IN THE SUPREME COURT OF NEVADA

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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 REPLY BRIEF

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APPELLANT'S REPLY BRIEF

Appellant VIVIAN MARIE LEE HARRISON, by and through her attorney, JOHN OHLSON, and pursuant to NRAP 28 and NRAP 32, submits her Reply Brief, as follows:

I. OVERVIEW

Appellant Vivian Marie Lee Harrison ("Ms. Harrison") has appealed the district court's November 19, 2013, order dismissing her complaint against Respondent Norton A. Roitman, M.D. ("Dr. Roitman") for medical malpractice, negligent and intentional infliction of emotional distress, and civil conspiracy based upon the witness/immunity privilege as stated in *Bruce v. Byrne-Stevens & Assocs. Eng'rs, Inc.*, 113 Wash.2d 123, 776 P.2d 666 (1989). The central issue on appeal concerns whether a ***diagnosis and prognosis*** of Mr. Harrison by Dr. Roitman based solely on third party information and despite that he never met or saw Ms. Harrison in violation of the applicable standard of care is protected by the witness immunity doctrine. Ms. Harrison asserts that the witness immunity doctrine as stated in *Bruce* is not applicable to this case based the underlying principles for witness immunity that have been stated by this Court and because it is distinguishable on its facts and from the law in Nevada. Under Nevada law, witness immunity has been limited to causes of action for defamation and claims that derivatively depend on defamation, and does not bar a claim against an expert witness for professional malpractice. Based on Dr. Roitman's failure in this case to meet the standard of care required of psychiatrists to use reasonable care, skill, or knowledge ordinarily used under similar circumstances, witness immunity does not protect Dr. Roitman against a claim for medical malpractice. Thus, the district court erred by dismissing Ms. Harrison's complaint with prejudice based on its application of *Bruce* to this case.

In his Answering Brief, Dr. Roitman generally contends that he is entitled

to witness immunity because he provided opinions and testimony as an expert witness during the course of a judicial proceeding. Other than framing Ms. Harrison's medical malpractice cause of action as alleged by Ms. Harrison in her complaint (Answering Brief at 2:28-3:5), Dr. Roitman otherwise ignores the specific nature of his conduct that gave rise to the medical malpractice claim. To that end, Dr. Roitman re-characterizes his conduct with descriptors that are within the language of the witness privilege and highlights one of the injuries suffered by Ms. Harrison as an element of defamation. Moreover, Dr. Roitman simply ignores the authority cited by Ms. Harrison that is directly on point and determinative of her ability to assert a medical malpractice claim against Dr. Roitman under the circumstances of this case. Dr. Roitman's efforts to re-characterize his conduct in an effort to keep a laser-focus on the witness immunity doctrine in the context of a defamation claim and his failure to address the clear authority in favor of permitting Ms. Harrison to maintain her medical malpractice claim, however, does not change what this case is about.

This is not a defamation case and Dr. Roitman's conduct went beyond providing "opinions and testimony" that might otherwise be protected under witness immunity. This is a medical malpractice case that is based upon Dr. Roitman's unequivocal *diagnosis and prognosis* of Ms. Harrison in violation of the applicable standard of care as stated in NRS 41A.009 (defining medical malpractice as the failure of a physician, in rendering services, to use the reasonable care, skill or knowledge ordinarily used under similar circumstances) and that alleges injuries to and damages suffered by Ms. Harrison as a direct result of the malpractice. Thus, Dr. Roitman has failed to offer any applicable authority or analysis that would validate the district court's order dismissing Ms. Harrison's complaint.

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II. ARGUMENT

Because Dr. Roitman's diagnosis and prognosis of Ms. Harrison without ever having met or seen her and based solely on third party information in violation of the applicable standard of care is, as a matter of law, medical malpractice, it does not constitute "opinion and testimony" offered by an expert in litigation that is protected by the witness immunity doctrine. The statutory nature of Ms. Harrison's medical malpractice claim obviates consideration of the witness immunity doctrine. Thus, Ms. Harrison is entitled to an order reversing the district court's November 19, 2013, Order dismissing her complaint and remanding this case to be heard on its merits.

A. Because Dr. Roitman's Diagnosis and Prognosis of Ms. Harrison Without Ever Having Met or Seen Her and Based Solely on Third Party Information in Violation of the Applicable Standard of Care is, as a Matter of Law, Medical Malpractice, it Does Not Constitute "Opinion and Testimony" Offered by an Expert in Litigation That Would be Afforded Witness Immunity.

