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No. 65879-4-I

THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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KEITH BROWN, Appellant.

v.

CHRYSALIS SCHOOL, INC.,  
a Washington corporation, Respondent,

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APPELLANT'S REPLY BRIEF IN SUPPORT OF BROWN'S APPEAL,  
AND RESPONSE BRIEF IN OPPOSITION TO CHRYSALIS  
SCHOOL'S "CROSS APPEAL"

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<sup>1</sup> While the school’s Cross Appeal is in fact a Motion for Discretionary Review, for purposes of simplicity it will be referred to herein as it is entitled, a Cross Appeal.

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## I. INTRODUCTION

This case comes before the court on Keith Brown's (hereinafter "Brown") appeal from the trial court's grant of summary judgment dismissing his claims, and on defendant Chrysalis School's (hereinafter the "school") so-called "Cross Appeal" of the trial court's previous denial of the school's motion for summary judgment predicated on the issue of privilege.

Section II below consists of Brown's Reply Brief in support of his appeal from summary judgment.

As to Brown's Response to the school's so-called "Cross Appeal"<sup>2</sup>, it should initially be noted that this matter is not properly before this court at all: A trial court's "denial of a motion for summary judgment is not appealable" as a matter of right. *Roth v. Bell*, 24 Wn. App. 92, 103, citations omitted; *and see* RAP 2.2.

The school's "Cross Appeal" is in fact a petition for discretionary review and differs in substance very little, if at all, from the Petition for Discretionary Review the school previously submitted to the Supreme Court in March of 2010. That Motion was denied by the Supreme Court

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<sup>2</sup> See Section III, below.

Commissioner's "Ruling Denying Review" dated May 13, 2010. See Appendix A.

Now the school seeks once again to bring this matter up for interlocutory review, entitling its effort a "Cross Appeal" because the Supreme Court had already rejected its petition when properly presented as a "Motion for Discretionary Review."

Although pursuant to RAP 5.1(c) an improperly designated notice of appeal will generally be given the same effect as a notice for discretionary review, in this instance the court should reject this subterfuge and strike the school's so-called cross-appeal. Discretionary review was previously rejected by the Supreme Court, and the school offers no new reason why this court should exercise its discretion and again review that question, or the question of privilege. The school is simply seeking two bites at the apple.

However, should this court, for whatever reason, choose to accept the schools' "cross appeal" and review the privilege issue, Brown has placed his Response to this "cross appeal" at Section III, below.

## II. REPLY ARGUMENT IN SUPPORT OF BROWN'S APPEAL

### ISSUE A: DEFENDANT'S FALSE STATEMENTS DEFAMED BROWN AND CAUSED HIS INJURIES

In essence, the school's Response contends that Murdoch's statements were about Ashley, not her father, and that these statements did not cause Brown's injuries. Response, p. 3. The short answer to this contention is that Murdoch's false statements about Brown's relationship with Ashley reflected on Brown, not Ashley, and were a significant factor in holding Brown up to contempt and ridicule, while disrupting his relationship with his daughter. Obviously, there can be more than one proximate cause of an event.<sup>3</sup>

In fact, as neither party denies, there were multiple causes of Brown's injuries.

On a motion for summary judgment an appellate court considers all evidence and reasonable inferences from that evidence in the light most favorable to the nonmoving party. *Dunlap v. Wayne*, 105 Wn.2d 529, 535, 716 P.2d 842 (1986). Despite this (or perhaps because of it), the school carefully avoids using the word "inference" at any point in its Response, and never explicitly acknowledges that for purposes of this motion

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<sup>3</sup> See, *inter alia*, WPI 15.01 (bracketed material).

Murdoch's statements, which are flatly contradicted by Ashley's testimony, are false. CP 833-835; CP 854-863; CP 943-948

However, in assessing whether Murdoch's statements were defamatory and about Brown, inferences are crucial:

Words which are harmless in themselves may be defamatory in light of surrounding circumstances.

*Pitts v. Spokane Chronicle Co.*, 63 Wn.2d 763, 767, 388 P.2d 976 (1964), citations omitted.

Here Murdoch's false statements were knowingly made to a court appointed parenting evaluator in the course of a child custody dispute.

These statements were, as the school itself (probably inadvertently) admits, about "the Brown children and parents." Response, p. 8. These false statements clearly implied that Brown's behavior adversely affected his daughter's education, and that Brown was a lousy parent whose own daughter wanted nothing to do with him. From this it is certainly reasonable to infer that these statements were defamatory, about Brown, and exposed him to contempt, ridicule, and humiliation.

