

CLERK OF THE COURT

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Elizabeth A. Brown
Clerk of Supreme Court

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Sean Fitzgerald*

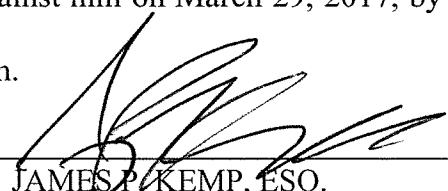
DISTRICT COURT
CLARK COUNTY, NEVADA

* * *

SEAN FITZGERALD,)	
)	Case No.: A-16-737119-C
)	
Plaintiff,)	Dept. No. XXXII
)	
vs.)	<u>NOTICE OF APPEAL</u>
)	
MOBILE BILLBOARDS, LLC, a Nevada)	
Limited Liability Company; VINCENT)	
BARTELLO, an individual; and DOES I)	
through X; and ROE BUSINESS ENTITIES I)	
through X, inclusive,)	
)	
Defendants.)	

NOTICE IS HEREBY GIVEN that the above-named Plaintiff, SEAN FITZGERALD, by and through his counsel of record, KEMP & KEMP, hereby appeals to the Supreme Court of Nevada from the Judgment entered against him on March 29, 2017, and the Order Granting Defendants' Motion to Dismiss entered against him on March 29, 2017, by the Eighth Judicial District Court in the above-captioned action.

DATED: April 6, 2017



JAMES P. KEMP, ESQ.
Nevada Bar No.: 6375
KEMP & KEMP

Attorney for Plaintiff Sean Fitzgerald


CERTIFICATE OF SERVICE

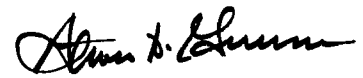
This is to certify that on the date indicated below, the undersigned deposited the within and foregoing NOTICE OF APPEAL document in the United States Mail at Las Vegas, Nevada, with postage fully prepaid thereon, addressed to the following persons or parties:

CARRIE E. HURTIK, ESQ.
RACHEL L. SHELSTAD, ESQ.
RACHEL A. SLOAN, ESQ.
HURTIK LAW & ASSOCIATES
7866 West Sahara Avenue
Las Vegas, NV 89117

Attorneys for Defendants Mobile Billboards and Vincent Bartello

Dated this 6th day of April, 2017.


An Employee of Kemp & Kemp



CLERK OF THE COURT

JAMES P. KEMP, ESQ.
Nevada Bar No.: 6375
VICTORIA L. NEAL, ESQ.
Nevada Bar No.: 13382
KEMP & KEMP
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jp@kemp-attorneys.com
vneal@kemp-attorneys.com

Attorneys for Plaintiff
Sean Fitzgerald

DISTRICT COURT
CLARK COUNTY, NEVADA

* * *

SEAN FITZGERALD,)	
)	Case No.: A-16-737119-C
)	
Plaintiff,)	Dept. No. 32
)	
vs.)	
)	
MOBILE BILLBOARDS, LLC, a Nevada)	
Limited Liability Company; VINCENT)	
BARTELLO, an individual; and DOES I)	
through X; and ROE BUSINESS ENTITIES I)	
through X, inclusive,)	
)	
Defendants.)	

CASE APPEAL STATEMENT

1. Name of appellant filing this case appeal statement: SEAN FITZGERALD.
2. Identify the judge issuing the decision, judgment, or order appealed from: HON. ROB BARE.
3. Identify all parties to the proceedings in the district court (the use of et al. to denote parties is prohibited): SEAN FITZGERALD, Plaintiff; MOBILE BILLBOARDS, LLC, and VINCENT BARTELLO, Defendants.

1 4. Identify all parties involved in this appeal (the use of et al. to denote parties is
2 prohibited): SEAN FITZGERALD, Plaintiff; MOBILE BILLBOARDS, LLC, and VINCENT
3 BARTELLO, Defendants.

4 5. Set forth the name, law firm, address, and telephone number of all counsel on appeal and
5 identify the party or parties whom they represent:

6 JAMES P. KEMP, ESQ.
7 VICTORIA L. NEAL, ESQ.
8 KEMP & KEMP
9 7435 W. Azure Drive, Ste 110
10 Las Vegas, NV 89130
11 702-258-1183 ph./702-258-6983 fax

12 Attorneys for Plaintiff/Appellant
13 Sean Fitzgerald

14 CARRIE E. HURTIK, ESQ.
15 RACHEL L. SHELSTAD, ESQ.
16 RACHEL A. SLOAN, ESQ.
17 HURTIK LAW & ASSOCIATES
18 7866 West Sahara Avenue
19 Las Vegas, NV 89117

20 Attorneys for Defendants
21 Mobile Billboards, LLC and Vincent Bartello/ Respondent

22 6. Indicate whether appellant was represented by appointed or retained counsel in the
23 district court: RETAINED COUNSEL.

24 7. Indicate whether appellant is represented by appointed or retained counsel on appeal:
25 RETAINED COUNSEL.

26 8. Indicate whether appellant was granted leave to proceed in forma pauperis, and the date
27 of entry of the district court order granting such leave: NOT APPLICABLE
28

1 9. Indicate the date the proceedings commenced in the district court (e.g., date complaint,
2 indictment, information, or petition was filed): COMPLAINT FILED ON May 20, 2016.

