CASE NO. 72803

IN THE SUPREME COURT OF THE STATE OF NEVADA

SEAN FITZGERALD, Appellant

v.

MOBILE BILLBOARDS, LLC, et al., Respondent

APPEAL FROM THE
EIGHTH JUDICIAL DISTRICT COURT, CLARK COUNTY, NEVADA

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed:

1. The Appellant, SEAN FITZGERALD (not a pseudonym) is a natural person and is the only person or entity that is an Appellant in this case;

2. The undersigned counsel of record for Mr. Fitzgerald and Victoria L. Neal, Esq. are the only attorneys who have appeared on his behalf in this matter in this Court. The undersigned and Victoria L. Neal, Esq. both appeared on behalf of Mr. Fitzgerald before the District Court.

These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

DATED this 13th day of November 2017.

/s/ James P. Kemp

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JURISDICTIONAL STATEMENT

This Court has jurisdiction over this matter under NRAP 3A(b)(1) because the matter arises from a final order of the District Court and no other proceedings remain below on the discreet issues raised in this appeal.

This appeal is timely as the Notice of Entry of Order (AA 15-24) was served by regular U.S. Mail by the Appellant on April 3, 2017 and the Notice of Appeal (AA 25-26) was filed in the District Court on Monday, April 6, 2017 less than 30 days after the written Notice of Entry of Order.

ROUTING STATEMENT NRAP 28(a)(5)

This matter is presumptively assigned to the Supreme Court of Nevada pursuant to NRAP 17(a)(13). This case involves an important issue of first impression in that the District Court ruled that the Defendants' defamatory statements were protected by an absolute privilege as to ALL statements made by an employer about an employee who has a workers' compensation claim on the theory that the workers' compensation claim is itself litigation between the employer and employee. Such an absolute privilege defense has never before been recognized by the Supreme Court under the common law of Nevada.

Also, under NRAP 17(a)(14) this matter involves a matter of statewide public importance because workers' compensation claims arise between employers and employees throughout the state of Nevada.

STATEMENT OF ISSUES PRESENTED

1. Did the District Court err in finding that the mere filing of a workers' compensation claim automatically protects all communications related to the claim by an employer about an employee on the basis of the common law absolute litigation privilege when no litigation and commenced and no threat of litigation has been communicated?
2. Did the District Court err in granting Defendants' Motion to Dismiss under NRCP Rule 12(b)(5) on the basis of absolute privilege where the Supreme Court of Nevada has never recognized an absolute privilege for communications about employees with workers' compensation claims by employers, particularly where the underlying facts that might give rise to such a privilege defense are in dispute?
3. Can a qualified privilege defense to defamation be raised in a NRCP Rule 12(b)(5) Motion to Dismiss in light of the clear precedent of *Pope v. Motel 6*, 121 Nev. 307, 319, 114 P.3d 277 (2005); *Lubin v. Kunin*, 117 Nev. 107, 114, 17 P.3d 422, 427 (2001); and *Simpson v. Mars Inc*., 113 Nev. 188, 191, 929 P.2d 966, 968 (1997) which require the privilege defense to be pleaded and proved?

STATEMENT OF THE CASE

The District Court granted the Defendants' NRCP Rule 12(b)(5) motion and dismissed Sean Fitzgerald's Complaint alleging defamation. The District Court ruled that the Complaint failed to state a claim because the defamatory statements made by his former employer and its owner were protected by an absolute privilege because the statements were made to a representative of the workers' compensation insurance company to which Sean had made a claim.

The District Court ruled that any statements made in the course of a workers' compensation claim, even intentionally false and malicious statements, were made in the course of litigation, or in "good faith" contemplation of litigation, and therefore were absolutely privileged as a matter of law. The District Court rejected Sean's argument that such statements should only, at best, be subject to a qualified privilege such as the "common interest" privilege and as a such not susceptible to an NRCP Rule 12(b)(5) motion because such privileges must be pleaded and proved under Nevada precedent.