Murdoch's statements were prominently featured in the parenting evaluator's report to the trial court, which in its disposition of the underlying child custody case accepted the evaluator's recommendations in their entirety. From this it can be reasonably inferred that Murdoch's

falsehoods were at least one proximate cause of Brown's resulting injuries.

These questions, however stated, raise material issues of fact. The trial court erred in resolving them on summary judgment.

1. Murdoch's Statements Were Defamatory:

It can be, and for summary judgment purposes must be, reasonably inferred that Murdoch's false statements to the parenting evaluator imply, and are intended to imply, that Brown was an unpleasant person, a bad parent, and seriously estranged from his daughter. The school actually goes so far as to assert that the trial court decided this "as a matter of law." Response, p. 22. If the school is correct and the trial court did decide this as a matter of law, this was reversible error: The trial court failed to view reasonable inferences from the evidence in the light most favorable to Brown.

Undeterred by realities, the school stays on message, and again and again repeats: Murdoch's statements were made "about Ashley" not Brown. While intoning this mantra the school carefully avoids any reference to the context in which these statements were made, or the reasonable inferences that can be drawn on this evidence.

Facts, however, are stubborn, and difficult to consistently ignore. In fact, Murdoch's false statements to Ms. Hedrick clearly convey, and were clearly intended to convey, the impression that Keith Brown was a lousy parent whose own daughter would prefer to have nothing to do with him. While the school would have the court ignore this obvious inference, its own Response recognizes that Murdoch's statements are actually about the "Brown children *and parents*." Response p. 8, emphasis added.

The only question is whether reasonable people might understand (the words used) in a defamatory sense. Thus, when circumstances are proved which will clothe with a defamatory meaning words otherwise innocent, the question must equally be whether reasonable people who know the special circumstances might understand them in a defamatory sense.

*Pitts, supra*, at 770, citations omitted.

Chrysalis School had full knowledge of exactly such "special circumstances": It knew that Ms. Hedrick was a court appointed parenting evaluator and knew, or certainly should have known, that its false statements could be expected to affect her report to the court in the ongoing child custody dispute between Brown and his ex-wife. Under these circumstances Murdoch's falsehoods must be understood in a defamatory sense.

The school attempts to support its contention that Murdoch's statements were not about Brown by citation to *Simms v. KIRO, Inc.*

(Response, p. 20), but fails to note that in *Simms* the KIRO broadcast in question identified neither the plaintiff nor his establishment. *Simms v. KIRO, Inc.*, 20 Wn. App. 229, 231 and 236, 580 P.2d 642 (1978). As stated in *Simms*,

The test is not whom the story intends to name but who a part of the audience may reasonably think is named “not who is meant, but who is hit” as one court put it.

*Id.*, at 234. Here, regardless of who the school claims it meant, it hit Keith Brown.

If Murdoch’s statements had been true, the school might arguably be justified in claiming that these statements were “about Ashley,” but these statements were false according to Ashley herself. CP 834-835. Ms. Murdoch, of course, claims she told the truth. For purposes of summary judgment this credibility dispute must be resolved in favor of Brown, the nonmoving party. Therefore, these statements, because they were false, cannot have conveyed any information “about Ashley”<sup>4</sup>; these falsehoods can *only* have served to defame Brown.

It is because of the transparent reasonableness of these inferences that the school so assiduously avoids use of the word “inference” in its Response.

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<sup>4</sup> False statements convey no information, only misinformation.

2. Defendant's Defamatory False Statements Caused Brown's Injuries:

- a. *There is a clear, direct, and unbroken line, between Murdoch's statements and Brown's injury.*

Just as the school's Response is purposefully blind as to the defamatory content and implications of the school's false statements about Brown, its Response stubbornly refuses to discern any direct link between these falsehoods and Brown's resulting injuries. Response, pp. 22-23.

This argument speaks to legal causation, which depends on foreseeability.

Foreseeability is normally an issue of fact and will be decided as a matter of law only where reasonable minds cannot differ.

*Schooley Pinch's Deli Market*, 134 Wn.2d 468, 477, 951 P.2d 7349 (1998), citations omitted.

In the instant case, the effect of the school's falsehoods is direct and predictable: The school's statements were knowingly made to a court appointed parenting evaluator who, based on her investigation was charged with reporting to the court in the ongoing custody dispute. The evaluator's report emphasized these false statements and recommended Brown lose custody and, among other things, be excluded from educational decision making. The trial court accepted the evaluator's report into evidence, and implemented, *without exception*, the evaluator's recommendations.

This is direct as could be: There's nothing unforeseeable in the fact that malicious falsehoods, communicated to one who is appointed to advise a decision maker, will have an adverse effect on the ultimate decision made.