3 10. A brief description of the nature of the action and result in the district court, including
4 the type of judgment or order being appealed and the relief granted by the district court: This is an
5 appeal from the district court's granting of Defendant's Motion to Dismiss on an intentional
6 misconduct claim brought by Plaintiff against Defendants for defamation.
7

8 DATED this 6th day of April, 2017.



JAMES P. KEMP, ESQUIRE
Nevada Bar No. 006375
7435 W. Azure Drive, Ste 110
Las Vegas, NV 89130

Attorney for Plaintiff/Appellant

CERTIFICATE OF SERVICE

This is to certify that on the date indicated below, the undersigned deposited the within and foregoing CASE APPEAL STATEMENT document in the United States Mail at Las Vegas, Nevada, with postage fully prepaid thereon, addressed to the following persons or parties:

CARRIE E. HURTIK, ESQ.
RACHEL L. SHELSTAD, ESQ.
RACHEL A. SLOAN, ESQ.
HURTIK LAW & ASSOCIATES
7866 West Sahara Avenue
Las Vegas, NV 89117

*Attorneys for Defendants/Respondents
Mobile Billboards and Vincent Bartello*

Dated this 6th day of April, 2017.



An Employee of Kemp & Kemp

DEPARTMENT 32
CASE SUMMARY
CASE NO. A-16-737119-C

Sean Fitzgerald, Plaintiff(s)
vs.
Mobile Billboards LLC, Defendant(s)

§
§
§
§
§

Location: **Department 32**
Judicial Officer: **Bare, Rob**
Filed on: **05/20/2016**
Cross-Reference Case Number: **A737119**

CASE INFORMATION

Case Type: **Intentional Misconduct**

Case Flags: **Appealed to Supreme Court**
Jury Demand Filed

DATE

CASE ASSIGNMENT

Current Case Assignment

Case Number	A-16-737119-C
Court	Department 32
Date Assigned	05/20/2016
Judicial Officer	Bare, Rob

PARTY INFORMATION

Plaintiff **Fitzgerald, Sean**

Kemp, James P.
Retained
7022581183(W)







Defendant **Bartello, Vincent**
Removed: 03/29/2017
Dismissed

Mobile Billboards LLC

DATE













EVENTS & ORDERS OF THE COURT

INDEX







05/20/2016	 Complaint With Jury Demand Filed By: Plaintiff Fitzgerald, Sean <i>Complaint</i>	
09/16/2016	 Notice of Appearance Party: Plaintiff Fitzgerald, Sean <i>Notice of Appearance</i>	
09/16/2016	 Ex Parte Application to Extend Time for Service Filed By: Plaintiff Fitzgerald, Sean <i>Ex Parte Motion For Extension Of Time To Serve Summons And Complaint On Defendant Vincent Bartello</i>	
09/25/2016	 Summons Filed by: Plaintiff Fitzgerald, Sean <i>Summons</i>	
10/11/2016	 Summons Filed by: Plaintiff Fitzgerald, Sean <i>Summons</i>	
10/11/2016	 Summons	

CASE SUMMARY

CASE NO. A-16-737119-C

	Filed by: Plaintiff Fitzgerald, Sean <i>Summons</i>
11/02/2016	 Order Extending Time to Serve Filed By: Plaintiff Fitzgerald, Sean <i>ORDER GRANTING EX PARTE MOTION FOR EXTENSION OF TIME TO SERVE SUMMONS AND COMPLAINT ON DEFENDANT VINCENT BARTELLO</i>
11/02/2016	 Summons Filed by: Plaintiff Fitzgerald, Sean <i>Summons</i>
11/18/2016	 Notice of Appearance Party: Defendant Bartello, Vincent <i>Notice of Appearance</i>
11/21/2016	 Summons Filed by: Defendant Bartello, Vincent <i>Summons</i>
11/21/2016	 Initial Appearance Fee Disclosure Filed By: Defendant Bartello, Vincent <i>Initial Appearance Fee Disclosure</i>
11/29/2016	 Motion to Dismiss Filed By: Defendant Bartello, Vincent <i>Defendants, Mobile Billboards, LLC's and Vincent Bartello's Motion to Dismiss Plaintiff, Sean Fitzgerald's Complaint Pursuant to NRCP 12(b)(5)</i>
12/23/2016	 Opposition to Motion to Dismiss Filed By: Plaintiff Fitzgerald, Sean <i>OPPOSITION TO DEFENDANTS' MOBILE BILLBOARDS, LLC'S AND VINCENT BARTELLO'S MOTION TO DISMISS PLAINTIFF, SEAN FITZGERALD'S COMPLAINT PURSUANT TO N.R.C.P. 12(b)(5)</i>
12/29/2016	 Stipulation and Order Filed by: Plaintiff Fitzgerald, Sean <i>Stipulation and Order to Extend Time for Plaintiff to Answer to Defendants' Motion to Dismiss</i>
01/10/2017	 Minute Order (9:00 AM) (Judicial Officer: Bare, Rob)
01/19/2017	 Reply in Support Filed By: Defendant Mobile Billboards LLC <i>Defendants, Mobile Billboards, LLC's and Vincent Bartello's Reply in Support of Defendants' Motion to Dismiss Plaintiff, Sean Fitzgerald's Complaint Pursuant to N.R.C.P 12(b)(5)</i>
01/24/2017	 Motion to Dismiss (9:30 AM) (Judicial Officer: Bare, Rob) <i>Defendants, Mobile Billboards, LLC's and Vincent Bartello's Motion to Dismiss Plaintiff, Sean Fitzgerald's Complaint Pursuant to NRCP 12(b)(5)</i>
02/03/2017	 Supplemental Brief Filed By: Plaintiff Fitzgerald, Sean <i>Supplement Briefing In Support Of Plaintiff's Opposition To Defendants' Mobile Billboards, Llc's And Vincent Bartello's Motion To Dismiss Plaintiff, Sean Fitzgerald's Complaint Pursuant To N.R.C.P. 12(B)(5)</i>

