. v. Culinary Workers Union Local 226</i> , 115 Nev. 212, 984 P.2d 164 (1999).....	13, 14, 15

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Rules and Statutes

NRAP 4(a)	6
NRAP 3(b)	6
NRS 41A.009	19
NRS 41A.100	20

Other Authority

Restatement (Second) of Torts § 587 (1977)	16
--	----

1 Appellant VIVIAN MARIE LEE HARRISON ("Ms. Harrison"), by and
2 through her attorney, JOHN OHLSON, and pursuant to NRAP 28, NRAP 32, and
3 this Court's March 19, 2014, Order Reinstating Briefing, submits her Opening
4 Brief, as follows:

6 **I. JURISDICTIONAL STATEMENT**

7
8 This appeal is taken from the district Court's November 19, 2103, Order
9 dismissing Ms. Harrison's complaint against respondent NORTON ROITMAN,
10 M.D. ("Dr. Roitman") with prejudice based upon the witness immunity privilege,
11 an order that constitutes a final judgment by the district court. Based upon Ms.
12 Harrison's timely December 3, 2013, Notice of Appeal pursuant to NRAP 4(a), this
13 Court has jurisdiction to consider and adjudicate this appeal pursuant to NRAP
14 3(b)(1).
15
16

17 **II. STATEMENT OF THE ISSUES FOR REVIEW**

18 Whether the district court erred by dismissing the Ms. Harrison's complaint
19 against Dr. Roitman for medical malpractice, negligent and intentional infliction of
20 emotional distress, and civil conspiracy based upon the witness/immunity privilege
21 as stated in *Bruce v. Byrne-Stevens & Assocs. Eng'rs, Inc.*, 113 Wash.2d 123, 776
22 P.2d 666 (1989) where, in the context of litigation, Dr. Roitman made a diagnosis
23 and prognosis of Ms. Harrison without ever having seen or met her and based solely
24 upon third party information in violation of the applicable standard of care.
25
26
27

28 ////

III. STATEMENT OF THE CASE

On June 26, 2013, Ms. Harrison sued Dr. Roitman for medical malpractice, negligent and intentional infliction of emotional distress, and civil conspiracy based upon a June 9, 2011, psychological analysis and report about Ms. Harrison in which Dr. Roitman diagnosed Ms. Harrison with “narcissistic personality disorder” based solely upon information provided by a third party and without ever having met or seen Ms. Harrison. *See* Joint Appendix (“J.A.”) at 1-19. Ms. Harrison sought to recover the damages to her caused by the report and diagnosis, which were used against her in litigation to which she was a party, based upon the effort she was required to undertake and expense she incurred to overcome Dr. Roitman’s inappropriate and incorrect diagnosis of her. *Id.*

In response to Ms. Harrison’s complaint, Dr. Roitman sought to dismiss the complaint with prejudice, initially asserting that Dr. Roitman did not owe a duty to Ms. Harrison and otherwise substantively challenging Ms. Harrison’s specific causes of action (as stated in Dr. Roitman’s Motion to Dismiss, J.A. at 30-38), but later raising witness immunity (as stated in Dr. Roitman’s Reply in Support of his Motion to Dismiss, J.A. at 55-73). After an October 8, 2013, hearing on Dr. Roitman’s motion (J.A. at 74-95) and considering the parties’ post-hearing supplemental points and authorities on the witness immunity issue (J.A. at J.A. 96-

1 100, 121-133)¹, the district court granted Dr. Roitman's motion and dismissed Ms.
2 Harrison's complaint based upon witness immunity as stated and applied in *Bruce*
3 *v. Byrne-Stevens & Assocs. Engineers, Inc.*, 113 Wash.2d 123, 776 P.2d 666 (1989)
4 (J.A. at 134-138).
5

6 Ms. Harrison appeals the district court's November 19, 2013, Order granting
7 Dr. Roitman's motion to dismiss Ms. Harrison's brief with prejudice based upon
8 witness immunity.
9