Dr. Roitman generally asserts that he is entitled to witness immunity because he provided "opinions and testimony" as an expert witness during the course of a judicial proceeding. In so doing, Dr. Roitman offers an overview and historical review of witness immunity, citing to the same Nevada cases and reciting the same verbiage offered by Ms. Harrison in her Opening Brief in reference to how witness immunity has been generally addressed by this Court. Dr. Roitman goes on to address witness immunity in the context of a defamation claim and as applicable to court-appointed experts, and to characterize Ms. Harrison's complaint as derivative of a defamation claim. Dr. Roitman also maintains the applicability of *Bruce* on its facts to this case, and offers other considerations as supporting the application of the witness immunity doctrine in this case such as public policy, Dr. Roitman's duty, and alternative recourse. Dr. Roitman's assertions, however, are nothing more than an effort to force a square

peg into a round hole. They do not overcome what this case is about or that the witness privilege doctrine does not, and cannot, be applied to evade liability for violating a statutory duty of care.

1. Nothing in the Duff v. Lewis *Opinion Overcomes Nevada's Historical Application of the Witness Immunity Doctrine to Defamation Cases.*

Despite asserting that this Court has never limited witness immunity to defamation cases and claims derivative of defamation, Dr. Roitman acknowledges that this Court has also never expressly extended the application of witness immunity beyond defamation cases and claims derivative of defamation. Answering Brief at 11:1-4. However, Dr. Roitman concludes that, based upon a the application of quasi-*judicial* immunity to a *court-appointed psychologist* in *Duff v. Lewis,* 114 Nev. 564, 958 P.2d 82 (1998), which concerned a claim of professional negligence, this Court intended to extend the witness immunity doctrine beyond defamation cases and claims derivative of defamation. Supporting that conclusion is Dr. Roitman's quotation of a large portion of the *Duff* opinion. *See* Answering Brief at 12-13. While Dr. Roitman highlights what distinguishes *Duff* from this case – the fact that the expert witness at issue was court-appointed rather than party-retained – he nevertheless suggests that it is distinction without a difference. That distinction, however, is ***precisely*** what sets *Duff* apart from and renders it inapplicable to this case.

Initially, Dr. Roitman's effort to blur the difference between judicial immunity and witness immunity is to no avail. Nowhere in *Duff* does this Court identify the immunity doctrine at issue as the "witness immunity" doctrine. Rather, what protected the court-appointed psychologist in *Duff* from a subsequent professional negligence suit by one of the parties was *quasi-judicial immunity* because that psychologist was appointed by the court to carry on *quasi-judicial duties*. *Duff,* 958 P.2d at 85-86. To that end, this Court extended the

absolute judicial immunity doctrine to those who are delegated judicial duties to aid the court. *Id., citing Seibel v. Kemble,* 63 Haw. 516, 631 P.2d 172, 180 (1981). Nowhere does this Court state, or even suggest, that the immunity granted to a court-appointed expert, who is a *neutral expert intended to assist the trier of fact*, is the same immunity would be afforded to party-retained expert witnesses, who is a *partisan witness intended to advocate a position for a party. See, i.e., Lambert v. Cargneghi,* 70 Cal.Rptr.3d 626, 644-645, 158 Cal.App. 4th 1120 (Cal.App. 2008) (explaining the differences, for purposes of immunity, between a court-appointed witness and an expert retained by a party).[1]

Moreover, that *Duff* concerned a professional negligence claim had nothing to do with the basis of this Court's opinion. On its face, and as just explained, the cornerstone of the *Duff* opinion was the fact that the psychologist being sued for professional negligence was court-appointed and, therefore, performing quasi-judicial functions that were entitled to immunity under a theory of *judicial* immunity that would also protect the judge in that case from suit. *Duff,* 958 P.2d at 86. Thus, because the nature of the underlying claim in the

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[1] The *Lambert* Court explained:

> "...we are not concerned that our refusal to extend the litigation privilege to a party's own expert will negatively impact the integrity of the judicial process. Again, ***experts retained by a party are partisan witnesses***, and we fail to see how permitting them to be sued would undermine the judicial process any more than permitting attorneys to be sued by their own clients. In this regard, ***an individually retained expert must be distinguished from a jointly retained, or court appointed, expert***. The litigation privilege has been held to apply to jointly retained or court-appointed experts. (E.g., *Ramalingam v. Thompson, supra,* 151 Cal.App.4th at p. 494, 60 Cal.Rptr.3d 11; *Gootee v. Lightner, supra,* 224 Cal.App.3d at p. 589, 274 Cal. Rptr. 697.) These neutral experts, whose testimony and opinions are intended to ***assist the trier of fact rather than to advocate a position for a party***, are arguably an integral part of the judicial process. We view their role in the judicial system as distinct from that of a partisan expert retained by an individual party and conclude that permitting individually and privately retained expert witnesses to be sued for their negligence will not undermine the judicial process."

