

CASE NO. 72803

IN THE SUPREME COURT OF THE STATE OF NEVADA

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SEAN FITZGERALD, Appellant

Electronically Filed  
Nov 14 2017 10:50 a.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

v.

MOBILE BILLBOARDS, LLC, et al., Respondent

---

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

**APPELLANT'S APPENDIX**

James P. Kemp, Esq.  
Nevada Bar No. 6375  
Victoria L. Neal, Esq.  
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Attorneys for Appellant

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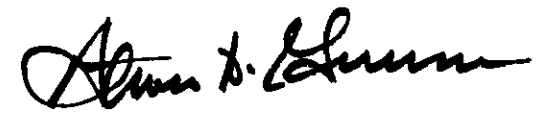
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CLERK OF THE COURT

**DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

SEAN FITZGERALD,

Plaintiff,

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 No.: A - 16 - 737119 - C

Dept No.: XXXI I

**COMPLAINT**

**JURY TRIAL DEMANDED**

**Arbitration Exemption: action seeking  
equitable or extraordinary relief.**

COMES NOW Plaintiff, SEAN FITZGERALD, by and through Counsel, KEMP &  
KEMP, ATTORNEYS AT LAW, and hereby complains and alleges the following:

**JURISDICTION**

1. SEAN FITZGERALD (herein "Plaintiff") is a resident of Clark County, Nevada. The amount in controversy in this case is in excess of \$10,000.00.
2. Defendant MOBILE BILLBOARDS, LLC (herein "Mobile") is a Nevada Limited Liability Company. It has continuous and ongoing business operations in the state of Nevada and Clark County. Plaintiff reserves the right to amend this Complaint to name any and all

appropriate parties in addition to this Defendant or instead of this Defendant should Plaintiff learn of additional or different facts from those set forth herein, or as a result of further discovery, analysis, and fact development in this case. Plaintiff thus brings these causes of action against MOBILE BILLBOARDS, LLC (herein Mobile”) as a successor or successor-in-interest, or as an integrated enterprise, or as a joint venturer, or otherwise jointly and severally responsible for Plaintiff’s damages.

3. Defendant VINCENT BARTELLO (herein “BARTELLO”) was at all relevant times mentioned herein, an owner, operating principal, employee, servant and/or agent authorized to act on behalf of Defendant MOBILE BILLBOARDS, LLC at its Clark County place of business. On information and belief this Defendant is, and was at all relevant times mentioned herein, a resident of Clark County, Nevada.

4. Plaintiff is unaware of the true names and capacities whether individuals, corporations, associates, or otherwise of Defendants DOE INDIVIDUALS I through X and ROE BUSINESS ENTITIES I through X, inclusive, and therefore sues these Defendants by such fictitious names. Plaintiff is informed and believes and thereupon alleges that the Defendants, and each of them, are in some manner responsible and liable for the acts and damages alleged in this Complaint. Plaintiff will seek leave of this Court to amend this Complaint to allege the true names and capacities of the DOE INDIVIDUAL and ROE CORPORATION Defendants when the true names of the DOE INDIVIDUAL and ROE CORPORATION Defendants are ascertained.

5. The Court has jurisdiction over the parties named herein and the subject matter of this case.

6. This action has been timely filed.

...

...

**FACTS COMMON TO ALL CLAIMS**

7. Plaintiff repeats and realleges each and every pertinent allegation contained in and every other pertinent paragraph contained in this Complaint, as if set forth fully herein.
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, 2015. 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

1 painkillers while operating dangerous and heavy equipment in the course of his employment.  
2 Such false and malicious accusations tend to harm the Plaintiff in his trade, occupation,  
3 profession, or business and is per se defamatory under Nevada law.

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

11  
12 15. Defendants acted with malice and ill will towards Plaintiff in disclosing information for which  
13 there was no reasonable grounds to believe was accurate and, thereby, recklessly and  
14 intentionally disclosed inaccurate and misleading information in an attempt to thwart  
15 Plaintiff's workers' compensation claim. It was reasonably foreseeable under the facts and  
16 circumstances that a person with ordinary intelligence and prudence could have anticipated  
17 that such conduct would result in injury to Plaintiff.

18  
19 **FIRST CAUSE OF ACTION:**

20 **DEFAMATION PER SE**  
21 **(Against All Defendants)**

22 16. All other Paragraphs of this Complaint are expressly incorporated here by reference as if fully  
23 reasserted, alleged, and set forth herein.

24 17. On one or more occasions Defendants told one or more third-persons, orally and/or in  
25 writing, that the Plaintiff was committing a crime including, but not limited to, the unlawful  
26 taking or obtaining of controlled substance or prescription under NRS 453.391.

18. On one or more occasions Defendants told one or more third-persons that Plaintiff was a drug addict, a loathsome disease.