10 **IV. STATEMENT OF FACTS**

11 In and during 2011 and 2012, Ms. Harrison was a party in a divorce action
12 being litigated in Clark County, Nevada ("the Harrison litigation") in which her
13 then-husband, Kirk Harrison, retained Dr. Roitman as his forensic psychiatric expert
14 to "evaluate" Ms. Harrison. J.A. at 136. It is the June 9, 2011, report that was
15 prepared and signed by Dr. Roitman and submitted to the court in the Harrison
16 litigation that gave rise to Ms. Harrison's lawsuit against Dr. Roitman in this case.
17 J.A. at 1-19, 101-120, 136.
18
19

20 In the underlying suit to this appeal, Ms. Harrison claims that Dr. Roitman's
21 June 9, 2011, report constitutes medical malpractice by Dr. Roitman and was the
22

23
24 ¹ Because Dr. Roitman's challenge to Ms. Harrison's complaint based upon
25 witness immunity was not raised by Dr. Roitman until he filed his reply in support
26 of his motion to dismiss (J.A. at 55-73), and because that basis for his request
27 became centerpiece for the district court's consideration (J.A. at 74-95), the district
28 court took Dr. Roitman's request under submission and permitted the parties to
submit supplemental points and authorities on the witness immunity issue prior to
scheduling its chambers decision on the motion. J.A. at 96.

1 result of a civil conspiracy between Dr. Roitman and the party adverse to Ms.
2 Harrison in the Harrison litigation. Ms. Harrison also asserts attendant claims for
3 negligent and intentional infliction of emotional distress. J.A. at 1-19, 101-120. In
4 support of her claims, Ms. Harrison alleged, in relevant part, that:
5

- 6 - during the Harrison litigation, her then-husband (the adverse party to her in
7 the Harrison litigation), in an effort to advance his position in the case and
8 gain an advantage over her, submitted to the court a June 9, 2011, Report
9 and "psychiatric analysis" that was signed by Dr. Roitman, a Nevada-
licensed psychiatrist;
- 10 - in his report and "psychiatric analysis" of Ms. Harrison, Dr. Roitman
11 **diagnosed** Ms. Harrison as having "narcissistic personality disorder,"
12 concluded that her "pathological narcissistic personality disorder is near
13 impossible to treat and her **prognosis is very poor**," and further stated that
14 "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;"
- 15 - Dr. Roitman's June 9, 2011, Report offered opinions and conclusions as to
16 what the outcome of the Harrison litigation in reference to Ms. Harrison
17 should be based upon that diagnosis and prognosis;
- 18 - Dr. Roitman provided his psychiatric analysis, conclusions, and diagnosis
19 regarding Ms. Harrison *despite that Dr. Roitman had never, and has
never, met or seen Ms. Harrison*; and
- 20 - Dr. Roitman submitted his report for the Harrison litigation based solely on
21 the information provided to him by Ms. Harrison's then-husband, who had
22 requested that psychiatric analysis of Ms. Harrison to inform the court of
23 her mental condition and functional limitations.

24 J.A. at 1-19, 101-120, 136 (emphasis added). Ms. Harrison goes on to allege that,
25 in response to Dr. Roitman's report, she voluntarily sought and underwent
26 comprehensive and direct clinical and psychometric assessments by other mental
27 health professionals, and that the opinions of those professionals about Ms.
28

1 Harrison were contrary to those stated by Dr. Roitman. J.A. at 1-19, 101-120.
2 However, because Dr. Roitman's report regarding and diagnosis of Ms. Harrison
3 did significant damage to her in the Harrison litigation, caused her emotional and
4 physical suffering, and caused unnecessary delays in and substantially increased the
5 attorneys fees and expert costs to Ms. Harrison of the Harrison litigation, Ms.
6 Harrison sought damages related to the effort required by her, the expense she
7 incurred to address and overcome Dr. Roitman's mis-diagnosis of her, and the
8 resulting emotional and physical harm to her. *Id.* In support of her claims, Ms.
9 Harrison submitted affidavits from two distinguished and prominent psychiatrists
10 who state that Dr. Roitman fell below the standard of care of a psychiatrist by
11 diagnosing Ms. Harrison based on third party information and without ever having
12 met or seen her. J.A. at 10-19.