Lambert, 70 Cal.Rptr.3d at 644-645 (emphasis added).

Duff case was irrelevant to the basis of this Court's opinion, *Duff* is inapposite to Dr. Roitman's conclusory assertion that Nevada's historical application of the witness privilege has not been limited to defamation cases.

2. Ms. Harrison's Complaint is one for Medical Malpractice, not Defamation or Any Other Claim Derivative of Defamation.

Dr. Roitman goes on to assert that, regardless of whether this Court extends the same immunity to an expert retained by a party as it does to court-appointed witnesses, the "nature" of Ms. Harrison's claim is derivative of a defamation claim and, therefore, obviated by the witness immunity doctrine. To that end, Dr. Roitman refers to one of Ms. Harrison's alleged injuries – the damage to her reputation to which she refers, *along with numerous other injuries and damages*, in her factual allegations (J.A. at 3, ¶ 14; 103, ¶ 14) – and equates that injury claim to a claim derivative of defamation. Dr. Roitman also suggests that because Ms. Harrison concedes the applicability of the witness immunity doctrine to defamation, her complaint is intentionally crafted to avoid a directly-stated defamation claim while maintaining that claim vis-à-vis her malpractice claim. Dr. Roitman, however, mischaracterizes the nature of Ms. Harrison's damages and her awareness of the witness immunity prohibition on a defamation claim or a cause of action derivative of defamation.

Ms. Harrison's complaint was not "artfully drafted" to cleverly get around witness immunity by asserting what is not there, and any suggestion by Dr. Roitman to the contrary is entirely unfair. What counsel for Ms. Harrison was acknowledging during the October 8, 2013, hearing before the district court was simply that Ms. Harrison could not maintain a defamation claim because of the witness immunity doctrine. J.A. at 83:24-85:6. To that end, and as reflected throughout the proceedings before the district court and this Court, there is no dispute that the witness immunity doctrine precludes a cause of action for or

claims derivative of defamation.

In this case, Ms. Harrison's complaint is drafted specifically in reference to Dr. Roitman's conduct that constitutes professional malpractice, and her cause of action for medical malpractice is based upon Nevada's statutory definition of malpractice.[2] That is, "the failure of a physician, ... in rendering services, to use the reasonable care, skill, or knowledge ordinarily used under similar circumstances." *Fernandez v. Admirand,* 108 Nev. 963, 968, 843 P.2d 354 (1992), *quoting* NRS 41A.009; J.A. at 3-4, 103-104. Contrary to his assertion, Dr. Roitman did not offer his "opinion and testimony" about Ms. Harrison in the Harrison litigation within the scope of what is protected by the witness immunity doctrine. Dr. Roitman's contribution to the Harrison litigation was an affirmative and definitive ***diagnosis*** of Ms. Harrison, and in solidifying that diagnosis, he rendered a ***prognosis*** specifically tailored to his diagnosis. J.A. at 2, 102, 113, 118-119 -120, 136. In providing his diagnosis and prognosis of Ms. Harrison, however, he failed to use the reasonable care, skill, or knowledge ordinarily used under similar circumstances because he gave that diagnosis and prognosis without ever having met or seen Ms. Harrison and based solely upon third party information. J.A. at 10-19, 111-120. Thus, this case has nothing to do with the protected "opinion and testimony" of an expert witness for which the witness immunity doctrine would otherwise be applicable.

