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### Harrison v. Roitman, 131 Nev. Adv. Op. 92 (Dec. 17, 2015)

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## TORTS: ABSOLUTE IMMUNITY

### **Summary**

The Court determined that absolute immunity applies to party-retained expert witnesses as well as court appointed witnesses. Party-retained expert witnesses have absolute immunity from suits for damages arising from statements made in the course of judicial proceedings.

### **Background**

During a divorce proceeding between Kirk Harrison and Vivian Harrison, Kirk hired psychiatrist Dr. Norton Roitman to submit a psychiatric evaluation of Vivian to the court. Dr. Roitman never met with Vivian, but through discussions with Kirk determined Vivian had a personality disorder. Dr. Roitman submitted a written report with this information to the lower court, concluding Vivian's prognosis was poor.

Following Dr. Roitman's testimony regarding Vivian's mental status, Vivian sued Dr. Roitman for medical malpractice, intentional infliction of emotional distress, negligent infliction of emotional distress, and civil conspiracy. Following Vivian's complaint, Dr. Roitman filed and succeeded on a NRCP 12(b)(5) motion to dismiss in the district court. The district court found, as a matter of law, that Dr. Roitman was absolutely immune from liability for claims arising out of his participation in a judicial proceeding. Vivian appealed, contending Nevada limits an absolute immunity defense to claims for defamation.

### **Discussion**

Absolute immunity "is a broad grant of immunity from not just civil damages, but also from the burdens of litigation, generally."<sup>2</sup> Courts have to balance the "social utility of the immunity against the social loss of being unable to attack the immune defendant."<sup>3</sup> Absolute immunity is driven by public policy, and thus courts are mindful that "functional categories, not . . . the status of the defendants' control[s]" are what guide the analysis.<sup>4</sup> The United States Supreme Court applies the "functional approach" to answer immunity questions.<sup>5</sup>

#### *The functional approach*

The functional approach to absolute immunity is made up of three separate inquiries: (1) "whether the [person seeking immunity] performed functions sufficiently comparable to those of [persons] who have traditionally been afforded absolute immunity at common law";<sup>6</sup> (2)

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<sup>1</sup> By Michael Coggeshall.

<sup>2</sup> *State v. Second Judicial Dist. Court (Ducharm)*, 118 Nev. 609, 615, 55 P.3d 420, 423 (2002).

<sup>3</sup> *Id.*

<sup>4</sup> *Rolon v. Henneman*, 517 F.3d 140, 145 (2d Cir. 2008).

<sup>5</sup> *Briscoe v. LaHue*, 460 U.S. 325, 335-36 (1983).

<sup>6</sup> *Ducharm*, 118 Nev. at 616, 55 P.3d at 424.

“whether the likelihood of harassment or intimidation by personal liability [is] sufficiently great to interfere with the [person’s] performance of his or her duties”;<sup>7</sup> and (3) “whether procedural safeguards exist in the system that would adequately protect against [illegitimate] conduct by the [person seeking immunity].”<sup>8</sup>

### *Immunity at common law*

At common law, “[t]he immunity of parties and witnesses from subsequent damages liability for their testimony in judicial proceedings was well established.”<sup>9</sup> This is because fear of subsequent damages could lead to two forms of self-censorship: (1) witnesses could fear presenting testimony for risk of subsequent damages liability, and (2) even if the witness gets to the stand, he might skew his testimony because of that same fear.<sup>10</sup> Thus, common law traditionally protects witnesses so that they may testify without fear.

### *The looming threat of liability*

The threat party-retained experts face is as great if not greater than the threat to court-appointed experts. Both classes risk exposure to law suits when they provide expert opinion as participants in adversarial judicial proceedings. Court-appointed experts are given absolute immunity, and the same looming threat of liability that affects court-appointed experts could also interfere with party-retained experts’ duties. They would be discouraged from accepting retainers, and would be forced to carry insurance to warrant the risk of taking the stand, which put them out of the price range of most parties. To permit actions against party-retained experts would discourage candid expert opinions and suppress access to them.<sup>11</sup>

### *Procedural safeguards as remedies*

Remedies and safeguards other than civil liability are sufficient to hold party-retained experts accountable for their conduct. Vivian was at liberty to avail herself of any other remedy. Regardless, the Court’s determination is not contingent on a factual finding that Vivian successfully used other remedies. Acknowledging that other remedial safeguards exist is enough to satisfy the final prong of the functional approach.<sup>12</sup>

### *Absolute immunity under Nevada law*

Vivian argues Nevada does not extend the absolute immunity defense beyond claims of defamation. However, Nevada case law such as *Duff* and *Foster* negate this assertion.<sup>13</sup> The Court does not make an issue of what type of claim is brought when considering an absolute immunity defense, and finds no reason to do so now.

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Briscoe*, 460 U.S. at 330-31.

<sup>10</sup> *Id.* at 333.

<sup>11</sup> *Duff v. Lewis*, 114 Nev. 564, 570, 958 P.2d 82, 86 (1998).

<sup>12</sup> *Id.* at 570, 958 P.2d at 86.

<sup>13</sup> *Id.* at 571, 958 P.2d at 87; *Foster v. Washoe County*, 114 Nev. 936, 943, 964 P.2d 788, 793 (1998).

*An unobstructed path to truth*

Vivian argues that because expert witnesses are hired to help only one party, the goal of ensuring that the path to truth is unobstructed is not advanced by giving those experts absolute immunity from negligence. The Court disagrees, stating an expert opinion is not admitted to assist one party, but rather to assist the trier of fact by giving them specialized knowledge.<sup>14</sup>

**Conclusion**

The Court found that absolute immunity applies to party-retained expert witnesses as well as court appointed witnesses. Thus, even if factual allegations in Vivian's complaint were true, as a matter of law, Dr. Roitman's defense of absolute immunity precludes her claim. Because of this, the Court affirmed the district court's dismissal.

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<sup>14</sup> NEV. REV. STAT. § 50.275.