Moreover, the District Court disregarded the NRCP Rule 12(b)(5) standard by not accepting Sean's pleaded facts as true and not drawing reasonable inferences in his favor. Specifically, there is a question of fact as to whether or not the defamatory statements by Sean's former employer and its owner were made in

"good faith" contemplation of initiating any judicial or quasi-judicial proceedings. Sean's claim was accepted and all benefits were provided to him without dispute so that no administrative or judicial proceedings appear to have ever been contemplated and certainly none were ever filed or litigated. The District Court ignored that, at a minimum, there is a predicate factual dispute over whether or not the Defendants had a "good faith" contemplation of initiating judicial or quasi-judicial proceedings.

STATEMENT OF FACTS

The basic facts are set forth in detail in the Complaint (AA 1-8) which is incorporated here in its entirety. The key facts are as follows and are numbered to correspond to the paragraphs of the Complaint:

8. Plaintiff began his employment with Defendants in April 2014, as head fleet mechanic.

9. Plaintiff was hired and paid by Hillsboro until he sustained an industrial injury on April 30, 20[14]. Hillsboro is owned and operated by Defendant Vincent Bartello. After that date, Plaintiff was paid by Defendant Mobile because, upon information and belief, Defendant Hillsboro was not insured for workers' compensation as required by Nevada state law.

10. Plaintiff's April 30, 2014 serious on-the-job industrial injury was to his finger/hand.

11. Plaintiff filled out a C-4 form for workers' compensation the day of the industrial accident, April 30, 2014.

12. On May 13, 2014, Plaintiff had surgery as result of the industrial accident sustained on April 30, 2015.

13. On or about May 21, 2014, Defendants orally and in writing communicated with their third-party workers' compensation administrator, AmTrust North America, that Plaintiff was attempting to obtain more and different prescription painkillers after his industrial injury, that multiple prescription painkillers, and prescriptions for additional painkillers, were found in Plaintiff's personal property which Defendants had refused to return to Plaintiff after terminating his employment. Defendants' statements were false and the information communicated imputed to Plaintiff the commission of a crime including, but not limited to, the unlawful taking or obtaining of a controlled substance or prescription under NRS 453.391. Defendants' statements further imply that Plaintiff was a drug addict, a loathsome disease. Defendants' statements further falsely impute to the Plaintiff acts of dangerous and reckless conduct including, but not limited to, stating that Plaintiff was taking narcotic prescription painkillers while operating dangerous and heavy equipment in the course of his employment. Such false and malicious accusations tend to harm the Plaintiff in his trade, occupation, profession, or business and is per se defamatory under Nevada law.

14. Plaintiff was not made aware of the defamation and slander by Defendants until approximately September 14, 2014, when Plaintiff was provided the letter from AmTrust North America wherein the claims adjuster restated what Defendants had told to her. AmTrust then republished the information to unprivileged third parties including, but not limited to, Plaintiff's workers' compensation doctor. Plaintiff received the AmTrust North America letter through the workers' compensation claims process. Defendants are liable for all foreseeable publications of the false and defamatory statements.

15. Defendants acted with malice and ill will towards Plaintiff in disclosing information for which there was no reasonable grounds to believe was accurate and, thereby, recklessly and intentionally disclosed inaccurate and misleading information in an attempt to thwart Plaintiff's workers' compensation claim. It was reasonably foreseeable under the facts and circumstances that a person with ordinary intelligence and prudence could have anticipated that such conduct would result in injury to Plaintiff.

In addition, there is absolutely no allegations or evidence that either Sean or his former employer (Defendants) contemplated in good faith any litigation over his workers' compensation claim at the time that the defamatory statements were made. No litigation over the legitimacy of the claim, acceptance of the claim, or any treatment under the claim was ever initiated by any person or party. Because

there was never a responsive pleading alleging the elements of the privilege and providing some notice of what the claimed defense would be, the issue was not properly placed in controversy.

SUMMARY OF THE ARGUMENT

The Supreme Court of Nevada has never held that all defamatory statements made by an employer or former employer about an employee, including those that are intentionally and maliciously false, are subject to an absolute litigation privilege if related in any way to a workers' compensation insurance claim. Nor should it do so. A workers' compensation claim is merely an insurance claim. There are litigation processes that can be initiated and pursued in a workers' compensation claim; however, those are distinct and discreet matters that are predicated on a determination made by an insurer and are assigned to an administrative tribunal with a case number and are litigated independently of other issues in the claim. Many claims are processed without any disputes or controversies ever arising such that the administrative dispute resolution process is never invoked or engaged. Likewise, just because judicial review is available and may be pursued by a party aggrieved by the administrative decision, it is not inevitable that such judicial review will happen in every case, nor even in every administrative tribunal dispute decision.