Indeed, Dr. Roitman's diagnosis and prognosis of Ms. Harrison in the context of the Harrison litigation ***was incorrect*** (J.A. at 15-19, 116-120) and resulted in substantial damage and injury to Ms. Harrison, all of which were alleged in her complaint as they related to her cause of action for medical

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[2] Ms. Harrison's causes of action for negligent and intention emotional distress and civil conspiracy (J.A. at 4-7, 104-107) are necessarily attendant to her medical malpractice claim.

malpractice and the attendant claims.[3] J.A. at 4-7, 104-107 (Ms. Harrison suffered actual and special injury and damages in excess of $10,000, including emotional and physical injury/illness and monetary damages in excess of $525,000.00). Contrary to Dr. Roitman's assertion, that Ms. Harrison included, among other things, injury to her reputation in her concluding factual allegations does not morph her cause of action for medical malpractice and attendant claims into a claim that is derivative of defamation. Rather, based on the nature of Dr. Roitman's malpractice – his diagnosis of Ms. Harrison as having a *mental health disease* from which she was unlikely to recover despite that he had never met or seen Ms. Harrison – is one that, among many other things, *necessarily* impacted Ms. Harrison's reputation. Unlike a diagnosis of disease in which one's physiology fails to function as it should (i.e., cancer or organ failure), which would have a more benign effect on the sufferer's reputation, the diagnosis of a mental health disease carries with it an unfortunate stigma that can be difficult to shed, especially when that diagnosis includes poor prognosis for recovery. In any event, that a passing reference is made to reputation injury in the context of the facts supporting a medical malpractice claim for which emotional distress damages are sought does not render Ms. Harrison's complaint anything other than what it is – a complaint for medical malpractice and attendant claims based

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[3] *See Fernandez*, 108 Nev. at 968-9 (in order to establish a claim for medical malpractice, the claimant must prove 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), *citing Orcutt v. Miller*, 95 Nev. 408, 411, 595 P.2d 1191, 1193 (1979); *see also* NRS 41A.100, which states:

> "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...."

upon a diagnosis and prognosis by Dr. Roitman in violation of the applicable standard of care. Given the plain language of Ms. Harrison's complaint, the statutory nature of medical malpractice claims, and the liberal construction afforded to by Nevada's courts to pleadings that place into issue matters that are fairly noticed to the adverse party (*Hay v. Hay,* 100 Nev. 196, 198, 678 P.2d 672, 674 (1984); NRCP 8(a)), Ms. Harrison has stated a cause of action for medical malpractice and for claims attendant to that cause of action that do not include consideration of a claim derivative of defamation.

3. On its Face and as Addressed by Other Courts, Bruce is Not Applicable this Case.

In defending his reliance on *Bruce* as the applicable authority in this case, Dr. Roitman contends that Ms. Harrison's efforts to distinguish *Bruce* from this case – claims against the party's own expert witness (as in *Bruce*) as opposed to the opposing party's expert witness (the issue in this case) – presents a stronger need for witness immunity because Ms. Harrison knew Dr. Roitman was retained knowing his testimony would be adverse to her. Dr. Roitman's assertion, however, is entirely conclusory and without any supporting authority. More importantly, Dr. Roitman completely ignores the *overall* challenge by Ms. Harrison to the district court's reliance on *Bruce* based both on the prevailing and contrary view by other courts and the dissent in *Bruce* (*Bruce,* 113 Wn.2d at 138; J.A. at 71-73), and based on the unique and specific factual and legal issues that were addressed in *James v. Brown,* 637 S.W.2d 914 (Tex. 1982) that are directly applicable to this case.

In shining a light on the general fallacy of the *Bruce* decision, Ms. Harrison specifically cited *Murphy v. A.A. Mathews, a Division of CRS Group Engineers, Inc.,* 841 S.W.2d 671, 678 (1992) as identifying *Bruce* as a minority and non-persuasive opinion – a point acknowledged by Dr. Roitman. *See*

Answering Brief at 17:8-12. Indeed, *Murphy* represents the same sentiment of other courts that have criticized and disagreed with *Bruce*. *See, i.e., Lambert, supra,* 70 Cal.Rptr.3d at 642 (*Bruce* represents a minority view on the applicability of witness immunity to a party's own witness; the majority view – that witness immunity does not bar a professional negligence/malpractice action against a party's expert witness – is the better reasoned approach on the issue) and *Marrogi v. Howard,* 805 So.2d 1118, 1131 (La. 2002) (identifying *Bruce* as the minority view in agreeing with the majority of other courts that a retained expert's failure to provide competent litigation support services are not barred by witness immunity). By failing to offer any authority in response to that prevailing view or that otherwise validates the *Bruce* holding can be considered a tacit admission by Dr. Roitman that *Bruce* does not have the broad, or even limited, applicability the district court found it to have in this case. Thus, there is essentially no dispute that *Bruce* does not concern facts that are at issue in this case – a medical malpractice claim against the adverse party's expert witness – or that it is a decision that has been specifically identified as a minority view and unpersuasive, even by some of the members of the very Court that rendered the decision (*Bruce,* 113 Wn.2d at 138-142, 776 P.2d at 674-676 (dissenting opinion)).

