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IN THE SUPREME COURT OF THE STATE OF NEVADA

VIVIAN MARIE LEE HARRISON,

Appellant,

v.

NORTON A. ROITMAN, M.D.,

Respondent.

Supreme Court Case No.: 64569

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

RESPONDENT'S ANSWERING BRIEF

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STATEMENT OF ISSUES

The issue on appeal is whether the District Court erred in granting Respondent's Motion to Dismiss where Appellant was seeking to recover for injuries to her reputation, among others damages, against Respondent for opinions and testimony that Respondent had rendered as an expert witness during the course of another judicial proceeding.

STATEMENT OF CASE

The underlying action was styled as a claim for medical malpractice, but the injuries alleged in Appellant's Complaint are defamatory injuries, not injuries resulting from medical care. (See Joint Appendix, hereinafter "J.A.", at 1-3) Specifically, Appellant's Complaint alleged that Respondent caused Appellant damage "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 [Appellant]" when Respondent rendered a preliminary psychiatric analysis in a another judicial proceeding against Appellant. (J.A. 3) Respondent had been retained by Appellant's ex-husband as a forensic psychiatric expert. (J.A. 2)

This is an appeal from the District Court's order dismissing Appellant's Complaint on the grounds that absolute immunity extended to all causes of action against Respondent, including medical malpractice, intentional infliction of emotional distress, negligent infliction of emotional distress, and civil conspiracy

because: (1) "[a]bsolute 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;" (2) "[w]itnesses in judicial pleadings are absolutely immune from suit based on their testimony;" and (3) 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. (J.A. 137-138) Eighth Judicial District Court, Clark County; Honorable Kenneth Cory, District Judge. (Id.)

STATEMENT OF FACTS

I. FACTS SUPPORTING DISMISSAL

Appellant was a party to another judicial proceeding against her ex-husband in and during the years of 2011 and 2012 (hereinafter "Divorce Proceeding"). (J.A. 2) During the course of the Divorce Proceeding, Appellant's ex-husband retained Respondent as a forensic psychiatric expert to provide a psychiatric analysis of Plaintiff. (Id.)

Appellant subsequently filed the underlying Complaint against Respondent for opinions and testimony that Respondent ultimately rendered as an expert witness during the course of the Divorce Proceeding. (J.A. 2-3) The causes of action set forth in Appellant's Complaint are medical malpractice, intentional infliction of emotional distress, negligent inflection of emotional distress and civil conspiracy. (J.A. 1-8) Appellant's Complaint alleged that Respondent fell below

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the standard of care, and thereby committed medical malpractice, when he diagnosed Appellant with narcissistic personality disorder and provided an analysis, conclusions and diagnosis of Appellant without ever having met her. (J.A. 2-3)

However, the injuries alleged in Appellant's Complaint are defamatory injuries, not injuries resulting from medical care:

> 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.

(J.A. 3 at 3:6-9) (emphasis added).

Respondent filed his Motion to Dismiss Appellant's Complaint on September 4, 2013. (J.A. 30) There were two general grounds for Respondent's Motion: (1) Respondent did not owe any duty to Appellant since Respondent never had a physician-patient relationship with Appellant; and (2) Respondent was absolutely immune from liability for the expert opinions and testimony that Respondent provided in the Divorce Litigation. (J.A. 34, 58-61)

II. HEARING, SUPPLEMENTAL BRIEFING, AND ORDER GRANTING DISMISSAL

The District Court entertained oral argument regarding Respondent's Motion on October 8, 2013. (J.A. 74) During oral argument, the parties discussed the duty issue and the immunity issue raised by Defendant's Motion. (See J.A. 88-89) The District Court was troubled that Respondent could owe a duty to someone who was

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never his patient. (J.A. 88-89 at 15:25 – 16:2 and J.A. 92-93 at 19:25 – 20:8)

Regarding the immunity issue, the District Court questioned why Appellant did not seek relief in the Divorce Proceedings by seeking to exclude Appellant as an expert witness or impeach his testimony, as well as seeking sanctions in that case. (J.A. 79-81 at 6:19 – 8:17) Appellant's Counsel agreed, stating "you're right" before attempting to explain why Appellant did not seek relief in the Divorce Proceedings. (J.A. 81 at 8:18)

Appellant's Counsel went on to argue that Respondent did not have absolute immunity in this case because absolute immunity only applies in defamation cases and Appellant's Counsel purposely chose to style Appellant's Complaint as one for medical malpractice rather than defamation because filing a claim for defamation would have been "skating close to the line in terms of the witness immunity." (J.A. 83-84 at 10:5 – 11:3) In other words, filing Appellant's Complaint as an action for medical malpractice was an attempt to circumvent the witness immunity privilege.

