

No. 69381

District Court No. A-15-714007-C

IN THE SUPRME COURT OF THE STATE OF NEVADA

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LARRY L. BERTSCH; AND LARRY L. BERTSCH CPA & ASSOCIATES

Petitioner,

v.

THE HONORABLE KENNETH CORY, DISTRICT COURT JUDGE,
EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR
COUNTY OF CLARK,

Respondent,

and

JAY BLOOM,

Real Party in Interest.

REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

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I. INTRODUCTION

COMES NOW, Petitioners, Larry L. Bertsch and Larry L. Bertsch CPA & Associates (“Special Master Bertsch”), through counsel, Adam Paul Laxalt, Attorney General of the State of Nevada, Frederick J. Perdomo, Senior Deputy Attorney General, and James R. Rosenberger of James R. Rosenberger Chtd. and hereby submit the following Reply in support of Petition for Writ of Mandamus pursuant to Nevada Rule of Appellate Procedure 21, NRS 34.150 through 34.310, and this Court’s Order, dated January 13, 2016. Special Master Bertsch requests that this Court issue a writ of mandamus directed to the Honorable District Court Judge Kenneth Cory ordering his Honor to find that Special Master Bertsch is entitled to absolute quasi-judicial immunity from suit in the underlying action *Jay Bloom v. Larry L. Bertsch, et al.*, Eighth Judicial District Court Case Number A-15-714007-C and further ordering his Honor to dismiss the action in its entirety on this basis.

II. STATEMENT OF ISSUES PRESENTED

1. Whether the record demonstrates that Special Master Bertsch was appointed to and did in fact take actions that were functionally comparable to a judicial officer or court appointed professional in a typical litigation setting which was adversarial in nature and which had potential procedural safeguards and remedies in place to ensure the constitutionality and integrity of that process.
2. Whether there is legal or policy support for Bloom’s arguments that the District Court and this Court should adopt a new exception to absolute judicial immunity

from a provision in the Order of Appointment that is, at best, ambiguous as to its application.

III. THERE IS NO SUPPORT IN THE RECORD FOR ANY OF BLOOM’S CONTENTIONS THAT THE FUNCTIONAL APPROACH IS INAPPLICABLE TO THE ALLEGED CONDUCT CHALLENGED IN THE UNDERLYING DISTRICT COURT ACTION AND THERE IS NO LEGAL, POLICY, OR JURISDICTIONAL BASIS FOR THE DISTRICT COURT TO RECOGNIZE A NEW EXCEPTION TO ABSOLUTE JUDICIAL IMMUNITY.

A. The Application of Absolute Immunity in this Case is Solely Judged by the Nature of the Acts Special Master Bertsch Performed in the Vion Litigation and Whether Those Acts Conformed to the Order of Appointment.

“The common law doctrine of absolute immunity extends to all person[s] who are an integral part of the judicial process.” *Duff v. Lewis*, 114 Nev. 564, 568, 958 P.2d 82, 85 (1998). “[A]bsolute immunity defeats a suit at the outset of litigation as long as the official’s actions were within the scope of immunity . . .” *State v. District Court*, 118 Nev. 609, 615, n.9, 55 P.3d 420, 423, n. 9 (2002).

The “functional approach” is used to determine whether a non-judicial actor is performing functions similar to a judge and is entitled to the judge’s immunity.

The “functional approach” takes into consideration various factors including: whether the individual is performing many of the same functions as a judicial officer, whether there are procedural safeguards in place similar to a traditional court, whether the process or proceeding is adversarial, the ability to correct errors on appeal, and whether there are any protective measures to ensure the constitutionality of the individual’s conduct and to guard against political influences.

Marvin v. Fitch, 126 Nev. Ad. Op. 18, 232 P.3d 425, 429-430 (2010). Special Master Bertsch previously argued that he is entitled to absolute quasi-judicial immunity because

he exercised discretionary judgment as part of his function as special master in the Vion Litigation. Bloom, without any citation to the record, suggests that Special Master Bertsch's role in the Vion Litigation was more akin to an expert or technician, a receiver, an accountant, or independent contractor. (Answer, p. 22). Bloom offers no explanation as to why this Court should accept his position when the Vion Court previously examined and rejected similar arguments and specifically ruled that Special Master Bertsch was not to be treated as an expert witness for any purpose in that case and that he assumed the duties and obligations of a judicial officer when he accepted appointment as special master. (PA Vol. II 0348-49).