13 Dr. Roitman moved to dismiss Ms. Harrison's complaint pursuant to NRC
14 12(b)(5) for failing to state a claim upon which relief can be granted. J.A. at 30-38.
15 Dr. Roitman asserted that, by suing him, Ms. Harrison attempted to circumvent the
16 litigation privilege, to which he made a very cursory and conclusory reference, and
17 went on to substantively challenge each of Ms. Harrison's causes of action. *Id.*
18 After opposing Dr. Roitman's motion on the bases stated in the motion (J.A. at 39-
19 54)², Dr. Roitman submitted a supporting reply that challenged Ms. Harrison's

20 ² Ms. Harrison contended that Dr. Roitman's report was not subject to the
21 litigation privilege, and that his motion was otherwise fraught with citations to
22 authority that were misleading and misstated, or were otherwise inapposite. J.A. at

1 complaint based on witness immunity as stated in *Bruce v. Byrne-Stevens &*
2 *Associates Eng'rs, Inc.* 113 Wn.2d 123, 776 P.2d 666 (1989) – a position that was
3 entirely different from the bases asserted in his motion.³ J.A. at 55-73.
4

5 Indeed, the witness immunity issue was the focus of the district court's
6 October 8, 2013, hearing on Dr. Roitman's motion to dismiss. J.A. at J.A. 74-95.
7 To that end, Dr. Roitman summarily argued that witness immunity simply
8 prohibited Ms. Harrison from suing Dr. Roitman because he appeared as an expert
9 witness in the underlying litigation. J.A. at 76-77. Although Ms. Harrison did not
10 have the opportunity to respond in writing to Dr. Roitman's newly-asserted witness
11 immunity position and had very little time between when she received Dr.
12 Roitman's October 3, 2013, reply and the district court's October 8, 2013, hearing
13 to address that new position, she was able to conduct enough research to address Dr.
14 Roitman's assertion of witness immunity during the hearing. To that end, Ms.
15 Harrison highlighted the violations by Dr. Roitman of the applicable standard of
16 care by issuing a *diagnosis* and prognosis of someone he had never met or seen and
17 the damage that was done to Ms. Harrison as a result, distinguished the nature of
18 this case from others in Nevada that concerned the issue of witness immunity, and
19
20
21
22
23
24
25 39-54.

26 ³ Dr. Roitman's cursory and conclusory reference to the litigation privilege
27 in his motion addressed Ms. Harrison's effort to avoid that privilege as it concerned
28 the party adverse to her in the Harrison litigation by not naming that party in this
case. J.A. at 32:6-8.

1 specifically noted the historical application of witness immunity in defamation
2 cases. J.A. at 77-84.

3
4 Prior to making a decision on the impact of the witness immunity privilege in
5 reference to Ms. Harrison's suit against Dr. Roitman, the district court permitted the
6 parties to submit additional briefing on that issue and scheduled a chambers
7 decision for October 23, 2013. J.A. at 96. On October 9, 2013, Ms. Harrison
8 submitted supplemental points and authorities in which she challenged the
9 application of the witness immunity privilege to this case as asserted by Dr.
10 Roitman.⁴ J.A. at 97-100. In her supplemental briefing, Ms. Harrison offered an
11 overview of some of the relevant Nevada case law on the issue of witness
12 immunity, the nature of those cases, the underlying rationale as stated in those
13 cases, and the salient facts on which those cases were decided. J.A. at 97-100. In
14 so doing, she illustrated that at no time had Nevada extended or modified its
15 application of witness immunity to the professional negligence/malpractice issues
16 raised in this case. *Id.* In his response to Ms. Harrison's supplemental briefing, Dr.
17 Roitman gave a recap of the cases cited by Ms. Harrison, and quoted (by copy-and-
18
19
20
21
22

23 ⁴ At the same time, Ms. Harrison also filed an amended complaint in which
24 she included an allegation that Dr. Roitman had duty of care to her (J.A. at 101-
25 120), an issue that was raised in Dr. Roitman's initial motion but was not pursued
26 with any zeal in his reply or during the hearing. J.A. at 55-96. Essentially, and
27 without necessarily conceding Dr. Roitman's contention (for the reasons stated in
28 her opposition to the motion to dismiss, J.A. at 41-46), Ms. Harrison addressed the
non-dispositive technicality in order to address what became the focus of Dr.
Roitman's request.