19. On one or more occasions Defendants told one or more third-persons that Plaintiff was improperly taking prescription narcotic painkillers and then dangerously or recklessly operating dangerous and/or heavy equipment while under the influence. These statements tend to harm the Plaintiff in his trade, occupation, profession, or business.

20. The statements of and concerning the Plaintiff were made as statements of fact and not of mere opinion.

21. The statements of and concerning the Plaintiff were false and defamatory.

22. The false and defamatory statements were published to third parties and were not privileged.

23. Defendants published the false and defamatory statements knowing they were false or with reckless disregard for the truth and/or with actual malice or malice in fact. Each publication and/or republication is a separate, distinct, and actionable tortious act.

24. The false and defamatory statements made by Defendants were of a type that would tend to harm the Plaintiff in his trade, occupation, profession, business, or office.

25. The false and defamatory statements of and concerning Plaintiff imputed to Plaintiff the commission of one or more crimes including, but not limited to, the unlawful taking or obtaining of a controlled substance or prescription under NRS 453.391, and that Plaintiff was a drug addict, a loathsome disease.

26. Plaintiff's reputation and character were harmed causing him actual pecuniary and special damages including, but not limited to lost income.

27. The false and defamatory statements of and concerning Plaintiff published by the Defendants constitute per se defamation.

28. Damages are presumed.

29. Plaintiff suffered emotional distress, mental anguish, and general damages.

30. Defendants conduct was accomplished with malice, fraud, or oppression such that punitive or exemplary damages should be awarded to deter similar future conduct by Defendants.

**SECOND CAUSE OF ACTION:**

**SLANDER PER SE  
(Against All Defendants)**

31. All other Paragraphs of this Complaint are expressly incorporated here by reference as if fully reasserted, alleged, and set forth herein.

32. Defendants made one or more false and defamatory written communications of and concerning the Plaintiff. The false and defamatory written statements of and concerning Plaintiff imputed to Plaintiff the commission of one or more crimes including, but not limited to, the unlawful taking or obtaining of a controlled substance or prescription under NRS 453.391, and that Plaintiff was a drug addict, a loathsome disease. Further, the Defendants stated to one or more third-persons that the Plaintiff had dangerously and recklessly taken narcotic painkillers and then worked on dangerous and/or heavy equipment creating a safety risk in his workplace. Each publication and/or republication is a separate, distinct, and actionable tortious act.

33. The false and defamatory communications were published to one or more third parties.

34. Defendants knew that the published communications were false, acted in reckless disregard as to the truth or falsity of the published communications and/or acted negligently with regard to each and every publication of defamatory matter.

35. The publication of each and every defamatory communication constituted slander per se in that it falsely imputed the commission of a crime to Plaintiff including, but not limited to, the unlawful taking or obtaining of controlled substance or prescription under NRS 453.391.



1 36. The publication of each and every defamatory communication constituted slander per se in  
2 that it would tend to injure the Plaintiff in his trade, occupation, business, profession, or  
3 office.

4 37. The communication was published with malice; the publication was unprivileged.

5 38. The defamatory communications have so damaged Plaintiff's reputation.

6  
7 **WHEREFORE**, Plaintiff expressly reserves the right to amend his Complaint at or before  
8 the time of trial of the action herein to include all items of damages not yet ascertained, and  
9 demands judgment against the Defendants, upon each of them, as follows:

10 A. All applicable monetary relief provided for under common law and Nevada state law  
11 including, but not limited to the following:

- 12 1. Money damages in excess of \$10,000.00;
- 13 2. Economic damages including, but not limited to, lost wages and benefits of  
14 employment, incidental and consequential damages;
- 15 3. General damages including emotional distress and general economic harm;
- 16 4. The full value of all chattels converted by Defendants;
- 17 5. Punitive and/or Exemplary Damages to deter the Defendants from future  
18 malicious, fraudulent, and oppressive conduct of a similar nature;
- 19 6. Pre-judgment and post-judgment interest on the amounts awarded at the  
20 prevailing legal rate;
- 21 7. Reasonable attorney fees, reasonable expert witness fees, and other costs of the  
22 action pursuant to statute, agreement, or court rule;
- 23 8. For extraordinary and equitable relief ordering that the Defendant be required to  
24 publish retractions to as much as possible restore to the Plaintiff his good name  
25 among those to whom the defamation was published;
- 26  
27  
28

1 B. A trial by jury on all issues that may be tried to a jury; and/or

2 C. For such other and further relief as the Court may deem just and proper.

3 DATED this 20th day of May, 2016.

4  
5 /s/ James P. Kemp

JAMES P. KEMP, ESQ.

Nevada Bar No.: 6375

VICTORIA L. NEAL, ESQ.

Nevada Bar No.: 13382

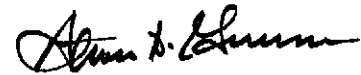
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702-258-1183 ph./702-258-6983 fax

*Attorneys for Plaintiff*



CLERK OF THE COURT

1 **ORDR**

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

4 \*\*\*\*\*

5  
6  
7 SEAN FITZGERALD,

8  
9 Plaintiff,

10 vs.