Regardless, even Bloom's attempt to minimize Special Master Bertsch's role in the Vion Litigation does not afford him relief, as this Court has found that receivers, expert witnesses, and court appointed professionals, like a psychologist, are generally entitled to absolute immunity. *See e.g. Duff*, 114 Nev. at 571 (granting absolute immunity to a court appointed psychologist); *Anes v. Crown Partnership, Inc.*, 113 Nev. 195, 201, 932 P.2d 1067, 1071 (1997) (recognizing absolute immunity for a court appointed receiver); *Harrison v. Roitman*, 131 Nev. Ad. Op. 92, 362 P.3d 1138, 1139-43 (2015) (granting absolute immunity to a party retained expert witness). With little doubt, a special master, who is an arm of the court, is entitled to the same, if not more, protection from personal liability.

This result is supported through application of the "functional approach" test. As Special Master Bertsch previously pointed out, he was directed by the Vion Court to

provide an accounting consisting of his findings related to all transactions of cash flow, assets, and capital investments of Murder Inc. and any movement of Murder Inc.’s assets that were inconsistent with the rights of Merchant Cash Advance Agreements executed by the Plaintiffs, Bloom and Murder Inc. on February 25 and March 14, 2011. (PA Vol. I 0060–61). In addition, Special Master Bertsch was directed to conduct “a forensic accounting of Murder Inc.’s accounting records, so as to determine their accuracy and veracity.” (*Id.*). Vion, the party that moved for Special Master Bertsch’s appointment, requested that Special Master Bertsch “be granted possession and powers over all corporate books and records in order to perform a thorough accounting.” (PA Vol. I 0051). In addition, Vion requested that Special Master Bertsch “prepare a report documenting the various transactions involving Murder Inc.’s assets and whether those transactions were legitimate.” (PA Vol. I 0051–52).

Bloom’s brief completely ignores the nature of the acts Special Master Bertsch performed in the Vion Litigation, and, instead, attempts to circumvent Special Master Bertsch’s immunity by resorting to labels over substance. However, this issue must be resolved by identifying the functions that Special Master Bertsch performed in the Vion Litigation that are ““comparable to those [persons] who have traditionally been afforded absolute immunity at common law.”” *Harrison*, 362 P.3d at 1140 (quoting *District Court*, 118 Nev. at 616). In *Duff*, this Court granted absolute immunity to a court appointed psychologist because ““(1) at least to some extent, his evaluations and recommendations aided the trial court in determining child custody, and (2) his services

were performed pursuant to court order.’” *Duff*, 114 Nev. at 571 (quoting *Lavit v. Superior Ct.*, 839 P.2d 1141, 1146 (Ariz. App. 1992)). In *Atkinson-Baker & Assoc., Inc. v. Kolts*, the Ninth Circuit granted absolute immunity to a special master because he exercised discretionary judgment as part of his function. *Atkinson-Baker & Assoc., Inc. v. Kolts*, 7 F.3d 1452, 1454-55 (9th Cir. 1993).

In the Vion Litigation, Special Master Bertsch’s services were performed in accordance with the Order of Appointment. Under that Order, he was directed by the Vion Court to receive evidence related to cash flow, assets, capital investments, and accounting records of Murder Inc.; to analyze that evidence; and to draft a written report consisting of findings related to the legitimacy and veracity of these business transactions. Such analysis invariably requires discretionary judgment. The Final Report of Special Master was generated to assist the Vion Court in making determinations of law and fact at trial, and could have been used by either party as persuasive evidence for that purpose. (PA Vol. II 0249). Accordingly, Special Master Bertsch performed functions that were comparable to persons that have been traditionally granted immunity under either an analysis geared toward a court appointed professional or a special master appointed under Rule 53.

In addition, Special Master Bertsch’s actions took place in a traditional litigation setting. As the *Duff* Court recognized, there are procedural remedies and safeguards to hold court appointed professionals accountable for their actions, which include “the adversarial process of cross examination and the opportunity ‘to bring the judges

attention to the deficiencies in the evaluation.”” *Duff*, 114 Nev. at 571 (quoting *Lythgoe v. Guinn*, 884 P.2d 1085, 1091 (Ak. 1994)). The *Duff* Court also recognized that ““the complaining party is “free to seek appellate review or . . . request a modification of the [trial court’s] order.””” *Id.* (quoting *Lythgoe* , 884 P.2d at 1091; *LaLonde v. Eissner*, 539 N.E.2d 538, 542 (Mass. 1989)). In addition, the court has discretion and authority to hold these agents accountable for their acts by imposing sanctions.