1 paste) large portions of *Clark County School District v. Virtual Education Software,*
2 *Inc.*, 125 Nev. 374, 213 P.3d 496 (2009) and *Bruce v. Byrne-Stevens & Associates*
3 *Engineers, Inc.*, 113 Wn.2d 123, 776 P.2d 666 (1989) that he deemed relevant to the
4 determination to be made by the district court in this case. J.A. at 121-133.
5

6 On October 23, 2013, the district court entered its order dismissing Ms.
7 Harrison's complaint based upon witness immunity. J.A. at 135-138. In so doing,
8 the district court cited to the general principles governing the absolute immunity as
9 stated in *Sahara Gaming Corp. v. Culinary Workers Union Local 226*, 115 Nev.
10 212, 218, 984 P.2d 164, 168 (1999) and applied the witness immunity privilege to
11 Ms. Harrison's complaint as stated in *Bruce v. Byrne-Stevens & Assocs. Engineers,*
12 113 Wn.2d 123, 776 P.2d 666 (1989), finding the *Bruce* case to be the "...authority
13 on this issue." J.A. at 137. The district court's application of *Bruce* in this context,
14 however, was error.
15
16
17

18 **V. SUMMARY OF THE ARGUMENT**

19 The witness immunity doctrine as stated in *Bruce v. Byrne-Stevens & Assocs.*
20 *Engineers*, 113 Wn.2d 123, 776 P.2d 666 (1989) is not applicable to this case based
21 the underlying principles for witness immunity that have been stated by this Court
22 and because it is distinguishable on its facts. Under Nevada law, witness immunity
23 has been limited to causes of action for defamation and claims that derivatively
24 depend on defamation, and does not bar a claim against an expert witness for
25 professional negligence/malpractice. Based on Dr. Roitman's failure in this case to
26
27
28

1 meet the standard of care required of psychiatrists to use reasonable care, skill, or
2 knowledge ordinarily used under similar circumstances, witness immunity does not
3 protect Dr. Roitman. Thus, the district court erred by dismissing Ms. Harrison's
4 complaint with prejudice based on its application of *Bruce* to this case.

6 VI. ARGUMENT

7
8 Nevada has not extended the application of witness immunity beyond
9 defamation cases and causes of action that derivatively depend on a defamation
10 claim. The *Bruce* case on which the district court relied in dismissing Ms.
11 Harrison's complaint based upon witness immunity is not applicable. Witness
12 immunity did not preclude Ms. Harrison from suing Dr. Roitman for medical
13 malpractice. Thus, Ms. Harrison is entitled to this Court's Order reversing the
14 district court's dismissal of her malpractice suit against Dr. Roitman.

17 A. *Nevada has not Extended the Application of Witness Immunity* 18 *Beyond Defamation Cases and Causes of Action That Derivatively* 19 *Depend on a Defamation Claim.*

20 As noted by the district court in its order, the general principles of the
21 absolute immunity doctrine are stated in *Sahara Gaming Corp. v. Culinary Workers*
22 *Union Local 226*, 115 Nev. 212, 218, 984 P.2d 164, 168 (1999).

23
24 Absolute immunity [is granted] to all statements made in the course of,
25 or incidental to, a judicial proceeding, so long as they are relevant to
26 the proceedings." *Sahara Gaming Corp.* [, *supra* 115 Nev. at 218, 984
27 P.2d at 168]. "This has been the policy and rule in Nevada for the last
28 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 that someone may occasionally make false
and malicious statements.

1 *Sahara Gaming Corp.*, 115 Nev. at 219, 984 P.2d at 168; J.A. at 137:8-16 (¶ 1).
2
3 Indeed, Nevada recognizes the long-standing common law rule that
4 communications uttered or published in the court of judicial proceedings are
5 absolutely privileged. *Circus Circus Hotels v. Witherspoon*, 99 Nev. 56, 60, 657
6 P.2d 101, 104 (1983). While Nevada has applied the absolute privilege related to
7 judicial proceedings *primarily in defamation actions*, it has extended its application
8 to other causes of action *that derivatively depend upon the alleged defamation*.
9
10 *Fink v. Oshins*, 118 Nev. 428, 49 P.3d 640, 643 (defamation); *Knox v. Dick*, 99
11 Nev. 514, 665 P.2d 267 (1983) (defamation and intentional infliction of emotional
12 distress); *Sahara Gaming Corp. v. Culinary Workers Union Local 226*, 115 Nev.
13 212, 984 P.2d 164 (1999) (civil conspiracy, interference with contract, and
14 interference with prospective economic damage *which were derivative of*
15 *defamation claim*). Moreover, Nevada has applied the absolute privilege doctrine
16 and principles to different sources of statements that give rise to defamation claims.
17
18 *Sahara Gaming Corp.*, 984 P.2d at 166 (Nevada has long recognized a special
19 privilege of *absolute immunity from defamation* given to the news media and the
20 general public to report newsworthy events in judicial proceedings). And, this
21 Court has applied the privilege to communications even if they were known to be
22 false or made with malicious intent. *Clark County School District v. Virtual*
23 *Education Software*, 125 Nev. 374, 213 P.3d 496, 502 (2009) (business defamation
24
25
26
27
28