In light of the fact that litigation may never ensue in a workers' compensation claim, the District Court's ruling that all defamatory statements, even those that are knowingly false and malicious, made by an employer or former employer about a workers' compensation claimant are immunized by the absolute litigation privilege is reversible legal error. The Supreme Court of Nevada has held that only it can devise common law absolute privileges and that it should do so sparingly. *See Cucinotta v. Deloitte & Touche, L.L.P.*, 129 Nev. ___, ___, 302 P.3d 1099, 1101 (2013) ("The class of absolutely privileged communications recognized by this court remains narrow and is limited…") Certainly statements made in the administrative litigation process before Hearing Officers and Appeals Officers are subject to the absolute litigation privilege. However, there is no social utility in protecting malicious lies by employers against employees with workers' compensation claims in the claims administration process

If any privilege defense should be recognized at all in the claims administration process it should only be a qualified privilege such as the "common interest" privilege recognized by the Supreme Court of Nevada in cases such as *Circus Circus Hotels v. Witherspoon*, 99 Nev. 56, 62, 657 P.2d 101, 105 (1983). The qualified privilege strikes the proper balance because it provides protection to those who publish defamatory matter in good faith, believing that it is true, to those who have a corresponding need to know the information, but the privilege is only

qualified and conditional and can be lost if it is abused by, for example, publication with malice in fact or with knowledge that it is false, or with a reckless disregard of the truth of the statement.

And with respect to qualified privileges, those are affirmative defenses that must be established by being pleaded and proved. *Lubin v. Kunin*, 17 P.3d 422, 428, 117 Nev. 107 (2001) ("At the NRCP 12(b)(5) stage, however, the Parents have not alleged the privilege by answer, let alone established facts to show that the privilege applies."); *Pope v. Motel 6*, 121 Nev. 307, 319, 114 P.3d 277 (2005); *Simpson v. Mars Inc*., 113 Nev. 188, 191, 929 P.2d 966, 968 (1997). Thus, the District Court here erred in ruling that a qualified privilege defense can be adjudicated as a matter of law at the NRCP Rule 12(b)(5) motion to dismiss stage. The Defendants must plead the defense in an answer and establish facts to show an entitlement to the privilege defense.

The Supreme Court of Nevada should hold that defamatory statements by an employer or former employer in the claims administration, as opposed to the administrative or judicial dispute resolution process, in a workers' compensation claim are protected only by a qualified privilege and not an absolute privilege. This privilege is conditional and must be pleaded and proved such that it cannot be raised on an NRCP Rule 12(b)(5) motion to dismiss as it must be raised in an answer and facts permitting invocation of the privilege defense must be

established. Thereafter, the privilege may be defeated if the plaintiff shows that the privilege has been abused by, as one example, publication with malice in fact. *Lubin v. Kunin*, 17 P.3d 422, 428, 117 Nev. 107 (2001). Most importantly, the Supreme Court of Nevada should hold that absolute litigation privilege does not apply in the claims administration process for defamatory statements by employers or former employers about employees who have made workers' compensation claims. The District Court's order in this case should be reversed and the matter remanded for further proceedings.

ARGUMENT

I. STANDARD OF REVIEW

The Supreme Court of Nevada rigorously reviews *de novo* all district court orders granting an NRCP 12(b)(5) motion to dismiss. *Buzz Stew, L.L.C. v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). The Court accepts all of the plaintiff's factual allegations as true and draws every reasonable inference in the plaintiff's favor to determine whether the allegations set forth in the Complaint are sufficient to state a claim for relief. *Id*. Plaintiff's Complaint should be dismissed for failure to state a claim "only if it appears beyond a doubt that [the Plaintiff] could prove no set of facts, which, if true, would entitle [the Plaintiff] to relief." *Id*. at 228, 181 P.3d at 672. The District Court's conclusions of law, including whether a defamation absolute privilege defense should be recognized is

reviewed *de novo*. *Id*.; *Cucinotta v. Deloitte & Touche, L.L.P*., 129 Nev. ___, ___, 302 P.3d 1099, 1101 (2013). Whether a statement is sufficiently relevant to any administrative quasi-judicial or actual judicial proceedings to fall within the absolute privilege is a question of law for the Supreme Court of Nevada. *Circus Circus Hotels, Inc. v. Witherspoon*, 99 Nev. 56, 62, 657 P.2d 101, 105 (1983).