Although [the agent] 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 [agent] to serve . . . , prohibiting the [agent] from further service to the court and reporting that [agent’s] behavior to the [professional board] for further action.

Id. (quoting *Seibel v. Kemble*, 631 P.2d 173, 177 n. 8 (Haw. 1981)).

While Bloom argues that Special Master Bertsch was not subjected to the adversarial process, the functional approach only examines whether there were processes available to Bloom to challenge perceived errors in the formulation and content of the Final Report of Special Master. (Answer, p. 23). Since Special Master Bertsch’s alleged actions were taken in a traditional court setting all of the aforementioned remedies were available to Bloom. Bloom’s choice to settle the case as opposed to utilizing these remedies does not undermine the integrity or call into question the constitutionality of the adversarial process in the Vion Litigation.

Finally, there are two recognized exceptions to judicial immunity. Generally, judges may be held liable for acts that are not judicial in nature or acts, though judicial in nature, that are “taken in complete absence of all jurisdiction.” *Mireles v. Waco*, 502 U.S. 9, 11-12 (1991). In Nevada, the jurisdiction of a court appointed officer is defined by the order of appointment. To this end, if a court appointed officer “faithfully and carefully carries out the order of the appointing judge’ [he or she] shares the judge’s judicial immunity.” *Anes*, 113 Nev. at 201 (quoting *Kermit Const. v. Banco Credito Y Ahorro Ponceno*, 547 F.2d 1, 3 (1st Cir. 1976)). On the other hand, a court appointed officer may be personally liable if he or she acts outside the authority granted by the court. *Id.* at 202. However, “[j]udicial immunity is not overcome by allegations of bad faith or malice, the existence of which ordinarily cannot be resolved without engaging in discovery and eventual trial.” *Mireles*, 502 U.S. at 11. Moreover, judicial immunity is not pierced by allegations of corruption. *Pierson v. Ray*, 386 U.S. 547, 554 (1967); *see also, Ashelman v. Pope*, 793 F.2d 1072, 1078 (9th Cir. 1986) (“[A] conspiracy between a judge and prosecutor to predetermine the outcome of a judicial proceeding, while clearly improper, nevertheless does not pierce the immunity extended to judges and prosecutors.”); *Nystedt v. Nigro*, 700 F.3d 25, 31 (1st Cir. 2012) (Ex parte contact between a discovery master and a party, without more, does not establish that the nature of the communication was not inextricably intertwined with the judicial function. “The fact that a court appointed discovery master performs a judicial function in an imperfect (or even unethical) way does not, by itself, dissolve his quasi-judicial immunity.”).

On this issue, Bloom's arguments once again focus on the ethics of and intention behind Special Master Bertsch's alleged acts and not the nature of the alleged acts. In particular, Bloom argues that Special Master Bertsch acted outside the scope of his jurisdiction and authority by allegedly colluding and engaging in ex parte communications with Vion and Vion's counsel. (Answer p. 25). However, Bloom's claims pertain to alleged acts committed by Special Master Bertsch in formulating the Final Report of Special Master, which Bloom cannot dispute was the objective of Special Master Bertsch's appointment. As described above, allegations of unethical conduct and malicious activity, without more, are not sufficient to establish that Special Master Bertsch acted in complete absence of jurisdiction and authority in the Vion Litigation. Therefore, absolute immunity applies in spite of any factual dispute related to allegedly unethical or malicious conduct.

Furthermore, Bloom does not dispute that the allegations in the underlying action are similar to the allegations and arguments asserted in Bloom's "Motion to Disqualify Larry Bertsch as Special Master, Strike the Special Master's Reports from the Record, and for Monetary Sanctions." In denying Bloom's motion, the Vion Court specifically found (1) that Special Master Bertsch was a fair, impartial, unbiased and highly skilled forensic accountant, and the matters in this case to which the Court made its referenced are in his area of expertise; and (2) that Special Master Bertsch complied in all respects with the Order appointing him as Special Master in the Vion Litigation. (PA Vol. II 0248-49). Given these findings by the Vion Court, there is no basis to find that Special

Master Bertsch took any action that was in complete absence of his jurisdiction or authority in the Vion Litigation.