Appellant's Counsel also complained that the immunity issue was not raised until Respondent's reply brief. (J.A. 84-85 at 11:20 – 12:2) The District Court allowed the parties to submit supplemental briefing on the issue and took the matter under advisement. (J.A. 88 at 15:1-14)

One day after the hearing, Appellant filed her Supplemental Points and Authorities. (J.A. 97-100) Appellant also filed an Amended Complaint alleging the same causes of action for medical malpractice, intentional infliction of emotional

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distress, negligent infliction of emotional distress and civil conspiracy all derived from the same allegations concerning Appellant's psychiatric analysis. (J.A. 101-120) Respondent filed a Reply to Appellant's Supplemental Points and Authorities, and sought dismissal of Plaintiff's Amended Complaint with prejudice on the basis of absolutely immunity. (J.A. 121-133)

Upon review of the parties' supplemental briefing, the District Court granted Respondent's Motion to Dismiss in chambers on October 21, 2013. (J.A. 134-144) The District Court based its ruling on the grounds that absolute immunity extended to all causes of action against Respondent, including medical malpractice, intentional infliction of emotional distress, negligent infliction of emotional distress, and civil conspiracy because: (1) "[a]bsolute 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;" (2) "[w]itnesses in judicial pleadings are absolutely immune from suit based on their testimony;" and (3) 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. (J.A. 137-138)

SUMMARY OF ARGUMENT

The District Court's dismissal of Appellant's Complaint should be upheld because Respondent is immune from liability for opinions and testimony that he provided as an expert witness during the course of the Divorce Proceeding.

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Appellant has essentially asserted two arguments for reversal: (1) Nevada law purportedly limits witness immunity to causes of action and claims that derivatively depend on defamation; and (2) the facts of Bruce v. Byrne-Stevens, & Assocs. Engineers, 113 Wn.2d 123, 776 P.2d 666 (1989) are purportedly distinguishable from the facts of this case. (See Appellant's Opening Brief at 13:19-28)

Appellant's first argument is without merit because this Court has never expressly limited witness immunity to defamation claims and claims derivative of defamation, but even if it was inclined to do so, Respondent should still be protected by witness immunity here because the nature of this action is for defamation even though it was pleaded as one for medical malpractice. This Court has explained that "[t]he term 'action'...refers to the nature or subject matter and not to what the pleader says it is." Hartford Ins. Group v. Statewide Appliances, Inc., 87 Nev. 195, 198-99, 484 P.2d 569, 571 (1971).

The injuries alleged in Appellant's Complaint are defamatory injuries, not injuries resulting from medical care:

> 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.

(J.A. 3 at 3:6-9) (emphasis added).

Additionally, Appellant's Counsel openly admitted in court that he

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purposely chose to style Appellant's Complaint as one for medical malpractice rather than defamation because filing a claim for defamation would have been "skating close to the line in terms of the witness immunity." (J.A. 83-84 at 10:5 – 11:3) Filing Appellant's Complaint as an action for medical malpractice was an improper attempt to circumvent the witness immunity privilege.

Appellant's second argument is without merit because the facts of this case are analogous to the facts of Bruce: former litigants suing an expert witness. Appellant attempts to distinguish her case from Bruce by highlighting the fact that Appellant is suing her opponent's expert rather than her own expert as in Bruce. However, this fact actually presents a stronger need for witness immunity since Respondent was retained knowing that his testimony would be adverse to Appellant's case, and without the expectation of witness immunity, there could have been a greater chilling effect on Respondent's testimony (whereas the expert's testimony in Bruce would have less likely been chilled without the expectation of witness immunity since he was retained to support the litigants' case).

Finally, even though it was not addressed in the District Court's order granting Respondent's Motion to Dismiss, dismissal was also proper because Respondent did not owe a duty to Appellant, and thus could not be held liable for medical malpractice.

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LAW AND ARGUMENT

I. STANDARD OF REVIEW

An order granting dismissal pursuant to NRCP 12(b)(5) is reviewed *de novo*. Buzz Stew, LLC v. City of N. Las Vegas, 124 Nev. 224, 228 (2008). 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").

II. APPELLANT IS ENTITLED TO WITNESS IMMUNITY BECAUSE HE PROVIDED OPINIONS AND TESTIMONY AS AN EXPERT WITNESS DURING THE COURSE OF A JUDICIAL PROCEEDING

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)).

"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 interest to have litigants speak freely in pleadings and while testifying during a trial or hearing without fear of civil liability." Id., 115 Nev. at 219.

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). "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,

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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).