DEPARTMENT 32
CASE SUMMARY
CASE NO. A-16-737119-C

02/17/2017	 Supplemental Points and Authorities Filed by: Defendant Mobile Billboards LLC <i>Defendants, Mobile Billboards, LLC's and Vincent Bartello's Supplemental Points and Authorities in Support of Defendants' Motion to Dismiss Plaintiff, Sean Fitzgerald's Complaint Pursuant to NRCp 12(b)(5)</i>
02/22/2017	 Decision (3:00 AM) (Judicial Officer: Bare, Rob) 02/22/2017, 03/15/2017 <i>Court's Decision Re: Dismissal</i>
03/29/2017	 Order Granting <i>Order Granting Defendant's Motion to Dismiss</i>
03/29/2017	Order of Dismissal (Judicial Officer: Bare, Rob) Debtors: Mobile Billboards LLC (Defendant), Vincent Bartello (Defendant) Creditors: Sean Fitzgerald (Plaintiff) Judgment: 03/29/2017, Docketed: 04/06/2017
04/03/2017	 Notice of Entry Filed By: Defendant Bartello, Vincent <i>Notice of Entry of Order Granting Defendant's Motion to Dismiss</i>
04/06/2017	 Notice of Appeal Filed By: Plaintiff Fitzgerald, Sean <i>NOTICE OF APPEAL</i>
04/06/2017	 Case Appeal Statement Filed By: Plaintiff Fitzgerald, Sean <i>Case Appeal Statement</i>

DATE	FINANCIAL INFORMATION
	Defendant Bartello, Vincent Total Charges 223.00 Total Payments and Credits 223.00 Balance Due as of 4/10/2017 0.00
	Defendant Mobile Billboards LLC Total Charges 30.00 Total Payments and Credits 30.00 Balance Due as of 4/10/2017 0.00
	Plaintiff Fitzgerald, Sean Total Charges 294.00 Total Payments and Credits 294.00 Balance Due as of 4/10/2017 0.00

DISTRICT COURT CIVIL COVER SHEET

A- 16 - 737119 - C

County, Nevada

XXXI I

Case No. _____

(Assigned by Clerk's Office)

I. Party Information (provide both home and mailing addresses if different)

Plaintiff(s) (name/address/phone):	Defendant(s) (name/address/phone):
SEAN FITZGERALD	MOBILE BILLBOARDS, LLC
c/o Kemp & Kemp, Attorneys at Law	VINCENT BARTELLO
7435 W. Azure Drive, Suite 110	
Las Vegas, NV 89130	
Attorney (name/address/phone):	Attorney (name/address/phone):
James P. Kemp, Esq.	
7435 W. Azure Drive, Suite 110	
Las Vegas, NV 89130	
702-258-1183	

II. Nature of Controversy (please select the one most applicable filing type below)**Civil Case Filing Types**

Real Property Landlord/Tenant <input type="checkbox"/> Unlawful Detainer <input type="checkbox"/> Other Landlord/Tenant Title to Property <input type="checkbox"/> Judicial Foreclosure <input type="checkbox"/> Other Title to Property Other Real Property <input type="checkbox"/> Condemnation/Eminent Domain <input type="checkbox"/> Other Real Property	Negligence <input type="checkbox"/> Auto <input type="checkbox"/> Premises Liability <input type="checkbox"/> Other Negligence Malpractice <input type="checkbox"/> Medical/Dental <input type="checkbox"/> Legal <input type="checkbox"/> Accounting <input type="checkbox"/> Other Malpractice	Torts Other Torts <input type="checkbox"/> Product Liability <input checked="" type="checkbox"/> Intentional Misconduct <input type="checkbox"/> Employment Tort <input type="checkbox"/> Insurance Tort <input type="checkbox"/> Other Tort
Probate Probate (select case type and estate value) <input type="checkbox"/> Summary Administration <input type="checkbox"/> General Administration <input type="checkbox"/> Special Administration <input type="checkbox"/> Set Aside <input type="checkbox"/> Trust/Conservatorship <input type="checkbox"/> Other Probate Estate Value <input type="checkbox"/> Over \$200,000 <input type="checkbox"/> Between \$100,000 and \$200,000 <input type="checkbox"/> Under \$100,000 or Unknown <input type="checkbox"/> Under \$2,500	Construction Defect & Contract Construction Defect <input type="checkbox"/> Chapter 40 <input type="checkbox"/> Other Construction Defect Contract Case <input type="checkbox"/> Uniform Commercial Code <input type="checkbox"/> Building and Construction <input type="checkbox"/> Insurance Carrier <input type="checkbox"/> Commercial Instrument <input type="checkbox"/> Collection of Accounts <input type="checkbox"/> Employment Contract <input type="checkbox"/> Other Contract	Judicial Review/Appeal Judicial Review <input type="checkbox"/> Foreclosure Mediation Case <input type="checkbox"/> Petition to Seal Records <input type="checkbox"/> Mental Competency Nevada State Agency Appeal <input type="checkbox"/> Department of Motor Vehicle <input type="checkbox"/> Worker's Compensation <input type="checkbox"/> Other Nevada State Agency Appeal Other <input type="checkbox"/> Appeal from Lower Court <input type="checkbox"/> Other Judicial Review/Appeal
Civil Writ Civil Writ <input type="checkbox"/> Writ of Habeas Corpus <input type="checkbox"/> Writ of Mandamus <input type="checkbox"/> Writ of Quo Warrant <input type="checkbox"/> Writ of Prohibition <input type="checkbox"/> Other Civil Writ		Other Civil Filing Other Civil Filing <input type="checkbox"/> Compromise of Minor's Claim <input type="checkbox"/> Foreign Judgment <input type="checkbox"/> Other Civil Matters

Business Court filings should be filed using the Business Court civil coversheet.

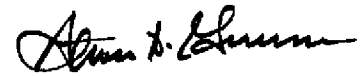
05/20/16

Date

/s/ James P. Kemp

Signature of initiating party or representative

See other side for family-related case filings.



CLERK OF THE COURT

1 **ORDR**

2 **DISTRICT COURT**
3 **CLARK COUNTY, NEVADA**

4 *****

5
6
7 SEAN FITZGERALD,

8
9 Plaintiff,

CASE NO.: A-16-737119-C

DEPT. NO. 32

10 vs.