II. THE DISTRICT COURT ERRED IN RULING THAT THE MERE FILING OF A WORKERS' COMPENSATION INSURANCE CLAIM IMPLICATES THE LITIGATION ABSOLUTE PRIVILEGE DEFENSE.

The District Court ruled that the mere filing of a workers' compensation insurance claim implicates the absolute litigation privilege. (AA at 12-13) The Supreme Court of Nevada recognizes an absolute privilege to defamation claims in only two instances. The Court has held that the "class of absolutely privileged communications recognized...remains narrow and is limited to those communications made in judicial or quasi-judicial proceedings and communications made in the discharge of a duty under express authority of law." *Cucinotta v. Deloitte & Touche, LLP*, 302 P. 3d 1099, 1102 (Nev. May 30, 2013). Absolute privilege has also be held by the Court to apply to communications in anticipation of litigation and applicable to both attorneys and parties to the litigation. *Clark County School District v. Virtual Educational Software, Inc*., 126 Nev. 374, 383, 213 P.3d 496, 502-03 (2009).

The District Court has stretched the absolute privilege beyond the breaking point in this case. It said that merely because litigation over issues in a workers' compensation may occur and that there is a process in place in the Nevada Industrial Insurance Act (NRS 616C.330 and NRS 616C.360) for administrative quasi-judicial proceedings, and because there is the possibility of judicial review under NRS 616C.370. Certainly in those administrative quasi-judicial proceedings and on judicial review the absolute litigation privilege would apply. But in the insurance claims administration process there is no need for an absolute privilege.

In this case Sean's workers' compensation claim was accepted and no party ever appealed any determinations to invoke the quasi-judicial process. There is no allegation or evidence to suggest that anyone ever seriously contemplated in good faith the filing of any appeals. Sean's former employer and its owner defamed Sean to the workers' compensation insurer (AA at 3-4) by stating that he had broken the law regarding prescription medications, that he was a drug addict, and that he was unsafely operating equipment while on drugs. The insurer republished these defamatory statements not in court or a quasi-judicial proceeding, but to Sean's doctor.[1] This is insurance claims administration, not

1 Note that the insurer has a statutory privilege under NRS 616D.020 for the statement to the doctor because there is no suggestion that the insurer acted "with malice"; however, the employer is alleged to have made the defamatory statements

litigation. This is not a situation where "the public interest in having people speak freely out-weighs the risk that individuals will occasionally abuse the privilege by making false and malicious statements." *Jacobs v. Adelson,* 130 Nev. ___, ___, 325 P.3d 1282, 1285 (2014). In court proceedings or quasi-judicial proceedings there are protections such as the penalty of perjury for lying under oath, or NRCP Rule 11 or NRS 7.085 sanctions for making false and defamatory statements. In the mere claims administration process there are no such remedies available. The law of defamation is the remedy. Absolute privilege is not called for under the circumstances of this case. There is no allegation or evidence that the employer or its owner was contemplating any litigation, nor was Sean. None had been initiated or was pending. Sean's claim had been accepted and he was receiving medical treatment and benefits.

A. The Affirmative Defense of Privilege Cannot Be Decided On A Motion to Dismiss Under Rule 12(b)(5) Because Defendant Must Plead And Prove The Defense.

> "[T]he law of defamation is meant to provide an incentive for people not to spread lies that can injure others. Since most people spend a good part of their time, effort and lives at their work, and have many colleagues, friends and acquaintances

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"with malice" and therefore would not have the protection of this statutory qualified privilege even though arguably the employer and its owner were reporting an alleged violation of NRS 616D.300 or fraud by Sean in the administration of the NIIA. The existence of this statutory qualified privilege (that only protects those who act without "malice") may also prevent the Court from extending a common law absolute privilege because the Legislature has spoken to the issue in the statutory scheme.