1 case), *citing* Restatement (Second) of Torts § 587, cmt. d (1977). To that end, this
2 Court explained that the purpose of the absolute privilege is to afford all persons
3 freedom to access the courts and freedom from liability *for defamation* where civil
4 or criminal proceedings are seriously considered. *Clark County School District*,
5 125 Nev. at 383, *citing* Restatement (Second) of Torts § 587, cmts. a, e (1977). Ms.
6 Harrison has purposely not asserted a cause of action for defamation or any claims
7 that derivatively depend on defamation. J.A. at 83-84. Rather, Ms. Harrison has
8 filed a medical malpractice lawsuit against Dr. Roitman based upon his failure to
9 meet the standard of care required of psychiatrists and to use reasonable care, skill,
10 or knowledge ordinarily used under similar circumstances by providing a diagnosis
11 and prognosis of Ms. Harrison without having ever met or seen her. Because
12 Nevada has not extended witness immunity to cases in which a professional expert
13 witness violates the applicable standard of care, Dr. Roitman is not protected by
14 witness immunity.
15

16
17
18
19
20 ***B. The Bruce Case on Which the District Court Relied in Dismissing***
21 ***Ms. Harrison's Case Based Upon Witness Immunity is Not***
22 ***Applicable.***

23 In its order granting Dr. Roitman's motion to dismiss, the district court
24 summarily concluded that *Bruce v. Byrne-Stevens & Assocs. Eng'rs Inc.*, 113
25 Wash.2d 123 (1989) is the authority on the absolute immunity issue, citing to the
26 portions of *Bruce* that state that "[w]itnesses in judicial pleadings are absolutely
27 immune from suit based on their testimony[]" and that immunity extends to expert
28

1 testimony and the acts, communications and reports that occur in connection with
2 the preparation for the matter in controversy. J.A. at 137:17-22, *citing Bruce*, 113
3 Wash.2d 123, 136. The district court's reliance on *Bruce*, however, is erroneous.

4
5 In *Bruce*, a group of landowners sued an engineer for negligence in preparing
6 his analysis and testimony he provided as an expert on their behalf in an underlying
7 case against other landowners for causing damage to their land. In the underlying
8 case, the engineer had testified on behalf of the plaintiff-landowners that the cost of
9 the restoration work would be half of what it turned out to be. The trial court
10 dismissed the plaintiff-landowners' case against the engineer for failure to state a
11 claim upon which relief can be granted based upon the witness immunity privilege.
12 The Washington Court of Appeals held that the engineer's statements as a witness
13 were not immune from a *negligence* claim and reversed the trial court's judgment.
14 See *Bruce v. Byrne-Stevens & Associates Engineers, Inc.*, 51 Wn.App. 199, 752
15 P.2d 949 (Wash.App. 1988). In reversing the Court of Appeals, the Washington
16 Supreme Court held that the landowner-plaintiffs' expert witness was absolutely
17 immune from liability for any negligence in his testimony or work preliminary to it.
18 *Bruce v. Byrne-Stevens & Assocs. Eng'rs Inc.*, 113 Wash.2d 123 (1989). The
19 Washington Supreme Court rejected the argument that witness immunity was
20 restricted to defamation cases and held that the policies that justified witness
21 immunity applied to the landowners' negligence claims against him. The *Bruce*
22 case, however, is not only the minority view on that issue, it is not applicable to this
23
24
25
26
27
28

1 case on its facts.