11 MOBILE BILLBOARDS, LLC, a
12 Nevada Limited Liability Company;
13 and VINCENT BARTELLO, an
14 individual,

15 Defendants.
16

17
18
19 **ORDER GRANTING DEFENDANTS' MOTION TO DISMISS**

20
21 This matter involves allegations of defamation that took place during the
22 pendency of a workers compensation claim. Plaintiff Sean Fitzgerald filed suit on
23 May 20, 2016 against his former employers, Mobile Billboards, LLC and the
24 company's owner, Vincent Bartello. Plaintiff alleges that after filing the workers
25 compensation claim due to an injury that occurred on April 30, 2014, the
26 Defendants made defamatory and slanderous comments about Plaintiff to the
27 workers compensation claims examiner, who then republished those comments to
Plaintiff's workers compensation doctor.

RECEIVED

MAR 29 2017

CLERK OF THE COURT

1 This matter came before the Court for Defendants' Motion to Dismiss on
2 January 24, 2017. One of the bases for Defendants' motion was the doctrine of
3 absolute litigation privilege. During oral argument, Plaintiff's attorney made new
4 arguments that were not contained in the original motion practice regarding
5 litigation privilege. The Court took the matter under advisement and ordered
6 supplemental briefing on the issue. After carefully considering the original motion
7 practice, the supplemental briefing, and oral argument, COURT ORDERED,
8 Defendants' Motion to Dismiss is GRANTED.

9 In this case, the employer defendant made statements to the workers
10 compensation claims examiner regarding the fact that the employer found
11 prescription pain medication in Plaintiff's toolbox at work shortly after the incident
12 which resulted in Plaintiff's injury. The employer expressed a concern to the
13 claims examiner, who then expressed the concern to the workers compensation
14 doctor. Plaintiff then brought suit, asserting that these various statements
15 constitute defamation and slander. In their Motion to Dismiss, Defendants contend
16 that these statements are protected by absolute litigation privilege, and this Court
17 agrees.

18 Nevada has long recognized the existence of an absolute privilege for
19 defamatory statements made during the course of judicial and quasi-judicial
20 proceedings. *Jacobs v. Adelson*, 130 Nev. Adv. Op. 44, 325 P.3d 1282, 1285
21 (2014). This privilege, which acts as a complete bar to defamation claims based on
22 privileged statements, recognizes that "[c]ertain communications, although
23 defamatory, should not serve as a basis for liability in a defamation action and are
24 entitled to an absolute privilege because 'the public interest in having people speak
25 freely outweighs the risk that individuals will occasionally abuse the privilege by
26 making false and malicious statements.'" *Id.* (quoting *Circus Circus Hotels, Inc. v.*
27 *Witherspoon*, 99 Nev. 56, 61, 657 P.2d 101, 104 (1983)).
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1
2
3 In order for the absolute privilege to apply to defamatory statements made in
4 the context of a judicial or quasi-judicial proceeding, "(1) a judicial proceeding
5 must be contemplated in good faith and under serious consideration, and (2) the
6 communication must be related to the litigation." *Jacobs v. Adelson*, 130 Nev.
7 Adv. Op. 44, 325 P.3d at 1285. "Therefore, the privilege applies to
8 communications made by either an attorney or a nonattorney that are related to
9 ongoing litigation or future litigation contemplated in good faith." *Id.* "When the
10 communications are made in this type of litigation setting and are in some way
11 pertinent to the subject of the controversy, the absolute privilege protects them
12 even when the motives behind them are malicious and they are made with
13 knowledge of the communications' falsity." *Id.*

14 "The scope of the absolute privilege is quite broad." *Fink v. Oshins*, 118
15 Nev. 428, 433, 49 P.3d 640, 643 (2002). The defamatory communication "need
16 not be strictly relevant to any issue involved" in "the proposed or pending
17 litigation," it only need be "in some way pertinent to the subject of controversy."
18 *Id.* (quoting *Circus Circus Hotels, Inc.*, 99 Nev. at 61, 657 P.2d at 104). Further,
19 the privilege applies not only to communications made during actual judicial
20 proceedings, but also to "communications preliminary to a proposed judicial
21 proceeding." *Id.*

22 "The scope of the privilege does, however, have limits." *Id.* When the
23 defamatory communication is made before a judicial proceeding is initiated, it will
24 be cloaked with immunity only if the communication is made "in contemplation of
25 initiation" of the proceeding. *Id.* In other words, at the time the defamatory
26 communication is made, the proceeding must be "contemplated in good faith and
27 under serious consideration." *Id.* (quoting *Circus Circus Hotels, Inc.*, 99 Nev. at 61,
28 657 P.2d at 104). Within these limits, courts should apply the absolute privilege

1 liberally, resolving any doubt in favor of its relevancy or pertinency. *Id.*

2 “Whether a statement is sufficiently relevant to the judicial proceedings to
3 fall within the absolute privilege is a question of law for the court.” *Circus Circus*
4 *Hotels, Inc.*, 99 Nev. at 62, 657 P.2d at 105.

5 In this case, Plaintiff was injured on the job on April 30, 2014 and he filed
6 the workers compensation claim on that same day. Therefore, as of April 30,
7 2014, there was an open claim which was then subject to the Nevada statutory
8 scheme for workers compensation, which is governed by NRS Chapter 616C.
9 This statutory scheme allows for judicial review. *See* NRS 616C.370. As such, this
10 Court finds that the opening of a workers compensation claim and the pursuit of
11 that workers compensation claim opens the door for potential judicial proceedings.