> there, to allow an employer to circulate lies around the workplace with impunity is particularly damaging."

Simpson v. Mars, 113 Nev. 188, 192, 929 P.2d 966 (1997).

Absolute privilege is one where the privilege is obvious on its face - where there can be no factual dispute that the privilege applies. *See infra at § B.* The Nevada Supreme Court held that the "class of absolutely privileged communications recognized...remains narrow and is limited to those communications made in judicial or quasi-judicial proceedings and communications made in the discharge of a duty under express authority of law." *Cucinotta v. Deloitte & Touche, LLP*, 302 P. 3d 1099, 1102 (Nev. May 30, 2013). Absolute privilege has also be held by the Court to apply to communications in anticipation of litigation and applicable to both attorneys and parties to the litigation. *Clark County School District v. Virtual Educational Software, Inc*., 126 Nev. 374, 383, 213 P.3d 496, 502-03 (2009).

The absolute litigation privilege requires that the **recipient** of the communication be either directly involved or significantly interested in the proceedings. *Jacobs v. Adelson*, 325 P. 3d 1282, 1289 (Nev., May 30, 2014); *Fink v. Oshins*, 118 Nev. 428, 436, 49 P.3d 640, 645-46 (2002) (Emphasis added). The review of the facts supporting the "nature of the recipient's interest in or connection to the litigation is a 'case-specific, fact-intensive inquiry' that must focus on and balance the underlying principles of the privilege." **Id.**

On **February 2, 2017,** the Nevada Supreme Court reiterated the principles in *Jacobs* regarding the absolute litigation privilege and reversed and remanded the motion to dismiss because the district court failed to "conduct a case-specific, fact-intensive inquiry that focused on and balanced the underlying principles of the privilege as required by *Jacobs*." *Shapiro v. Welt*, 389 P.3d 262, 133 Nev. Adv. Op. 6 at pp. 9-11 (2017). It logically follows that a fact-intensive inquiry would require development of the record and would preclude dismissal under Rule 12(b)(5).

Plaintiff's industrial injury occurred on April 30, 2014. Plaintiff's worker's compensation claim was accepted on May 14, 2014. ***Unless*** Defendants knew they would violate the Nevada worker's compensation statutes, causing Plaintiff to file an appeal with the Department of Administration Appeals Office to enforce his rights, Defendants could not have possibly believed Plaintiff would have to litigate his worker's compensation claim on May 21, 2014, when at least one of the defamatory communications was made. [2] Plaintiff's valid worker's compensation claim was less one week old (calculating time for mailing) and had, in fact, been accepted; there was no reason or basis for Plaintiff to make any threats of litigation

2 There were verbal communications between Goodes and Defendant about Plaintiff's prescription to which Defendant has admitted occurred before and/or on the day of May 21, 2014.

regarding his worker's compensation claim. There is no basis for an absolute privilege defense in this case.

B. Some Absolute Litigation Privilege Cases Can Be Disposed Of Under Rule 12(b)(5): This Is Not One Of Them.

The following cases directly address the absolute litigation privilege as it relates to Rule 12(b)(5). In each case it is clear that an absolute litigation privilege existed that did not require the court to make further factual determinations.

- *Clark County School Distract v. Virtual Educational Software, Inc*., 126 Nev. 374, 383, 213 P.3d 496, 502-03 (2009) - Motion to Dismiss granted on ground that absolute privilege attached where Plaintiff made an unequivocal written threat of litigation to Defendant.

- *Hampe v. Foote*, 47 P. 3d 438, 440, 118 Nev. 405 (Nev. 2002) - Motion to Dismiss granted because NRS 463.3407 bars any civil cause of action grounded on communications by a holder of, or applicant for, a gaming license to the Gaming Control Board or Gaming Commission to assist the entity in its functions and, therefore, absolute privilege attaches.