A. Nevada has Never Limited the Application of Witness Immunity to Defamation Cases and Causes of Action That Derivatively Depend on a Defamation Claim

Witness immunity in Nevada has generally been discussed in terms of "absolute immunity" and "absolute privilege." See Circus Circus Hotels, 99 Nev. 56; Sahara Gaming Corp., 115 Nev. 212; and Duff v. Lewis, 114 Nev. 564 (1998). See also Hampe v. Foote, 118 Nev. 405, 409 (2002) (overruled on other grounds) ("An absolute privilege is an immunity, which protects against even the threat that a court or jury will inquire into a communication"). This Court has granted "absolute privilege" to communications uttered or published in the course of judicial proceedings and quasi-judicial hearings, complaints filed with an internal affairs bureau against a police officer, letters written in anticipation of litigation, and formal pleadings. See Sahara Gaming Corp., 115 Nev. at 218.

However, there has not been a clear distinction drawn between the terms

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"witness immunity" and "judicial immunity." This Court has not expressly extended the application of "witness immunity" beyond defamation cases and causes of action derivative of defamation claims, but it has expressly extended the application of "judicial immunity" to professional negligence cases like the one at issue here.

Immunity was granted in Duff v. Lewis to a court-appointed psychologist who performed a psychological assessment of children and the parents of the children in connection with a custody proceeding.[1] Duff, 114 Nev. at 567. While testifying at the children's custody hearing, the psychologist recommended that the father temporarily lose custody of the children as well as his right to visitation, and the trial court adopted the psychologist's recommendations in its findings of fact and conclusions of law. Id. The father of the children then sued the psychologist for professional negligence and alleged that he was denied custody and forced to seek psychological care as a result of the psychologist's negligent psychological assessment.[2] Id. at 568. This was not a defamation case.

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[1] The psychologist's fees were to be jointly paid by the parents of the children. Id. at 567.

[2] Before the civil lawsuit was filed, the Nevada State Board of Psychological Examiners found that the psychologist's evaluation of the father was deficient, and as a result, issued discipline against the psychologist. Id. at 567-568.

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In granting immunity to the psychologist, this Court explained the following:

> 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 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 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 independent action; and (5) the existence of adequate procedural 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)).
>
> > These policy reasons apply equally to court-appointed officials such as psychologists and psychiatrists who assist the court in making decisions. Without immunity, 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 duties to aid the 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)).

Duff, 114 Nev. at 568-569 (emphasis added).

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Additionally, this Court articulated that:

> there are adequate procedural remedies and safeguards that hold court-appointed professionals accountable for their actions. First, and most obvious, is the adversarial process of cross-examination and the opportunity "to bring to the judge's attention any alleged deficiencies in the evaluation." *Lythgoe,* 884 P.2d at 1091. Second, "the complaining party is 'free to seek appellate review or . . . request a modification of the [trial court's] order.'" *Id.* (quoting *LaLonde v. Eissner*, 405 Mass. 207, 539 N.E.2d 538, 542 (Mass. 1989)). Third,
>
> > "although appellees would not be civilly liable for the consequences of their alleged negligent acts, the court is able to insure that its agents will be accountable for their conduct and actions. The court, in its discretion, has the authority to impose or recommend that numerous sanctions be imposed for negligent conduct. Some of the sanctions that could be imposed include appointing another doctor to serve on the panel, prohibiting the doctor from further service to the court and reporting that doctor's behavior to the medical boards for further action."
>
> *Id.* (quoting *Seibel,* 631 P.2d at 177 n.8.)).

Duff, 114 Nev. at 570-571.

The foregoing provides persuasive authority that the application of witness immunity should extend beyond defamation cases and causes of action derivative of defamation claims. In this case, the facts are only distinguishable from Duff in that the psychologist there was appointed by the trial court, whereas here, Respondent was retained by Appellant's adversary. The rationale for protecting a witness's testimony from liability, however, remains the same. Voluntarily retained witnesses should thus be afforded the same protections as court-appointed

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witnesses.

Therefore, the District Court did not err in granting Respondent's Motion to Dismiss since Respondent's opinions and testimony were rendered during the course of another judicial proceeding and were relevant to the proceeding.

B. The Nature of Appellant's Claim is Derivative of a Defamation Claim

Even if the Court was not inclined to grant a voluntarily retained witness the same scope of protection afforded to a court-appointed witness, Respondent should still be granted immunity because Appellant's claim is derivative of a defamation claim despite the fact that it was pleaded as a claim for medical malpractice.

"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) (emphasis added) (citing Hammett v. Hunter, 189 Okla. 455, 117 P.2d 511, 512 (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").