What is left after disposing of Dr. Roitman's efforts to breathe life into the factual applicability of *Bruce* to this case is his contention that the facts in this case – a claim against an expert witness hired by the opposing party – presents an even stronger need for witness immunity than what was considered in *Bruce.* Dr. Roitman, however, offers no authority in support of his contention. Indeed, Dr. Roitman's unsupported position is one that is belied by compelling authority that was cited and analyzed by Ms. Harrison in her Opening Brief and that is specifically and directly applicable to this case (*see,* Opening Brief at 19-24,

addressing *James v. Brown,* 637 S.W.2d 914 (Tex. 1982) (medical malpractice claim against an adverse expert witness is not precluded by witness immunity)), but that was *completely ignored* by Dr. Roitman in his Answering Brief. Given the *unopposed* and determinative nature of the specific and compelling authority that permits Ms. Harrison's lawsuit against Dr. Roitman for medical malpractice, and based upon the importance of the distinction between lawsuits by a party against the party's own expert and the expert witness of the opposing party, Ms. Harrison defers discussion on this point to her final position, detailed in Subsection B, *infra.*

4. The Public Policy Supporting Witness Immunity Favors Ms. Harrison's Malpractice Case Against Dr. Roitman.

Dr. Roitman concludes that public policy favors dismissal of Ms. Harrison's medical malpractice claim based on the general policy underlying witness immunity, and offers a 2+ page footnote in which he quotes the public policy stated in *Bruce.* Answering Brief at 18-20. To that end, Dr. Roitman warns that if Ms. Harrison's case is allowed to go forward in the face of witness immunity, it would open the floodgates of litigation. Contrary to Dr. Roitman's conclusory assertion, and given the facts and statutory authority specific to this case, the public policy on which witness immunity is based provides a well-reasoned basis on which Ms. Harrison should be permitted to pursue her medical malpractice claim against Dr. Roitman.

As noted by Dr. Roitman in his lengthy footnote quotation of *Bruce* (Answering Brief at 18:24-26), witness immunity was based upon a general policy that required that the paths that lead to the ascertainment of ***truth*** (i.e., witness testimony) should be left free an unobstructed. *See Briscoe v. LaHue,* 460 U.S. 325, 333, 103 S.Ct. 1108 (1983). It is a policy that is intended to encourage candid, objective, and undistorted evidence to better enable the finder

of fact to ***uncover the truth***. *Id.* However, it is a policy that is not served when a witness purposely distorts evidence. *See, i.e., Matsuura v. EI Du Pont de Nemours and Co.*, 102 Haw. 149, 73 P.3d 687, 694 (2003) (fraudulent distortion of evidence is witness misconduct that is directly contrary to the policy of promoting candid, objective, and undistorted disclosure of evidence). Moreover, what the witness immunity doctrine does *not* state is that a licensed medical professional can be shielded from *malpractice,* as defined *by statute,* by knowingly and intentionally failing to use the reasonable care, skill, or knowledge ordinarily used under similar circumstances[4] (NRS 41A.009), and then hiding behind the protection of witness immunity. Indeed, and as more fully addressed in *James v. Brown,* 637 S.W.2d 914 (Tex. 1982) (*see* Subsection B, *infra*), the issue in this case is very fact-specific in reference to a medical professional's *statutory* duty of care, and does not have broader implications that would open the proverbial floodgates of litigation. Thus, public policy does not permit the witness immunity doctrine to preclude a cause of action for medical malpractice.

5. Under the Circumstances of This Case, Nevada Law Imposed on Dr. Roitman a Duty of Care to Ms. Harrison.

The statutory scheme governing medical malpractice cases in Nevada does not require a physician-patient relationship. Even if Nevada's medical malpractice statutes require a physician-patient relationship, it has been established by Dr. Roitman's conduct.

[4] Notably, at no time does Dr. Roitman take the position that he did not know that issuing a diagnosis and prognosis of someone he has never met or seen and based solely upon third party information would violate the statutory standard of care imposed on him under Nevada law.

a. Nevada's Statutory Scheme Governing Medical Malpractice Cases Does not Require a Physician-Patient Relationship.