- *Knox v. Dick*, 665 P. 2d 267 (Nev. 1983) - Motion to Dismiss granted because Clark County Grievance Board hearings are conducted in a manner consistent with quasi-judicial administrative proceedings and, therefore, absolute privilege attaches.
merits.

None of the above cases dealt with defamatory statements by a former employer made with malice regarding the claims administration of a workers' compensation claim and all of those cases are distinguishable.

III. THE FACTS THAT MIGHT GIVE RISE TO A PRIVILEGE DEFENSE ARE IN DISPUTE, BUT IN ANY EVENT ONLY A QUALIFIED PRIVILEGE SUCH AS THE "COMMON INTEREST" PRIVILEGE SHOULD BE APPLIED.

Absolute privilege under the circumstances of this case goes too far. If anything the Supreme Court of Nevada should hold that only a qualified privilege such as the "Common Interest" Privilege should apply in this case.

The "Common Interest Privilege" is a qualified or conditional privilege that "exists where a defamatory statement is made in good faith on any subject matter in which the person communicating has an interest, or in reference to which he has a right or a duty, if it is made to a person with a corresponding interest or duty." *Circus Circus Hotels v. Witherspoon,* 99 Nev. 56, 62, 657 P.2d 101, 105 (1983); S*ee Also Bank of America Nevada v. Bourdeau,* 115 Nev. 263, 266-67, 982 P.2d 474, 476 (1999). Whether the Common Interest Privilege applies is a question of law for the court. *See Circus Circus Hotels,* 99 Nev. at 62, 657 P.2d at 105.

However, the legal determination requires the resolution of threshold facts before the Court can determine as a matter of law if the privilege may apply. This inescapably requires the case move forward into discovery of the facts and circumstances surrounding the alleged privilege and requires Defendants to plead and prove the affirmative defense of privilege. At the NRCP Rule 12(b)(5) stage there has been no answer which actually raises the defense and no facts or

evidence put forth to show the Court that the Defendants are entitled to the defense. *Lubin v. Kunin*, 17 P.3d 422, 428, 117 Nev. 107 (2001)

Further, whether a privilege applies is a question of law for the court; however, whether a conditional privilege is lost due to abuse by, for example, malice in fact on the part of the defendant is a question of fact for the jury. *Id.* The burden of alleging and proving a privilege defense is on the defendant NOT the plaintiff. *Simpson v. Mars*, 113 Nev. 188, 192, 929 P.2d 966, 968 (1997). Where the court finds as a matter of law that a conditional privilege applies, the burden shifts to the plaintiff to prove that the privilege is lost due to abuse by, for example, malice in fact on the part of the defendant. *Bank of America Nevada v. Bourdeau*, 115 Nev. 263, 267 (1999) "A conditional privilege may be abused by publication in bad faith, with spite or ill will or some other wrongful motivation toward the plaintiff" *Circus Circus Hotels v. Witherspoon*, 99 Nev. 56, 62 (fn.2) (1983). Yet another way that the privilege is overcome is where the defendant has published with malice in fact, *Id*., which means that the defendant held a deliberate intention to injure, vex, annoy or harass the plaintiff. *Craigo v. Circus-Circus Enterprises*, 106 Nev. 1, 9 (1990).[3]

As made clear in *Shapiro v. Welt*, 389 P.3d 262, 133 Nev. ___, (2014). whether the Court engages in an analysis of absolute litigation privilege under the

[3] This is the same "malice" standard as for the imposition of punitive damages.

Jacobs analysis or in the alternative under a conditional or qualified privilege analysis, threshold facts must first pleaded and proved in a responsive pleading under Rules 7 and 8 and dismissal under Rule 12(b)(5) is not appropriate. Plaintiff's pleading in his Complaint is sufficient under the standard for pleading and it should not be dismissed for failure to state a claim. It is up to the Defendants to answer the complaint and raise the privilege defense and make a factual showing to the District Court that the threshold facts of publication in good faith are met. As held by the Supreme Court in *Lubin*, *Simpson*, and *Pope* this cannot be done at the NRCP Rule 12(b)(5) motion to dismiss stage.