2 In *Bruce*, the issue concerned the application of witness immunity in a suit in
3 which the plaintiffs sued their own expert witness. In that context, *Bruce* has been
4 identified as a *minority and non-persuasive opinion*. See, i.e., *Murphy v. A.A.*
5 *Mathews, a Division of CRS Group Engineers, Inc.*, 841 S.W.2d 671, 678 (1992).
6

7 The general prevailing view is that because expert witnesses are procured to testify
8 to the benefit of the party procuring the expert, the goal of ensuring the path to truth
9 is unobstructed is not advanced by immunizing an expert witness from his or her
10 negligence in formulating that opinion. See *LLMC of Michigan, Inc. v. Jackson-*
11 *Cross Co.*, 559 Pa. 297, 306, 740 A.2d 186, 191 (1999) (witness immunity did not
12 bar professional malpractice claim against expert witness).
13
14

15 “The judicial process will be enhanced only by requiring that an *expert*
16 *witness render services to the degree of care, skill and proficiency*
17 *commonly exercised by the ordinarily skillful, careful and prudent*
18 *members of their profession.*”

19 *Id.* (emphasis added).

20 Moreover, *Bruce* was a plurality opinion in which *four out of the nine*
21 *Washington Supreme Court Justices dissented*. *Bruce*, 113 Wn.2d at 138
22 (dissenting opinion); J.A. at 71-73. According to the dissent, which would have
23 affirmed the unanimous decision of the Washington Court of Appeals (51 Wn.App.
24 199):
25

26 The majority properly states the common law rule that a witness is
27 absolutely immune from suit for *defamatory statements* uttered in a
28 judicial proceeding. [Citations omitted.] 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

1 shield otherwise actionable professional malpractice.
2 *Bruce*, 113 Wn.2d at 138 (emphasis in original); J.A. at 71. To that end, the *Bruce*
3 dissent explained that the immunity related primarily to defamation cases should
4 not be extended to a privately retained expert based on the professional
5 responsibilities of an expert witness. *Id.* at 139-140, *citing*, in relevant part, *James*
6 *v. Brown*, 637 S.W.2d 914, 917-18 (Tex. 1982) (the unavailability of a defamation
7 action against a medical expert witness did not preclude a claim for negligent
8 misdiagnosis/medical malpractice merely because the diagnoses were later
9 communicated to a court in judicial proceedings) and *Levine v. Wiss & Co.*, 97 N.J.
10 242, 478 A.2d 397 (1984) (immunity was not available to shield an accountant's
11 malpractice, even though the professional was hired to prepare an appraisal for a
12 judicial proceeding). Thus, the scope and impact of the *Bruce* case is limited to the
13 context in which it was decided and does not reflect the more widely accepted
14 limitation on witness immunity in reference to expert witnesses. As a consequence,
15 the district court erred by summarily finding the *Bruce* case as the authority on the
16 witness immunity issue. J.A. at 137:17-18.

22 **C. *Witness Immunity Did Not Preclude Ms. Harrison From Suing Dr.***
23 ***Roitman for Medical Malpractice.***

24 In Nevada, the failure of a psychiatrist to meet the standard of care required
25 of psychiatrists and to use reasonable care, skill, or knowledge ordinarily used
26 under similar circumstances constitutes medical malpractice. *See* NRS 41A.009
27
28

1 and 41A.100. In this case, Ms. Harrison sued Dr. Roitman for medical malpractice
2 and attendant claims pursuant to NRS Chapter 41A based upon Dr. Roitman's June
3 9, 2011, report in which he, among other things, diagnosed Ms. Harrison with
4 narcissistic personality disorder and offered a grim prognosis for her despite that he
5 had never met or seen Ms. Harrison. J.A. at 1-19, 41-46, 101-120. Based on those
6 facts, Dr. Roitman fell below the standard of care required of psychiatrists. *Id.* Dr.
7 Roitman's improper and incorrect diagnosis of Ms. Harrison caused substantial
8 harm and injury to Ms. Harrison, including eviction from her home, separation from
9 her children, and monetary damages in the Harrison litigation in excess of
10 \$525,000.00. J.A. at 1-8, 78-79, 101-108. That Dr. Roitman gave his diagnosis and
11 prognosis in the context of litigation does not, and should not, protect him from Ms.
12 Harrison's complaint against him for malpractice.