12 The elements that must be met for absolute litigation to apply to alleged
13 defamatory statements made are “(1) a judicial proceeding must be contemplated
14 in good faith and under serious consideration, and (2) the communication must be
15 related to the litigation.” *Jacobs v. Adelson*, 130 Nev. Adv. Op. 44, 325 P.3d at
16 1285. Because the Nevada Supreme Court has held that the privilege also to
17 “communications preliminary to a proposed judicial proceeding,” this Court finds
18 that these statements, which were made during the pendency of an open workers
19 compensation claim and which were related to the treatment under that claim, meet
20 the elements of absolute litigation privilege. *See Fink v. Oshins*, 118 Nev. 428,
21 433, 49 P.3d 640, 644 (2002). Moreover, the Nevada Supreme Court has made it
22 clear that “courts should apply the absolute privilege liberally, resolving any doubt
23 in favor of its relevancy or pertinency.” *Fink*, 118 Nev. at 433, 49 P.3d at 644.

24 This Court does not agree with Plaintiff’s argument that a motion to dismiss
25 cannot be granted on the basis of absolute litigation privilege, but that rather it
26 must be plead and proven as an affirmative defense by Defendants at trial.

27 Plaintiff cites to *Simpson v. Mars Inc.*, 113 Nev. 188, 189, 929 P.2d 966, 966
28

1 (1997) and *Pope v. Motel 6*, 121 Nev. 307, 309, 114 P.3d 277, 279 (2005).

2 However, both of those cases dealt with issues pertaining to intracorporate
3 communication privilege, and not absolute litigation privilege. Additionally,
4 neither of those cases actually held that privilege cannot be the basis for dismissal.
5 As such, the Court is not persuaded by this argument and finds that privilege can
6 be a basis for dismissal, especially given that it is a matter of law to be determined
7 by the district court. *See Circus Circus Hotels, Inc.*, 99 Nev. at 62, 657 P.2d at 105.

8 These statements made by the employer and the claims examiner were in
9 regards to the Plaintiff's his medical treatment under the workers compensation
10 coverage. Plaintiff may litigate any issues pertaining to the workers compensation
11 claim within the system under NRS Chapter 616C, and he may later seek further
12 relief through a petition for judicial review. Therefore, although this Court finds
13 that absolute litigation privilege applies to the alleged defamatory statements,
14 Plaintiff is not left without recourse at this time.

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16 IT IS SO ORDERED.

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23 Dated this 27 day of March, 2017.

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26 Rob Bare
27 Judge, District Court, Department 32
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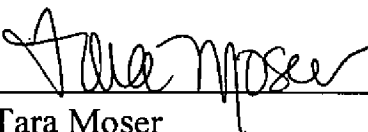
CERTIFICATE OF SERVICE

I hereby certify that on the date filed, I or mailed or faxed a copy to:

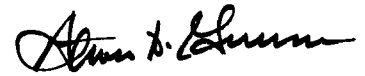
JAMES P. KEMP, ESQ.
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Las Vegas, NV 89117
(702) 966-5200
churtik@hurtiklaw.com
Attorney for Defendants

Dated this 27th day of March, 2017.



Tara Moser
Judicial Executive Assistant, Dept. 32



CLERK OF THE COURT

1 **NEO**
2 **CARRIE E. HURTIK, ESQ.**
3 Nevada Bar No. 7028
4 **JONATHON R. PATTERSON, ESQ.**
5 Nevada Bar No. 9644
6 **HURTIK LAW & ASSOCIATES**
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11 churtik@hurtiklaw.com
12 jpatterson@hurtiklaw.com
13 Attorneys for Defendants,
14 **VINCENT BARTELLO**
15 **MOBILE BILLBOARDS, LLC**

9 **EIGHTH JUDICIAL DISTRICT COURT**

10 **CLARK COUNTY, NEVADA**

11 **SEAN FITZGERALD,**

12 Plaintiff,

13 vs.

14 **MOBILE BILLBOARDS, LLC, a Nevada**
15 **Limited Liability Company; VINCENT**
16 **BARTELLO, an individual; and DOES I**
17 **through X; and ROE BUSINESS ENTITIES I**
18 **through X, inclusive,**

19 Defendants.

Case No.: A-16-737119-C

Dept. No.: XXXII

20 **NOTICE OF ENTRY OF ORDER GRANTING DEFENDANT'S MOTION TO DISMISS**

21 PLEASE TAKE NOTICE that an Order granting Defendant's Motion to Dismiss was entered
22 in the above-entitled action on 29th day of March, 2017. A true and correct copy of said Order

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

1 Granting Defendant's Motion to Dismiss is attached hereto as Exhibit "A".

2 DATED this ^{3rd} day of April 2017.

3 **HURTIK LAW & ASSOCIATES**

4 

5 **CARRIE E. HURTIK, ESQ.**

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7 7866 West Sahara Avenue
8 Las Vegas, Nevada 89117
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10 (702) 966-5206 Facsimile
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12 Attorneys for Defendants,
13 VINCENT BARTELLO
14 MOBILE BILLBOARDS, LLC
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CERTIFICATE OF SERVICE

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

I, NANCY RAMIREZ, declare:

I am a resident of and employed in Clark County, Nevada. I am over the age of eighteen (18) years and not a party to the within action. My business address is 7866 West Sahara Avenue, Las Vegas, Nevada 89117.


On April 3, 2017, I served the document described **NOTICE OF ENTRY OF ORDER GRANTING DEFENDANT'S MOTION TO DISMISS** on the party listed below at his/her/their last known addresses:

James P. Kemp, Esq.
KEMP & KEMP
7435 W. Azure Drive, Ste., 110
Las Vegas, NV 89130

☒ **VIA U.S. MAIL:** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada. I am "readily familiar" with the firm's practice of collection and processing correspondence by mailing. Under that practice, it would be deposited with the U.S. postal service on that same day with postage fully prepaid at Las Vegas, Nevada in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing an affidavit.

☒ **VIA ELECTRONIC SERVICE:** by transmitting via Wiznet, pursuant to EDCR 8.05, to the electronic mail address as last given by that person on any document which he/she has filed in the action and served on the party making the service. The copy of the document served by electronic service bears a notation of the date and time of transmission. A confirmation of the transmission containing the electronic mail address(es) to which the document(s) was/were transmitted will be maintained with the document(s) served.