The fact of causation is incapable of mathematical proof, since no one can say with absolute certainty what would have occurred if the defendant had acted otherwise... If as a matter of ordinary experience a particular act or omission might be expected, under the circumstances, to produce a particular result, and that result in fact has followed, the conclusion may be permissible that the causal relationship existed.

*Prosser & Keaton on Torts*, §41, at 269-270 (5th ed. 1984)<sup>5</sup>

In support of its contention that causation was properly decided as a matter of law, the school cites to the case of *Childs v. Allen*, 125 Wn.2d 50, 105 P.3d 411 (2005), but fails to note that the *Childs* case was decided not on the issue of causation, but on the basis of the absolute immunity of a court appointed expert. The *Childs* case might be applicable if Brown was suing Ms. Hedrick (a testifying witness, who *is* absolutely immune), but does not apply to the school or Ms. Murdoch, who never appeared or testified.<sup>6</sup>

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<sup>5</sup> Washington courts have repeatedly cited and quoted Section 41 with approval. See, e.g.: *Daugert v. Pappas*, 104 Wn.2d 254, 162, 704 P.2d 600 (1985) and *Mavroudis v. Pittsburg-Corning Corp.*, 86 Wn. App. 22, 30, 935 P.2d 684 (1997)

<sup>6</sup> See Brown's Response on the school's cross-appeal.

Furthermore, to the extent *Childs* did address the issue of causation it found that plaintiff did not produce any competent evidence of causation. *Id.*, at 57. Here, however, Brown has shown that the school's statements were heavily relied upon in Ms. Hedrick's report to the court trying the custody dispute.

Ms. Hedrick's report referenced interviews with nine collateral contacts (apart from the parties, Ed Garth, Ms. Garth's then current husband, and their children). Nearly a full page of that report was devoted to Chrysalis, far more than any other such contact. CP 902-903. No other collateral contact was cited in Ms. Hedrick's conclusions to her report. CP 907-909. At trial, Ms. Hedrick testified that she included in her report all evidence that was important to her conclusions. CP 920. Ms. Hedrick relied on school employees in preparing her report, stating that the School's testimony provided a "microcosm" of Brown's general behavior patterns, and concluded that Brown should be barred from involvement in his daughter's education. CP 909. In deciding the custody litigation, the trial court entirely accepted Ms. Hedrick's conclusions, which were adverse to Brown in every respect. At her deposition Ms. Hedrick testified that her investigation at Chrysalis was highly significant in her

decision to recommend to the court that Brown be excluded from all decisions regarding, and involvement in, Ashley's education. CP 879.

Regardless of all else, when Brown saw Ms. Hedrick's report, he was understandably shocked when he read the statements and behavior the school had falsely attributed to his daughter. CP 828. This, standing alone, is a direct resulting injury.

The school's contention that there was no direct link between its falsehoods and Brown's damages cannot be supported.

The school further attempts to minimize these plain facts by claiming that to establish a casual connection on this basis is speculative, mere conjecture. This is no answer at all, it simply, once again, dodges the question of reasonable inferences:

Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference.

*Lavender v. Kern*, 327 U.S. 645, 653, 66 S.Ct. 740, 90 L.Ed. 916 (1946); quoted with approval in *Herskovitz v. Group Health Coop.*, 90 Wn.2d 609 617, 664 P.2d 474 (1983).

Under the Washington law such disputed inferences are to be settled at trial, not by a judge on a CR 56 motion.

*b. The issue of multiple causation was repeatedly addressed by both parties in the trial court and was not first raised on this appeal.*

The school declines to offer substantive a rebuttal in regard to the applicability of the substantial factor test under the circumstances of the instant case. Instead, the school contends that on this appeal RAP 2.5 precludes all consideration of the substantial factor test in analyzing proximate causation.<sup>7</sup>

RAP 2.5 provides in pertinent part that the appellate court, with certain exceptions “may refuse to review any claim of error which was not raised in the trial court.” However, RAP 2.5 *does not* say, and certainly cannot mean, that this court is barred from employing the proper legal analysis of issues raised both in the trial court and on appeal.

On this appeal Brown claims the trial court erred in granting summary judgment by failing “to review all evidence and inferences from that evidence in the light most favorable to plaintiff, the nonmoving party.” See Brown’s Opening Brief, “Assignment of Error” p. 1. This is the only “claim of error” made, though there are a number of associated issues.

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<sup>7</sup> Response, p. 28, ¶4 (in bold typeface).

The trial court's Order Granting Summary Judgment does not elaborate upon the grounds or the underlying reasoning on which that court granted summary judgment. Therefore, on appeal Brown must address and claim the above-stated error as applied to each and all of the issues presented to the trial court. One of these issues was the question of whether the school's statements to Ms. Hedrick proximately caused injury to Brown. This is not a new "claim of error," it is the continuation of a causation argument that took place before the trial court. RAP 2.5 is inapplicable.