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Appellant concedes that absolute immunity applies to defamation cases and to other causes action that derivatively depend upon the alleged defamation (including, but not limited to, claims for intentional infliction of emotional distress, civil conspiracy, interference with contract, and interference with prospective economic damage). (See Appellant's Opening Breif at 15:3-26) In fact, Appellant's counsel admitted that he intentionally styled Appellant's complaint as a claim for medical malpractice rather than defamation because when he was researching the issues he realized a claim for defamation was "skating close to the line in terms of witness immunity." (See J.A. 83-84 at 10:5 – 11:3) Appellant admits the same in her Brief. (See Appelant's Opening Breif at 16:6-9) This is an improper attempt to circumvent the witness immunity privilege.

The injuries alleged in Appellant's Complaint are further evidence that Appellant has actually brought a defamation claim against Respondent. Appellant has alleged injury to her reputation. (J.A. 3 at 3:7) This is an injury resulting from defamation, not medical care. Appellant did not assert any injuries allegedly resulting from Respondent's medical care. Her artful pleading of medical malpractice is thus disingenuous.

As this Court has previously explained, "[t]he term 'action'…refers to the nature or subject matter and not to what the pleader says it is."[3] Hartford Ins.

[3] Although this Court was interpreting the term "action" within the context of NRS 11.190(3), there is nothing to suggest this interpretation would not apply equally when interpreting the term "action" in other contexts. See also Siragusa v. Brown,

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Group v. Statewide Appliances, Inc., 87 Nev. 195, 198-99, 484 P.2d 569, 571 (1971). This Court should thus look at the real purpose of the complaint, which in this case seeks recovery for injuries to Appellant's reputation, which is an action for defamation, or at the very least, is derivative of a defamation claim. To deny Respondent absolute immunity on the basis that Appellant pleaded medical malpractice rather than defamation "would truly exalt form over substance in disregard of reality," which is a result the Court has always disfavored. See Carrillo v. Valley Bank, 103 Nev. 157, 158 (1987).

Therefore, the District Court did not err in granting Respondent's Motion to Dismiss since the injuries alleged in Appellant's Complaint are defamatory injuries, not injuries resulting from medical care. (See Joint Appendix, hereinafter "J.A.", at 1-3)

C. The Facts of This Case are Analogous to the Facts in Bruce

The facts of this case are analogous to the facts of Bruce: former litigants suing an expert witness. Appellant attempts to distinguish her case from Bruce by highlighting the fact that Appellant is suing her opponent's expert rather than her own expert as in Bruce. (J.A. 2 at 2:11-14) However, this fact actually presents a stronger need for witness immunity since Respondent was retained knowing that

(continued)
114 Nev. 1384, 1391 n.5 (1998) (citing Hartford Ins. Group as basis for upholding the district court's finding that the gravamen off all plaintiff's claims alleged fraud or conspiracy despite pleading additional causes of action for conversion, intentional interference with contractual relations/prospective economic advantage, and prejudicing/defrauding a lien creditor).

his testimony would be adverse to Appellant's case, and without the expectation of witness immunity, there could have been a greater chilling effect on Respondent's testimony (whereas the expert's testimony in Bruce would have less likely been chilled without the expectation of witness immunity since he was retained to support the litigants' case).

Appellant also points out that at least one court did not follow Bruce reasoning that "the goal of ensuring the path to truth is unobstructed is not advanced by immuninizing an expert witness from his or her negligence in formulating that opinion." (See Appellant's Opening Brief at 18:7-15) Appellant's argument would again be more persuasive if she was suing her own expert since their interests would typically be aligned during litigation (as in Bruce) whereas immunity is designed to protect witnesses against retaliation from parties with adversarial interests (as in this case).

Therefore, the District Court did not err in granting Respondent's Motion to Dismiss since: (1) Bruce v. Byrne-Stevens, & Assocs. Engineers, 113 Wn.2d 123, 776 P.2d 666 (1989) provides persuasive authority; (2) Bruce held that "[w]itnesses in judicial pleadings are absolutely immune from suit based on their testimony"; and (3) the facts here are analogous to the facts in Bruce and actually present a stronger need for witness immunity than in Bruce.

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D. Other Considerations

1. Public policy favored dismissal

Strong public policy favored dismissal here. As this Court has explained, "[t]he policy underlying the [immunity] 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 Circus Hotels v. Witherspoon, 99 Nev. 56, 61 (Nev. 1983) (citing Ducosin v. Mott, 642 P.2d 1168 (Or. 1982); Fairbanks Pub. Co. v. Francisco, 390 P.2d 784 (Alaska 1964); Sampson v. Rumsey, 563 P.2d 506 (Kan.App. 1977)). See also Clark County Sch. Dist. v. Virtual Educ. Software, Inc., 125 Nev. 374, 383 (2009) ("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").