In his initial motion to dismiss (J.A. at 30-38), Dr. Roitman asserted that he did not have a duty of care to Ms. Harrison because there was no physician-patient relationship between them (J.A. at 34). In response to that assertion, Ms. Harrison established Dr. Roitman's duty of care to her under Nevada law based upon the circumstances under which she based her medical malpractice claim. J.A. at 41-46. In his reply in support of his motion to dismiss, Dr. Roitman ignored Ms. Harrison's argument supporting his duty of care to her, instead focusing, for the first time, on the witness immunity doctrine and asserted that he had no duty to Ms. Harrison because enjoys witness immunity. J.A. at 55-62; 76. Despite that the sole issue on appeal in this case concerns the district court's conclusion that *Bruce, supra,* is the controlling authority on the witness immunity doctrine at issue in this case, Dr. Roitman now re-asserts his original contention that he had no duty of care to Ms. Harrison because there was no physician-patient relationship between them.

In support of his initial contention that he had no duty to Ms. Harrison, Dr. Roitman cited to *Fernandez v. Admirand,* 108 Nev. 963, 843 P.2d 354 (1992) as stating that a physician can only be liable for malpractice where he departed from the accepted standard of medical care in a manner that results in injury "...to their patient." J.A. at 34. Because *Fernandez* does not actually state what Dr. Roitman represented in his motion to dismiss (J.A. at 42), and despite that Dr. Roitman specifically conceded Ms. Harrison's contention that one can maintain a medical malpractice claim without a physician-patient relationship (J.A. at 89:4-7), Dr. Roitman has now changed the law on which he relies from Nevada, as stated in *Fernandez*, to Illinois and Kansas, as stated in *Barnes v. Anuanwu,* 391 F.App'x 549 (7th Cir. 2010) and *Talavera v. Wiley,* 725 F.3d 1262 (10th Cir. 2013). Dr. Roitman suggests that because case law in Illinois and Kansas

references the requirement of a physician-patient relationship in medical malpractice claims, it is so in Nevada as well. Dr. Roitman's reliance on cases from Illinois and Kansas, however, are misplaced.

In *Barnes v. Anuanwu, supra*, the court affirmed the dismissal of a negligent infliction of emotional distress claim where a prison medical director declined to provide an inmate with treatment because there was no treatment and, therefore, no physical impact (addressing the elements of a negligent infliction of emotional distress claim and a physician's duty in that context). *Barnes,* 391 F.App'x at 551-52 (7th Cir. 2010). In *Talavera v. Wiley, supra,* the Tenth Circuit cites to the common law in Kansas (*Irvin v. Smith,* 272 Kan. 112, 31 P.3d 934, 942 (2001) and *Adams v. Via Christi Reg'l Med. Ctr.*, 270 Kan. 824, 19 P.3d 132 (2001)) that generally requires a physician-patient relationship for medical malpractice liability. Those cases, however, neither address a statutory scheme for medical malpractice in either state nor reflect Nevada's statutory definition of malpractice.

As fully and comprehensively addressed by Ms. Harrison in her opposition to Dr. Roitman's motion to dismiss (J.A. at 41-46), *a position to which Dr. Roitman has yet to substantively respond*, Nevada's statutory scheme governing medical malpractice cases (NRS Chapter 41A) broadly defines medical malpractice and professional negligence.[5] 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

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[5] As stated above, NRS 41A.009 defines medical malpractice "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.015 defines 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 personal injury.

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, and nothing in the governing statutory definitions require a physician-patient relationship as a predicate to a medical malpractice claim.

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 (RCW) 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).

Ms. Harrison has asserted a general medical malpractice claim pursuant to the negligence principles applicable to NRS Chapter 41A because Dr. Roitman, a

licensed psychiatrist who diagnosed Ms. Harrison with narcissistic personality disorder and gave a poor prognosis for her recovery, 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 (*i.e.*, a psychiatrist being asked to render a psychological evaluation and diagnosis of someone he or she has never met or seen). *See* J.A. at 3, ¶ 16; 103 ¶ 16. According to the two psychiatric experts who have supported Ms. Harrison's medical malpractice claim, Dr. Roitman fell below the standard of care required of psychiatrists in his written diagnosis of Ms. Harrison and in the conclusions he reached about her because he had never met or seen Ms. Harrison, he never conducted an evaluation of Ms. Harrison, and reached his diagnosis and conclusions based solely on narratives provided to him by the adverse party to Ms. Harrison in the Harrison litigation. J.A. at 3, 10-19, 103, 111-120). Moreover, ***his diagnosis was incorrect***. J.A. at 8,119. Thus, under the circumstances of this case and the nature of Dr. Roitman's diagnosis and prognosis of Ms. Harrison, Dr. Roitman had a duty of care to Ms. Harrison that he breached.