13 Although this Court has not specifically addressed the applicability of
14 witness immunity in the context of a professional negligence/malpractice case, its
15 historical application of witness immunity in defamation (and defamation-
16 derivative) cases combined with the reasoning of cases in which witness immunity
17 did not preclude non-defamation claims and that are more factually aligned with
18 this case is compelling. For instance, in *James v. Brown*, 637 S.W.2d 914 (Tex.
19 1982) (highlighted above as cited by the dissent in *Bruce, supra*), the plaintiff sued
20 three psychiatrists based upon an involuntary hospitalization proceeding initiated by
21 her son and daughter. The plaintiff's claims concerned reports that were filed by
22
23
24
25
26
27
28

1 the psychiatrists in the proceedings stating that the she was mentally ill and likely to
2 cause injury to herself or others if she was not immediately restrained. After the
3 plaintiff obtained a writ of habeas corpus releasing her from the custody of the
4 hospital and all proceedings against her were dismissed by agreement with the
5 children, she sued the three psychiatrists for libel, negligent misdiagnosis-medical
6 malpractice, false imprisonment, and malicious prosecution.
7

8
9 The trial court granted the psychiatrists' motion for summary judgment, and
10 the court of appeals affirmed, holding that the doctors' opinions were privileged and
11 that no damages could be recovered based on their reports, even if their assessments
12 might have been arrived at negligently. *James v. Brown*, 637 S.W.2d at 916. The
13 Supreme Court of Texas, however, disagreed and reversed the court of the appeals
14 as to the plaintiff's medical malpractice claim.⁵ In so doing, and reciting the same
15 general principles as those that have been stated by this Court, the Texas Supreme
16 Court explained:
17
18

19
20 Communications in the due course of a judicial proceeding will not
21 serve as the basis of a civil action **for libel or slander**, regardless of the
22 negligence or malice with which they are made. *Reagan v. Guardian*
23 *Life Insurance Co.*, 140 Tex. 105, 166 S.W.2d 909 (1942). This
24 privilege extends to any statement made by the judge, jurors, counsel,
25 parties or witnesses, and attaches to all aspects of the proceedings,
26 including statements made in open court, pre-trial hearings,
27 depositions, affidavits and any of the pleadings or other papers in the
28 case. W. Prosser, *Handbook of the Law of Torts* Sec. 114 4th ed.
1971). The Restatement (Second) of Torts Sec. 588 (1981) provides:

25
26 ⁵ While the Texas Supreme Court agreed that the plaintiff's claim for
27 defamation was precluded by witness immunity, it expressly affirmed dismissal of
28 the plaintiff's other claims for false imprisonment and malicious prosecution
because the plaintiff failed to state a cause of action for either, and not because of
any absolute immunity. *James*, 637 S.W.2d at 918-919.

1 A witness is absolutely privileged to publish defamatory
2 matter concerning another in communications preliminary
3 to a proposed judicial proceeding or as a part of a judicial
4 proceeding in which he is testifying, if it has some relation
5 to the proceeding.

6 The administration of justice requires full disclosure from witnesses,
7 unhampered by fear of retaliatory suits for defamation. Thus, the
8 doctors' reports to the probate judge in Mrs. James' mental health
9 proceedings are absolutely privileged, and will not give rise to an
10 action for defamation. The trial court's summary judgment
11 concerning these communications was, therefore, proper.

12 *James v. Brown*, 637 S.W.2d at 916-17. However, because one of the doctors
13 admitted that he was not certain of his diagnosis of the plaintiff that he filed in the
14 proceedings before the trial court, the Supreme Court of Texas held that there were
15 genuine issues of material fact as to whether that doctor acted as a prudent
16 physician in connection with this examination and diagnosis of the plaintiff, and on
17 that basis, he was not entitled to summary judgment. *Id.* at 917.