The Bruce court likewise explained that the "purpose of witness immunity is to preserve the integrity of the judicial process by encouraging full and frank testimony." Bruce, 113 Wn.2d at 126.[4]

[4] The Bruce court also discussed the public policy reasons behind extending witness immunity to retained expert witnesses:

> 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,

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(continued)

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 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 fact that Byrne was retained and compensated 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.

* * *

...[I]t 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 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

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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. While it may be that many 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 objective testimony, as stated in *Briscoe.*

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 dis-courage the 1-time expert -- the university professor, for example -- from 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 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

To have allowed Appellant's case to go forward against Respondent in the face of absolute witness immunity would have opened 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. Expert witnesses specifically would likely stop participating in the judicial process. Litigants would then lose the ability to explain complicated issues to lay jurors. This would be detrimental to the legal system and litigants' due process rights.

Therefore, the District Court did not err in granting Respondent's Motion to Dismiss since public policy favored dismissal.

2. Respondent did not owe any duty to Appellant

One of the grounds for Respondent's Motion was that Respondent did not owe any duty to Appellant since Respondent never had a physician-patient relationship with Appellant. The District Court did not address this issue in its order granting Respondent's Motion, but at the hearing on the Motion, the District

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(continued)

> 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, 113 Wn.2d at 126-131.

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Court was troubled that Respondent could owe a duty to someone who was never his patient. (J.A. 88-89 at 15:25 – 16:2 and J.A. 92-93 at 19:25 – 20:8)

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).

"A physician's duty is limited to those situations where a direct physician-patient relationship exists." Barnes v. Anyanwu, 391 Fed. Appx. 549, 551 (7th Cir. Ill. 2010). "Whether a physician owes a legal duty to a patient under a particular circumstance is a question of law. It is not a question of fact or of negligence. Absent the existence of a physician-patient relationship, there can be no liability for medical malpractice." Talavera v. Wiley, 725 F.3d 1262, 1269-1270 (10th Cir. Kan. 2013) (quoting Irvin v. Smith, 272 Kan. 112, 31 P.3d 934, 942 (Kan. 2001)).

In this case, it is undisputed that no physician-patient relationship existed. This prohibited Appellant from maintaining a medical malpractice claim against Respondent as a matter of law.

Therefore, even though it was not addressed in the District Court's order granting Respondent's Motion to Dismiss, dismissal was also proper because

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Respondent did not owe a duty to Appellant, and thus could not be held liable for medical malpractice.

3. Appellant's proper recourse was to seek relief in her Divorce Proceeding

If Appellant had any objections to Respondent's opinions and testimony in her Divorce Proceedings, her proper recourse was to seek relief in that proceeding. The District Court questioned why Appellant did not seek relief in the Divorce Proceedings by seeking to exclude Appellant as an expert witness or impeach his testimony, as well as seeking sanctions in that case. (J.A. 79-81 at 6:19 – 8:17) Appellant's Counsel agreed, stating "you're right" before attempting to explain why Appellant did not seek relief in the Divorce Proceedings. (J.A. 81 at 8:18)

Therefore, even though it was not stated as a basis for the District Court's order granting Respondent's Motion to Dismiss, dismissal was also proper because Appellant's proper recourse was to seek relief in her Divorce Proceeding.

CONCLUSION

In the instant matter, Respondent is immune from liability for opinions and testimony that he provided as an expert witness during the course of the Divorce Proceeding. This Court has never expressly limited witness immunity to defamation claims and claims derivative of defamation, but even if it was inclined to do so, Respondent should still be protected by witness immunity here because the nature of this action is for defamation (as evidenced by Appellant's allegation

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that Respondent injured her reputation) even though Appellant styled her Complaint as one for medical malpractice. Public policy also favored dismissal here, as well as other considerations discussed above. Therefore, this Court should uphold the District Court's dismissal of Appellant's Complaint.

DATED this 9TH day of July 2014.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

[X] It has been prepared in proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

2. I further certify that this brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is:

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3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not friviolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any of the transcript or appendix where the matter relied on is to be found.

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I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of this Nevada Rules of Appellate Procedure.

DATED this 9TH day of July 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of July 2014, I served a true and correct copy of the foregoing **RESPONDENT'S ANSWERING BRIEF** by electronic means was submitted electronically for filing and/or service with the Supreme Court of the State of Nevada, and in a sealed envelope, postage paid, by U.S. Postal Service, to the following individuals:

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