For these reasons, Special Master Bertsch is entitled to absolute immunity. His actions were functionally comparable to other actors that have been granted absolute immunity, procedural safeguards and remedies were available to Bloom to challenge Special Master Bertsch's alleged actions and findings in the Vion Litigation, and Bloom's salacious allegations, without more, are insufficient to fall within a recognized exception to this defense.

B. Bloom Has Not Cited Any Authority Establishing that the Alleged Waiver of Immunity in the Order of Appointment is Legally Enforceable or Reviewable in the Underlying Action.

In the underlying action, the Petition, and this brief, Special Master Bertsch has shown that he is entitled to absolute quasi-judicial immunity. Bloom does not dispute that absolute immunity bars both claims for monetary and equitable relief. Under these circumstances, the District Court is required to dismiss the underlying action in its entirety. *See Int'l Game Tech., Inc. v. District Court*, 124 Nev. 193, 197, 179 P.3d 556, 559 (2008).

Recognizing the dispositive nature of this defense, Bloom argues that Special Master Bertsch's absolute quasi-judicial immunity was partially waived in the Vion Court's Order of Appointment. (Answer, pp. 14-20). The relevant provision in the Order of Appointment provides as follows: "[t]he Special Master shall not be personally liable to any party for acts taken pursuant to the Special Mastership, except in the event

of the Special Master's gross negligence, fraud or willful misconduct.” (PA Vol. I 0063). As described above, there are two recognized exceptions to absolute judicial immunity. Under Bloom's interpretation of this provision, Special Master Bertsch would be subject to personal liability for alleged acts constituting gross negligence, fraud, or willful misconduct, even if they were judicial in nature and committed within Special Master Bertsch's jurisdiction and authority in the Vion Litigation. In other words, Bloom argues that absolute immunity is subject to an additional exception, waiver. However, as Bloom concedes, no court in this State, other than allegedly the Vion Court, and no known court in this country, has recognized waiver as an exception to absolute judicial and quasi-judicial immunity. (Answer, pp. 16-17).

In spite of having no legal support for his position, Bloom still argues that the District Court was bound by his expansive interpretation of this provision. (Answer, p. 17). In this State, District Courts have coequal and coextensive jurisdiction and power; therefore, one District Court Judge cannot issue an order that binds another District Court Judge. *See* NRS 3.220 (“The district court judges shall possess equal coextensive and concurrent jurisdiction and power.”). Furthermore, it is axiomatic that a District Court Order is not binding on this Court based on the judicial hierarchy established in the Nevada Constitution. *See* Nev. Const. Art. 6, §§ 1, 4, 6. Therefore, contrary to Bloom's argument, this provision is not binding legal authority in this State.

Bloom has not offered any policy basis for this Court to recognize waiver as a potential third exception to absolute judicial immunity. Rather, Bloom offers short-sited

reasons as to why the underlying policies supporting absolute quasi-judicial immunity do not apply in this case and ignores the potential ripple effect of waiver on subsequent cases. (Answer, p. 19). According to the *Duff* Court, the underlying policy considerations for absolute immunity include (1) preventing harassment and intimidation of judges, advocates, and witnesses; (2) saving judicial time in defending suits; (3) bringing finality to disputes; (4) preventing lawsuits from deterring competent persons from taking office; (5) preventing lawsuits from discouraging independent action; and (6) encouraging litigants to use available procedural safeguards, such as appellate review, to seek relief. *Duff*, 114 Nev. at 569. The *Duff* Court recognized that these policy considerations apply with equal force to court appointed officials who assist the court in making decisions and who, without immunity, risk exposure to lawsuits whenever they perform quasi-judicial duties. *Id.*