b. To the Extent That a Physician-Patient Relationship is Required by Nevada's Statutory Scheme Governing Medical 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 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. *Mead,* 283 P.3d at 910. If the physician either knew or reasonably should have known 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...."). 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, knowing that it was information that would be considered and used against Ms. Harrison in a litigation to which she was a party.

6. Ms. Harrison's Complaint for Medical Malpractice is Independent of any Recourse That May Have Been Available to her in the Divorce Litigation.

Finally, Dr. Roitman contends that any objections Ms. Harrison had to his June 9, 2011, psychological report should have been raised in those proceedings and that her failure to do so constitutes additional grounds for dismissal. Dr. Roitman's contention, however, ignores that Ms. Harrison *did* challenge the diagnosis and conclusions by Dr. Roitman by virtue of undergoing a full clinical evaluation by Dr. Thienhaus (J.A. at 15-19, 116-120), who concluded that Ms. Harrison did not meet the diagnostic criteria for any mental disorder, and specifically, she did not have a personality disorder. J.A. at 17:25-18:6, 118:25-119:6. In fact, those efforts by Ms. Harrison to challenge and address the diagnosis and conclusions about her by Dr. Roitman that violated the applicable standard of care and *were incorrect* are part and parcel of her damages claim in this case. J.A. at 1-8, 101-108.

To the extent that Dr. Roitman maintains that Ms. Harrison should have

sought sanctions against Dr. Roitman and/or the opposing party in the Harrison litigation assumes that the proceedings in the Harrison litigation progressed to the point at which those additional efforts could have been undertaken. In response to Ms. Harrison's efforts to overcome Dr. Roitman's psychological analysis and diagnosis of her by having her own independent psychological evaluation conducted, the opposing party in the Harrison litigation simply abandoned the position he took based on Dr. Roitman's analysis and diagnosis. As a consequence, the issues that were being litigated as they related to Dr. Roitman's report resolved in response to Dr. Thienhaus's evaluation. The resolution of those issues, however, did not eradicate the damage that was done to Ms. Harrison personally and in the Harrison litigation by Dr. Roitman's June 9, 2011, psychological evaluation and diagnosis of her, and it would have been entirely improper for Ms. Harrison to assert a medical malpractice cause of action against Dr. Roitman in the context of the Harrison litigation. Indeed, and as more fully explained below, Dr. Roitman's incorrect diagnosis and prognosis of Ms. Harrison in the Harrison litigation did not obviate Ms. Harrison's independent and viable cause of action against him for medical malpractice.

In any event, because the issues that were created in the Harrison litigation by Dr. Roitman's June 9, 2011, psychological evaluation of Ms. Harrison dissipated upon the responding psychological evaluation of Ms. Harrison by Dr. Thienhaus, there was no opportunity by Ms. Harrison to confront Dr. Roitman by way of cross examination or other similar challenge. Rather, the issues that were created in the Harrison litigation by Dr. Roitman's June 9, 2011, report came into existence on an *ex parte* basis and without a hearing or an opportunity for an in-court challenge by Ms. Harrison to the basis on which Dr. Roitman diagnosed her.[6] Once the opposing party in the Harrison litigation abandoned the position

[6] Indeed, when an evaluation of an expert witness is used to alter a party's position in a divorce/custody matter, due process requires that a motion supported by

he had taken based on Dr. Roitman's diagnosis of Ms. Harrison, there was no reason for Ms. Harrison to continue to highlight the fallacy of Dr. Roitman's report in the context of that case in favor of her independent claim against him for medical malpractice. For her to do so would have only unnecessarily increased the cost of the Harrison litigation and, therefore, her damages in this case. Thus, that Ms. Harrison did not further challenge Dr. Roitman in the Harrison litigation does not obviate her separate cause of action for medical malpractice.

B. The Statutory Nature of Ms. Harrison's Medical Malpractice Claim Obviates Consideration of the Witness Immunity Doctrine.