18 While the doctors' communications to the court of their diagnoses of
19 Mrs. James' mental condition, regardless of how negligently made,
20 cannot serve as the basis for a defamation action, the diagnoses
21 themselves may be actionable on other grounds. The
22 unavailability of a defamation action does not preclude a plaintiff
23 from pursuing other remedies at law. See, *Runge v. Franklin*, 72 Tex.
24 585, 10 S.W. 721 (1889) and *Tsesmelis v. Sinton State Bank*, 53
25 S.W.2d 461 (Tex.Comm'n App.1932, judgment adopted). [Thus, the
26 plaintiff] is not prevented from recovering from the doctors for
27 negligent misdiagnosis-medical malpractice merely because their
28 diagnoses were later communicated to a court in the due course of
judicial proceedings.

Id. at 917-18. (disapproving the language of *Clark v. Grigson*, 579 S.W.2d 263
(Tex.Civ.App. 1979) inasmuch as it extended to psychiatrists testifying in mental
health proceedings a blanket immunity from all civil liability).

Indeed, *James v. Brown*, *supra*, is factually and legally on point with this

1 case. In *James v. Brown*, the plaintiff asserted her medical malpractice and other
2 claims against three doctors for their medical reports and diagnoses that were used
3 against her by the plaintiff's children, who were adverse to her in the underlying
4 mental health proceedings. *James v. Brown*, 637 S.W.2d at 916-917. The
5 plaintiff's medical malpractice claim was supported by affidavits from other
6 psychiatrists that stated that the plaintiff was not mentally ill and that the defendant
7 doctors' diagnosis of her could not have been arrived at properly during their brief
8 periods of observation. *Id.* at 918. In this case, Ms. Harrison bases her medical
9 malpractice suit against Dr. Roitman on his medical report and diagnosis of her that
10 were used against her by the party adverse to her in the underlying Harrison
11 litigation. J.A. at 1-9; 101-110. Ms. Harrison's medical malpractice complaint is
12 supported by affidavits from two prominent psychiatrists, one of whom states that
13 Ms. Harrison does not meet the diagnostic criteria for any personality disorder, and
14 both of whom state that who state that Dr. Roitman fell below the standard of care
15 of a psychiatrist by diagnosing Ms. Harrison based on third party information and
16 without ever having met or seen her.⁶ J.A. at 10-19; 111-120. Given its statement
17 of the same principles that have been cited by this Court in reference to the witness
18 immunity privilege, it is far more compelling and determinative in this case than
19
20
21
22
23
24

25 ⁶ Even the district court recognized the nature of Ms. Harrison's claims
26 against Dr. Roitman as "...a kind of egregious usurpation of [the witness] immunity
27 by a witness in a case. And it at least raises fairly the question of is here – is there
28 any point at which a witness cannot rely on that. You know, can you go far enough
afoul of all however you want to describe it, of public policy considerations, that
that policy would no longer protect you? Is there really no limit?" J.A. 76 at 5-10.

1 *Bruce, supra*, especially given the very strong dissent over which *Bruce, supra*, was
2 decided based, in part, on *James*. Thus, the district court erred by applying witness
3 immunity as a bar to Ms. Harrison's medical malpractice complaint against Dr.
4 Roitman.
5

6 **VII. CONCLUSION**

7
8 Based on the foregoing, witness immunity did not bar Ms. Harrison's medical
9 malpractice suit against Dr. Roitman. As a consequence, the district court erred by
10 its application of *Bruce* as the authority on which it dismissed Ms. Harrison's
11 complaint against Dr. Roitman. Thus, Ms. Harrison requests that this Court reverse
12 the district court's order dismissing her complaint and remand this case to be tried
13 by the district court.
14

15
16 ///

17 ///

18 ///

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

2
3
4
5
6
7
8

9
10
11
12
13
14
15
16

17
18
19
20
21
22
23
24
25
26
27

28

1 requirements of the Nevada Rules of Appellate Procedure.

2 DATED June 10th, 2014.

3
4 /s/ John Ohlson
John Ohlson, Esq.
5 Nevada State Bar No. 1672
275 Hill Street, Suite 230
6 Reno, Nevada 89501
(775) 323-2700

7 Counsel for Appellant
8 Vivian Marie Lee Harrison
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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 **OPENING BRIEF** by the method indicated and addressed as follows:

John H. Cotton, Esq.
John Savage, Esq.
Cotton, Driggs, Walch, Holley,
Woloson & Thompson
400 South Fourth Street, Third Floor
Las Vegas, Nevada 89101

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

DATED June 10th, 2014.

/s/ Rob May
Rob May