There is reason to believe that each of these factors will be negatively impacted by a finding that absolute immunity is waivable. First, there can be no doubt that recognizing a third exception to absolute immunity will breed additional lawsuits seeking to hold, among others, judges, quasi-judicial officers, expert witnesses, and court-appointed professionals liable for acts committed within the scope of their jurisdiction and authority. Second, the possibility of waiver will assuredly deter qualified individuals from taking part in the judicial process, as litigants may seek waivers as part of an order of appointment or look for immunity waivers through in-court and out-of-court interactions during litigation. Alternatively, court appointed professionals, quasi-judicial

officers, and expert witnesses may raise their rates to account for additional exposure to personal liability, which could make their participation financially unfeasible. Third, litigants could use the threat of perceived waivers and potential personal liability to either coerce recusal or to discourage independent action. Finally, any increase in civil actions for personal liability against judges, quasi-judicial officers, expert witnesses, or court appointed professionals could unnecessarily delay final resolution of cases, undermine the procedural safeguards in place to challenge judicial action and decision making, and call into question valid and final decisions rendered in prior actions. For these reasons, there is little to no doubt that the underlying policies supporting absolute immunity will be negatively impacted if this Court recognizes waiver as an exception to this defense.

Furthermore, the subject provision cannot be enforced even if waiver is a valid exception to absolute immunity. As Special Master Bertsch previously argued, any waiver of this defense must be express and unequivocal, similar to a waiver of sovereign immunity under the Eleventh Amendment. *Sossamon v. Texas*, 563 U.S. 277, 284 (2011). Bloom does not offer any substantive opposition to this position. Instead, Bloom argues that the subject provision in the Order of Appointment is a clear waiver of immunity and that affording credence to Special Master Bertsch's alternative interpretation of the subject provision would require the Court to examine the underlying intent of the parties. (Answer, p. 18). However, the subject provision is not as clear as Bloom assumes it to be. On its face, the subject provision is not specific as to whether liability lies with acts committed within and/or without Special Master Bertsch's

jurisdiction and authority in the Vion Litigation. Accordingly, the subject provision could be read as limiting Special Master Bertsch's liability to three specific claims for quasi-judicial acts committed outside the scope of his jurisdiction and authority. Regardless of the parties or the Court's intent in drafting this provision, its ambiguity prevents the provision from effectuating a waiver under a standard that requires a waiver of immunity to be clearly and unequivocal expressed.

Finally, a significant question exists as to whether Bloom's request for application of waiver in the underlying action is jurisdictionally proper. In cases involving receivers, this Court has held that "[g]enerally, a receiver cannot be sued without leave of the appointing court." *Id.* at 200 (citing *Barnette v. Wells Fargo Nevada Nat. Bank*, 270 U.S. 438, 439 (1926)). "The purpose of the rule is to accommodate all claims possible in the receivership action under the supervision of the appointing court, and to render the receiver answerable solely to that court." *Id.* (citing *Vitug v. Griffin*, 214 Cal.App.3d 488, 493 (Cal. App. 1989)). Only "where the receiver acts beyond the scope of its court-derived authority such that it may be sued as an individual, leave of the court is unnecessary." *Id.* (citing 66 Am.Jur.2d *Receivers* § 465). Based on this precedent, if Bloom believed he had a viable action for gross negligence, fraud, or willful misconduct based on alleged quasi-judicial acts committed by Special Master Bertsch within the scope of his jurisdiction and authority, Bloom was required to seek leave of the Vion Court to bring such an action. Since Bloom has not sought leave of the Vion Court or otherwise been granted such leave, the underlying action is jurisdictionally improper to

the extent that it seeks to hold Special Master Bertsch liable for alleged acts committed within the course and scope of his jurisdiction and authority in the Vion Litigation and to the extent such an action is proper.

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IV. CONCLUSION

For the reasons stated in this Reply Brief and the Petition, Special Master Bertsch respectfully requests that this Court grant mandamus relief by declaring that Special Master Bertsch is entitled to absolute quasi-judicial immunity from suit and ordering the Honorable District Court Judge to dismiss the underlying action in its entirety on this basis.

RESPECTFULLY SUBMITTED this 29th day of February, 2016.

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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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word 10, in 14 pitch, Times New Roman.

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 either proportionately spaced, has a typeface of 14 points or more, and contains 3,660 words.

3. Finally, I hereby certify that I have read this reply 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

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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.

RESPECTFULLY SUBMITTED this 29th day of February, 2016.

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CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General, State of Nevada, and that on this 29th day of February, 2016, I caused to be deposited for mailing, a true and correct copy of the foregoing, **REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS**, to the following:

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