As noted above, one of the primary positions taken by Ms. Harrison in her Opening Brief is that, pursuant to the analysis and holding of *James v. Brown,* 637 S.W.2d 914 (Tex. 1982) (a medical malpractice claim against an expert witness who had been *adverse* to the plaintiff in the underlying proceedings was appropriate based on the statutory nature of her negligent misdiagnosis/medical malpractice claim), the witness immunity doctrine did not preclude her from suing Dr. Roitman for medical malpractice pursuant to NRS 41A.009 and 41A.100. *See* Opening Brief at 19-24 (Subsection C). As also noted above, it is a position and a case that was completely ignored by Dr. Roitman in his answering brief. Dr. Roitman's failure to mention or address that issue and its supporting authority, however, does not make it go away. Rather, the failure of Dr. Roitman's answering brief to address one of the most significant issues raised by Ms. Harrison in her opening brief is essentially a tacit admission to its validity. *See Polk v. State,* 126 Nev. ___ (Adv. Op. No. 19), 233 P.3d 357, 359-

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an expert opinion should generally not be decided *ex parte* or without a hearing such that a court can rely on a medical diagnosis that is made in violation of medical ethics and the standard of care. To that end, the witness privilege should only be applicable to a qualifying expert opinion if that expert testifies about his or her opinion in open court and is subject to cross examination.

60 (2010) (the failure of a party's answering brief to address a significant issue raised in the appeal constitutes a confession of error), *citing Bates v. Chronister,* 100 Nev. 675, 681-81, 691 P.2d 865, 870 (1984) and *Barry v. Lindner,* 119 Nev. 661, 671-72, 81 P.3d 537, 543-44 (2003) (this Court expects all appeals to be pursued with high standards of diligence, professionalism, and competence, and impresses on the members of the bar its resolve to end lackadaisical appellate practices); *see also* NRAP 31(d).

Notwithstanding the fallacy of the points made by Dr. Roitman in his answering brief, the reasoning and holding of *James v. Brown, supra,* as raised by Ms. Harrison in her opening brief, is deeply compelling, if not dispositive, in this case. It is a case that has been consistently cited for the very specific factual basis on which it was decided – the statutory basis of a professional negligence/medical malpractice claim against an adverse expert witness. *See, i.e., Davis ex. rel. Davis v. Wallace,* 211 W.Va. 264, n. 2, 565 S.E.2d 386, n.2 (W.Va. 2002) (citing *James* as a case in which the adverse expert-witness psychiatrist owed a statutory duty of care to the plaintiff); *Davis, supra* 565 S.E.2d at 393 (dissenting opinion also citing to the statutory basis for the plaintiff's lawsuit in *James* against the adverse expert witness in the underlying case); *Murphy, supra,* 841 S.W.2d at 679 (explaining that the *James* decision hinged on a statute permitting a professional negligence claim). Indeed, it should not be unreasonable for a litigant to expect an adverse expert witness to observe the same standard of care applicable outside the context of litigation services. *Davis,* 565 S.E.2d at 391, *quoting* W. Raley Alford, III, Comment, *The Biased Expert Witness in Louisiana Tort Law: Existing Mechanisms of Control and Proposals for Change,* 61 La. L.Rev. 18 (2000). The *James* case, both by its holding and reasoning and as it is described by other courts, is precisely what is at issue in this case. Ms. Harrison is suing Dr. Roitman for medical malpractice

pursuant to Nevada's statutory scheme defining medical malpractice and governing medical malpractice actions. Ms. Harrison's claims are based on Dr. Roitman's failure, in rendering his services, to use the reasonable care, skill or knowledge ordinarily used under similar circumstances by *diagnosing* her with a mental health disease and stating a poor prognosis for recovery based solely on third party information and without ever having met or seen her. NRS 41A.009; J.A. at 1-19, 101-120. Under these circumstances, and given the specific nature of Dr. Roitman's conduct in the Harrison litigation at it concerns Ms. Harrison, the witness immunity doctrine cannot be used to shield a statutory medical malpractice claim. *James, supra.* Thus, the district court erred by dismissing Ms. Harrison's medical malpractice claim against Dr. Roitman based on the witness immunity doctrine.

III. CONCLUSION

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

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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

2. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7)(A)(ii) because, excluding the parts of the brief

exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and, including footnotes, contains 7,130 words (NRAP 32(a)(7)(A)(ii) (requiring that a reply brief not exceed 7,500 words).

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

DATED July 29th, 2014.

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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 **APPELLANT'S REPLY 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 July 29th, 2014.

/s/ Rob May
Rob May