I declare under the penalty of perjury that the foregoing is true and correct.
Executed at Las Vegas, Nevada on this 3 day of April 2017.


NANCY RAMIREZ, an employee of
HURTIK LAW & ASSOCIATES

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EXHIBIT A


CLERK OF THE COURT

1 **ORDR**

2 **DISTRICT COURT**
3 **CLARK COUNTY, NEVADA**

4 *****

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7 SEAN FITZGERALD,

8
9 Plaintiff,

CASE NO.: A-16-737119-C

DEPT. NO. 32

10 vs.

11
12 MOBILE BILLBOARDS, LLC, a
13 Nevada Limited Liability Company;
14 and VINCENT BARTELLO, an
individual,

15 Defendants.
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19 **ORDER GRANTING DEFENDANTS' MOTION TO DISMISS**

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21 This matter involves allegations of defamation that took place during the
22 pendency of a workers compensation claim. Plaintiff Sean Fitzgerald filed suit on
23 May 20, 2016 against his former employers, Mobile Billboards, LLC and the
24 company's owner, Vincent Bartello. Plaintiff alleges that after filing the workers
25 compensation claim due to an injury that occurred on April 30, 2014, the
26 Defendants made defamatory and slanderous comments about Plaintiff to the
27 workers compensation claims examiner, who then republished those comments to
Plaintiff's workers compensation doctor.

1 This matter came before the Court for Defendants' Motion to Dismiss on
2 January 24, 2017. One of the bases for Defendants' motion was the doctrine of
3 absolute litigation privilege. During oral argument, Plaintiff's attorney made new
4 arguments that were not contained in the original motion practice regarding
5 litigation privilege. The Court took the matter under advisement and ordered
6 supplemental briefing on the issue. After carefully considering the original motion
7 practice, the supplemental briefing, and oral argument, COURT ORDERED,
8 Defendants' Motion to Dismiss is GRANTED.

9 In this case, the employer defendant made statements to the workers
10 compensation claims examiner regarding the fact that the employer found
11 prescription pain medication in Plaintiff's toolbox at work shortly after the incident
12 which resulted in Plaintiff's injury. The employer expressed a concern to the
13 claims examiner, who then expressed the concern to the workers compensation
14 doctor. Plaintiff then brought suit, asserting that these various statements
15 constitute defamation and slander. In their Motion to Dismiss, Defendants contend
16 that these statements are protected by absolute litigation privilege, and this Court
17 agrees.

18 Nevada has long recognized the existence of an absolute privilege for
19 defamatory statements made during the course of judicial and quasi-judicial
20 proceedings. *Jacobs v. Adelson*, 130 Nev. Adv. Op. 44, 325 P.3d 1282, 1285
21 (2014). This privilege, which acts as a complete bar to defamation claims based on
22 privileged statements, recognizes that "[c]ertain communications, although
23 defamatory, should not serve as a basis for liability in a defamation action and are
24 entitled to an absolute privilege because 'the public interest in having people speak
25 freely outweighs the risk that individuals will occasionally abuse the privilege by
26 making false and malicious statements.'" *Id.* (quoting *Circus Circus Hotels, Inc. v.*
27 *Witherspoon*, 99 Nev. 56, 61, 657 P.2d 101, 104 (1983)).
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3 In order for the absolute privilege to apply to defamatory statements made in
4 the context of a judicial or quasi-judicial proceeding, “(1) a judicial proceeding
5 must be contemplated in good faith and under serious consideration, and (2) the
6 communication must be related to the litigation.” *Jacobs v. Adelson*, 130 Nev.
7 Adv. Op. 44, 325 P.3d at 1285. “Therefore, the privilege applies to
8 communications made by either an attorney or a nonattorney that are related to
9 ongoing litigation or future litigation contemplated in good faith.” *Id.* “When the
10 communications are made in this type of litigation setting and are in some way
11 pertinent to the subject of the controversy, the absolute privilege protects them
12 even when the motives behind them are malicious and they are made with
13 knowledge of the communications’ falsity.” *Id.*

14 “The scope of the absolute privilege is quite broad.” *Fink v. Oshins*, 118
15 Nev. 428, 433, 49 P.3d 640, 643 (2002). The defamatory communication “need
16 not be strictly relevant to any issue involved” in “the proposed or pending
17 litigation,” it only need be “in some way pertinent to the subject of controversy.”
18 *Id.* (quoting *Circus Circus Hotels, Inc.*, 99 Nev. at 61, 657 P.2d at 104). Further,
19 the privilege applies not only to communications made during actual judicial
20 proceedings, but also to “communications preliminary to a proposed judicial
21 proceeding.” *Id.*

22 “The scope of the privilege does, however, have limits.” *Id.* When the
23 defamatory communication is made before a judicial proceeding is initiated, it will
24 be cloaked with immunity only if the communication is made “in contemplation of
25 initiation” of the proceeding. *Id.* In other words, at the time the defamatory
26 communication is made, the proceeding must be “contemplated in good faith and
27 under serious consideration.” *Id.* (quoting *Circus Circus Hotels, Inc.*, 99 Nev. at 61,
28 657 P.2d at 104). Within these limits, courts should apply the absolute privilege

1 liberally, resolving any doubt in favor of its relevancy or pertinency. *Id.*

2 “Whether a statement is sufficiently relevant to the judicial proceedings to
3 fall within the absolute privilege is a question of law for the court.” *Circus Circus*
4 *Hotels, Inc.*, 99 Nev. at 62, 657 P.2d at 105.

5 In this case, Plaintiff was injured on the job on April 30, 2014 and he filed
6 the workers compensation claim on that same day. Therefore, as of April 30,
7 2014, there was an open claim which was then subject to the Nevada statutory
8 scheme for workers compensation, which is governed by NRS Chapter 616C.
9 This statutory scheme allows for judicial review. *See* NRS 616C.370. As such, this
10 Court finds that the opening of a workers compensation claim and the pursuit of
11 that workers compensation claim opens the door for potential judicial proceedings.