IV. SUPREME COURT OF NEVADA PRECEDENT IS CLEAR THAT PRIVILEGE IS A DEFENSE THAT MUST BE PLEADED AND PROVED WHICH PRECLUDES DISMISSAL UNDER NRCP RULE 12(b)(5).

A statement that is capable of defamatory construction is not actionable if the communication is privileged. *Lubin v. Kunin*, 117 Nev. 107, 114, 17 P.3d 422, 427 (2001). However, privileges are affirmative defenses to a defamation claim and, therefore, the defendant has the initial burden of properly alleging the privilege and then of proving the allegations at trial. *Pope v. Motel 6*, 121 Nev. 307, 319, 114 P.3d 277 (2005); *Simpson v. Mars Inc*., 113 Nev. 188, 191, 929 P.2d 966, 968 (1997). Because a privilege must be pleaded and proved dismissal under Rule 12(b)(5) is not appropriate. A qualified privilege defense cannot succeed on

a Rule 12(b)(5) motion to dismiss. The reason is that under *Pope v. Motel 6*, 121 Nev. 307, 319, 114 P.3d 277 (2005) (citing *Simpson*) Defendants bear the burden of alleging and *proving* the affirmative defense of privilege:

> In *Simpson v. Mars Inc.*, however, we revisited the issue of intracorporate communications and concluded that while certain intracorporate communications are privileged, any privileges are defenses and not part of the prima facie case. As a result, defendant corporations bear the burden of alleging and proving the privilege's existence. We noted in *Simpson* that "[t]he circumstances of the communication of the allegedly defamatory material are uniquely within the knowledge of the corporation and its agents." Because an intracorporate communication is only privileged if the communication occurs in the regular course of the corporation's business, we held that it would be unfair to place the burden on the plaintiff to plead and prove facts "which are peculiarly within the knowledge of the corporate defendant, such as the circumstances of intracorporate communications."

Id. at 121 Nev. 318. (footnotes, and citations omitted) The "intracorporate communications privilege" is a species of the "common interest privilege" and both are qualified privileges only. The same rules apply to both. *See Lubin v. Kunin*, 17 P.3d 422, 428, 117 Nev. 107 (2001) ("At the NRCP 12(b)(5) stage, however, the Parents have not alleged the privilege by answer, let alone established facts to show that the privilege applies.").

Thus, at this stage it is not incumbent upon the Plaintiff to know and to allege all of the particulars of the communication. It is incumbent upon the Defendants to plead and prove their affirmative defense if they can. It is only incumbent upon the Plaintiff to allege publication, which he has adequately done,

and to allege that the publication was not privileged, which he has adequately done. Plaintiff has adequately pled defamation against all of the Defendants. It is up to them to answer and raise their defenses and the particulars of the facts upon which they rely. Then Sean can address the issues as either why the privilege defense does not arise, or why the privilege is lost to abuse and to point out any applicable factual disputes on those issues.

CONCLUSION

In accordance with the above, the District Court's Order Granting Defendant's Motion to Dismiss pursuant to NRCP 12(b)(5) rests on an error of law. The dismissal of Mr. Fitzgerald's Complaint should be reversed and the case remanded so that it may proceed on the merits.

RESPCTFULLY SUBMITTED this 13th day of November 2017.

/s/ James P. Kemp
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Attorney for Appellant

ATTORNEY'S CERTIFICATION IN COMPLIANCE WITH RULE 28.2 OF THE NEVADA RULES OF APPELLATE PROCEDURE

James P. Kemp, Attorney for Appellant, by signing below herby certifies in compliance with Rule 28.2 of the Nevada Rules of Appellate Procedure that:

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 2003 in Times New Roman size 14 font;

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

Proportionately spaced, has a typeface of 14 points or more, and contains 4,864 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 this 13th day of November 2017

/s/ James P. Kemp

JAMES P. KEMP, ESQ., Bar No.6375

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 13, 2017, I filed the foregoing Appellant's Opening Brief through the Supreme Court of Nevada's electronic filing system along with the Appellant's Appendix. Electronic service of the foregoing shall be made in accordance with the Master Service List. The following parties were served with a copy of the Opening Brief and Appellant's Appendix by regular first class U.S. Mail as follows:

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DATED this 13th day of November 2017

/s/ James P. Kemp
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