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

15 Defendants.  
16

CASE NO.: A-16-737119-C

DEPT. NO. 32

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  
28 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)).  
28

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  
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.

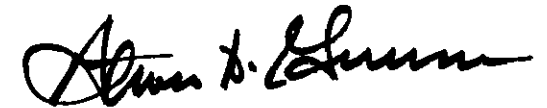
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26 **Rob Bare**  
27 **Judge, District Court, Department 32**  
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Appellant's Appendix Page 14





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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8 Las Vegas, Nevada 89117  
9 (702) 966-5200 Telephone  
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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,**

18 Defendants.

Case No.: A-16-737119-C

Dept. No.: XXXII

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

20  
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 ///

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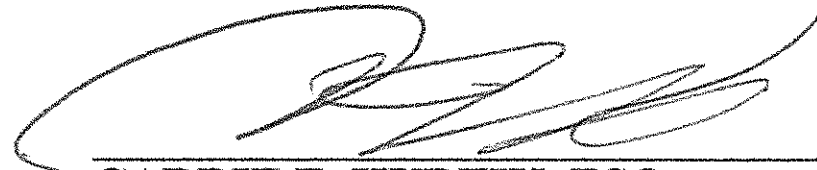
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1 Granting Defendant's Motion to Dismiss is attached hereto as Exhibit "A".

2 DATED this 3<sup>rd</sup> day of April 2017.

3 **HURTIK LAW & ASSOCIATES**

4 

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

6 Nevada Bar No. 7028  
7 7866 West Sahara Avenue  
8 Las Vegas, Nevada 89117  
9 (702) 966-5200 Telephone  
10 (702) 966-5206 Facsimile  
11 churtik@hurtiklaw.com  
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

*Adam D. Levine*

CLERK OF THE COURT

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DISTRICT COURT  
CLARK COUNTY, NEVADA

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SEAN FITZGERALD,

Plaintiff,

vs.

MOBILE BILLBOARDS, LLC, a  
Nevada Limited Liability Company;  
and VINCENT BARTELLO, an  
individual,

Defendants.

CASE NO.: A-16-737119-C

DEPT. NO. 32

**ORDER GRANTING DEFENDANTS' MOTION TO DISMISS**

This matter involves allegations of defamation that took place during the pendency of a workers compensation claim. Plaintiff Sean Fitzgerald filed suit on May 20, 2016 against his former employers, Mobile Billboards, LLC and the company's owner, Vincent Bartello. Plaintiff alleges that after filing the workers compensation claim due to an injury that occurred on April 30, 2014, the Defendants made defamatory and slanderous comments about Plaintiff to the 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).

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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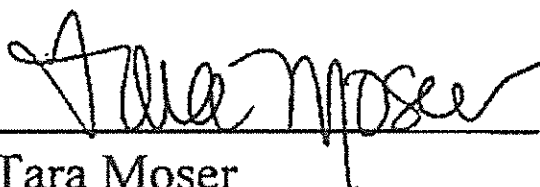
**CERTIFICATE OF SERVICE**

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

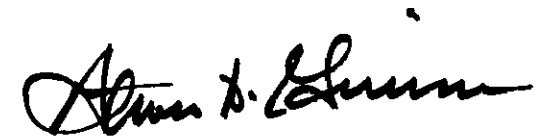
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Dated this 27<sup>th</sup> day of March, 2017.



Tara Moser  
Judicial Executive Assistant, Dept. 32



CLERK OF THE COURT

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Sean Fitzgerald*

DISTRICT COURT  
CLARK COUNTY, NEVADA

\* \* \*

SEAN FITZGERALD,

Plaintiff,

vs.

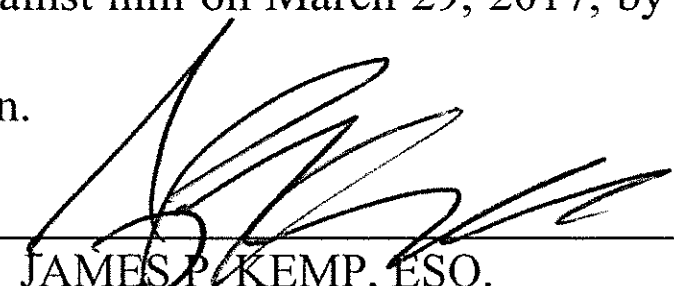
MOBILE BILLBOARDS, LLC, a Nevada  
Limited Liability Company; VINCENT  
BARTELLO, an individual; and DOES I  
through X; and ROE BUSINESS ENTITIES I  
through X, inclusive,

Defendants.

)  
) Case No.: A-16-737119-C  
)  
) Dept. No. XXXII  
)  
) **NOTICE OF APPEAL**

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