12 The elements that must be met for absolute litigation to apply to alleged
13 defamatory statements made are “(1) a judicial proceeding must be contemplated
14 in good faith and under serious consideration, and (2) the communication must be
15 related to the litigation.” *Jacobs v. Adelson*, 130 Nev. Adv. Op. 44, 325 P.3d at
16 1285. Because the Nevada Supreme Court has held that the privilege also to
17 “communications preliminary to a proposed judicial proceeding,” this Court finds
18 that these statements, which were made during the pendency of an open workers
19 compensation claim and which were related to the treatment under that claim, meet
20 the elements of absolute litigation privilege. *See Fink v. Oshins*, 118 Nev. 428,
21 433, 49 P.3d 640, 644 (2002). Moreover, the Nevada Supreme Court has made it
22 clear that “courts should apply the absolute privilege liberally, resolving any doubt
23 in favor of its relevancy or pertinency.” *Fink*, 118 Nev. at 433, 49 P.3d at 644.

24 This Court does not agree with Plaintiff’s argument that a motion to dismiss
25 cannot be granted on the basis of absolute litigation privilege, but that rather it
26 must be plead and proven as an affirmative defense by Defendants at trial.
27 Plaintiff cites to *Simpson v. Mars Inc.*, 113 Nev. 188, 189, 929 P.2d 966, 966
28

1 (1997) and *Pope v. Motel 6*, 121 Nev. 307, 309, 114 P.3d 277, 279 (2005).

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3 However, both of those cases dealt with issues pertaining to intracorporate
4 communication privilege, and not absolute litigation privilege. Additionally,
5 neither of those cases actually held that privilege cannot be the basis for dismissal.
6 As such, the Court is not persuaded by this argument and finds that privilege can
7 be a basis for dismissal, especially given that it is a matter of law to be determined
8 by the district court. *See Circus Circus Hotels, Inc.*, 99 Nev. at 62, 657 P.2d at 105.

9 These statements made by the employer and the claims examiner were in
10 regards to the Plaintiff's his medical treatment under the workers compensation
11 coverage. Plaintiff may litigate any issues pertaining to the workers compensation
12 claim within the system under NRS Chapter 616C, and he may later seek further
13 relief through a petition for judicial review. Therefore, although this Court finds
14 that absolute litigation privilege applies to the alleged defamatory statements,
15 Plaintiff is not left without recourse at this time.

16 IT IS SO ORDERED.

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23 Dated this 27 day of March, 2017.

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26 **Rob Bare**
27 **Judge, District Court, Department 32**
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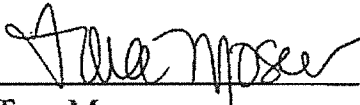
CERTIFICATE OF SERVICE

I hereby certify that on the date filed, I or mailed or faxed a copy to:

JAMES P. KEMP, ESQ.
VICTORIA L. NEAL, ESQ.
Kemp & Kemp
7435 W. Azure Drive, Ste 110
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Hurtik Law & Associates
7866 W. Sahara Ave.
Las Vegas, NV 89117
(702) 966-5200
churtik@hurtiklaw.com
Attorney for Defendants

Dated this 27th day of March, 2017.


Tara Moser

Judicial Executive Assistant, Dept. 32

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Intentional Misconduct

COURT MINUTES

January 10, 2017

A-16-737119-C	Sean Fitzgerald, Plaintiff(s)
	vs.
	Mobile Billboards LLC, Defendant(s)

January 10, 2017 9:00 AM Minute Order

HEARD BY: Bare, Rob **COURTROOM:** Chambers

COURT CLERK: Kory Schlitz

RECORDER:

REPORTER:

**PARTIES
PRESENT:**

JOURNAL ENTRIES

- At the request of Court, for judicial economy, the Motion to Dismiss filed by Defendants Mobile Billboards LLC currently scheduled for January 17, 2017, is RESCHEDULED to January 24, 2017 at 9:30 A.M. If the parties wish to have a hearing prior to that date, they are directed to contact chambers.

CLERK'S NOTE: A copy of the foregoing minute order was distributed to the following party through Wiznet E-Service to:

Hurtik Law through: mwalker@hurtiklaw.com

Hurtik Law & Associates through: churtik@hurtiklaw.com

Kemp & Kemp through: JP@kemp-attorneys.com

(1-10-17 ks)

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Intentional Misconduct

COURT MINUTES

January 24, 2017

A-16-737119-C	Sean Fitzgerald, Plaintiff(s)
	vs.
	Mobile Billboards LLC, Defendant(s)

January 24, 2017 9:30 AM Motion to Dismiss

HEARD BY: Bare, Rob **COURTROOM:** RJC Courtroom 03C

COURT CLERK: Cynthia Moleres

RECORDER: Carrie Hansen

REPORTER:

PARTIES

PRESENT:	Hurtik, Carrie E.	Attorney
	Kemp, James P.	Attorney
	Neal, Victoria L.	Attorney

JOURNAL ENTRIES

- Court provided a procedural overview of the case and the Court summarized the pleadings. COURT NOTED there was an error concerning the litigation privilege. Arguments by Ms. Hurtik and Mr. Kemp regarding the motion to dismiss. Arguments by Mr. Kemp and Ms. Hurtik regarding the litigation privilege. Upon Court's inquiry regarding the 12(b)(5) motion, Mr. Kemp stated Hope v. Motel 6 and Simpson v. Mars, which are not absolute privilege case; however, they are qualified privilege cases but the analysis is the same. Ms. Hurtik stated Mr. Kemp did not reference Hope v. Motel 6 and would like the opportunity to brief it. COURT ORDERED, Plaintiff to FILE, by close of business on 2-3-17, a Supplemental Pleading, as to the issue Mr. Kemp stated that the defense cannot have this decided on a matter of procedural law, that 12(b)(5) can't happen if your serving privilege as a basis, Ms. Hurtik to have a Response FILED by 2-17-17 and both are to submit copies to chambers. COURT FURTHER ORDERED, motion taken UNDER ADVISEMENT and SET on Chambers Calendar.

02-22-17 DECISION - CHAMBERS CALENDAR

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Intentional Misconduct

COURT MINUTES

February 22, 2017

A-16-737119-C	Sean Fitzgerald, Plaintiff(s)
	vs.
	Mobile Billboards LLC, Defendant(s)

February 22, 2017	3:00 AM	Decision
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HEARD BY: Bare, Rob

COURTROOM:

COURT CLERK:

RECORDER:

REPORTER:

**PARTIES
PRESENT:**

JOURNAL ENTRIES

- As the Decision on Defendants Motion to Dismiss has not yet been reached, COURT ORDERED matter Status Check: Court's Decision Re Dismissal currently set for February 22, 2017, shall be CONTINUED to March 15, 2017, in Chambers. Parties need not appear at the next Court date.

CLERK'S NOTE: A copy of this minute order was placed in the attorney folder(s) of: James Kemp, Esq. (Kemp & Kemp) and Carrie E. Hurtik, Esq. (Hurtik Law & Assoc.)

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Intentional Misconduct

COURT MINUTES

March 15, 2017

A-16-737119-C Sean Fitzgerald, Plaintiff(s)
vs.
Mobile Billboards LLC, Defendant(s)

March 15, 2017 3:00 AM Decision

HEARD BY: Bare, Rob **COURTROOM:**

COURT CLERK: Brynn Griffiths

RECORDER:

REPORTER:

**PARTIES
PRESENT:**

JOURNAL ENTRIES

- As the decision on Defendants Motion to Dismiss has not yet been issued, COURT ORDERED matter Status Check: Decision currently set for March 15, 2017, shall be CONTINUED to April 5, 2017, in Chambers. Parties need not appear at the next Court date. The Decision will be issued by that date.

CLERK'S NOTE: A copy of this minute order was placed in the attorney folder(s) of: James Kemp, Esq. {Kemp and Kemp}; Carrie Hurtik, Esq. {Hurtik Law and Assoc}. bg/03/20/17



EIGHTH JUDICIAL DISTRICT COURT CLERK'S OFFICE
NOTICE OF DEFICIENCY
ON APPEAL TO NEVADA SUPREME COURT

JAMES P. KEMP, ESQ.
7435 W. AZURE DR., STE. 110
LAS VEGAS, NV 89130

DATE: April 10, 2017
CASE: A-16-737119-C

RE CASE: SEAN FITZGERALD vs. MOBILE BILLBOARDS, LLC; VINCENT BARTELLO

NOTICE OF APPEAL FILED: April 6, 2017

YOUR APPEAL HAS BEEN SENT TO THE SUPREME COURT.

PLEASE NOTE: DOCUMENTS NOT TRANSMITTED HAVE BEEN MARKED:

- ☒ \$250 – Supreme Court Filing Fee (Make Check Payable to the Supreme Court)**
 - If the \$250 Supreme Court Filing Fee was not submitted along with the original Notice of Appeal, it must be mailed directly to the Supreme Court. The Supreme Court Filing Fee will not be forwarded by this office if submitted after the Notice of Appeal has been filed.
- ☐ \$24 – District Court Filing Fee (Make Check Payable to the District Court)**
- ☒ \$500 – Cost Bond on Appeal (Make Check Payable to the District Court)**
 - NRAP 7: Bond For Costs On Appeal in Civil Cases
- ☐ Case Appeal Statement
 - NRAP 3 (a)(1), Form 2
- ☐ Order
- ☐ Notice of Entry of Order

NEVADA RULES OF APPELLATE PROCEDURE 3 (a) (3) states:

"The district court clerk must file appellant's notice of appeal despite perceived deficiencies in the notice, including the failure to pay the district court or Supreme Court filing fee. **The district court clerk shall apprise appellant of the deficiencies in writing**, and shall transmit the notice of appeal to the Supreme Court in accordance with subdivision (e) of this Rule with a notation to the clerk of the Supreme Court setting forth the deficiencies. Despite any deficiencies in the notice of appeal, the clerk of the Supreme Court shall docket the appeal in accordance with Rule 12."

Please refer to Rule 3 for an explanation of any possible deficiencies.

***Per District Court Administrative Order 2012-01, in regards to civil litigants, "...all Orders to Appear in Forma Pauperis expire one year from the date of issuance." You must reapply for in Forma Pauperis status.**

Certification of Copy

State of Nevada }
County of Clark } SS:

I, Steven D. Grierson, the Clerk of the Court of the Eighth Judicial District Court, Clark County, State of Nevada, does hereby certify that the foregoing is a true, full and correct copy of the hereinafter stated original document(s):

NOTICE OF APPEAL; CASE APPEAL STATEMENT; DISTRICT COURT
DOCKET ENTRIES; CIVIL COVER SHEET; ORDER GRANTING DEFENDANTS' MOTION TO
DISMISS; NOTICE OF ENTRY OF ORDER GRANTING DEFENDANT'S MOTION TO DISMISS;
DISTRICT COURT MINUTES; NOTICE OF DEFICIENCY

SEAN FITZGERALD,

Plaintiff(s),

vs.

MOBILE BILLBOARDS, LLC; VINCENT
BARTELLO,

Defendant(s),

Case No: A-16-737119-C

Dept No: XXXII

now on file and of record in this office.

IN WITNESS THEREOF, I have hereunto
Set my hand and Affixed the seal of the
Court at my office, Las Vegas, Nevada
This 10 day of April 2017.

Steven D. Grierson, Clerk of the Court



Heather Ungermann, Deputy Clerk