Moreover, one of the express exceptions contained in RAP 2.5, is "manifest error affecting a constitutional right." Here the trial court's grant of summary judgment was manifestly in error in that it failed to view the facts and inferences in the light most favorable to Brown, instead taking it upon itself to resolve disputed issues of material fact. By doing so the court deprived Brown of his constitutional right to a jury trial on his claims. RAP 2.5 is inapplicable.

In this regard the school might have argued RAP 9.12, rather than RAP 2.5, but would have been no better off had it done so. RAP 9.12 provides that the appellate court will consider "only evidence and issues called to the attention of the trial court" and requires a listing of such

evidence. Brown has offered no new “evidence” on this appeal, and it cannot be doubted that the “issue” of proximate causation was called to the attention of the trial court.

In arguing the issue of proximate causation before the trial court, both parties addressed the question of multiple causation. In its Motion for Summary Judgment the school contended that Ms. Murdoch’s falsehoods had no effect on the outcome of the Brown/Garth litigation, and that there was an abundance of “*other evidence*” of Brown’s conduct, which caused the result in that litigation. CP 282-283. The school argued that this “other” evidence, not Murdoch’s statements caused Brown to lose custody. CP 292. In its Reply on Summary Judgment, the school pointed to Brown’s own behavior as “the reason” he lost in the parenting litigation.<sup>8</sup> CP 931.

Here the school would have this court bar all consideration of the substantial factor test for determining proximate causation though this is the proper test to be applied in such instances of inextricably tangled multiple causation. Instead, the school apparently contends this court’s legal analysis should be confined to the “but for” test, because Brown

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<sup>8</sup> All of this sounds a great deal like an “intervening cause” argument, but since the school never used this term before the trial court, one would have to assume that, under its own analysis of the application of RAP 2.5, it has waived its right to raise this issue on appeal.

never used the exact words “substantial factor” in the trial court.

Response, p. 28.

However, in the trial court Brown did contend that Murdoch’s statements were a “significant factor” (CP 804) in Hedrick’s report which, when accepted by the trial court, led to his injuries. If the school’s position is accepted, this court would be barred from considering the proper legal analysis of a key issue, because Brown used the word “significant,” rather than the word “substantial.” Surely this court’s ability to employ the proper legal analysis cannot be circumscribed by such empty formalities.

In explicating RAP 9.12 the Washington State Supreme Court stated that under that rule there is no requirement to list every statute, code, or case brought to the attention of the trial court,

Nor should there be, as any court is entitled to consult the law in its review of an issue, whether or not a party has cited that law.

*Ellis v. Seattle*, 142 Wn.2d 450, 460 (fn. 3), 13 P.3d 1065 (2001).

On summary judgment the trial court was presented with the issue of proximate causation, and both parties acknowledged the obvious fact that multiple causes affected the outcome of the Brown/Garth custody litigation. Neither party correctly utilized the proper test for causation in

the context of multiple and intermingled proximate causes, but that cannot bar this court from doing so.

This court is not precluded by RAP 2.5 or RAP 9.12 from considering whether the substantial factor test is the proper vehicle for analysis of the issue of proximate causation in the circumstances of this case. The trial court was free to consult the law on proximate cause under the circumstances of multiple potential causes such as those her presented.

This court, “as any court, is entitled to consult the law in its review of an issue, whether or not a party has cited that law.” *Ellis, supra*.

If the school’s argument was correct, there would be little point in briefing cases to an appellate court, one would be bound by the analysis presented to the trial court regardless of how faulty that analysis might have been. If this was the rule a party could do nothing more on appeal than simply re-submit, with perhaps some re-writing, the briefing previously submitted to the trial court, an appellant could usefully add little more a of statement on the standard on review.

The most serious problem with this approach is that, if this were the rule the parties’ erroneous legal analysis in the trial court would become something like the law of the case, binding the appellate court to that prior erroneous analysis.

Perhaps realizing the weakness of its waiver argument, the school shifts its ground in an attempt to shore up its position, claiming that the substantial factor test can only be applied under four sorts of circumstances... because it has previously only been applied under those circumstances. Response, p. 29. The school fails to note that those circumstances are much like the circumstances presented by Brown's claims: In those cases where the substantial factor test has been applied, as here, multiple causes may have brought about the same or a similar result, and separating out these multiple causes to determine what would have happened had defendant not acted wrongfully, is flatly impossible.

First, the test is used where either one of two causes would have produced the identical harm... Second, the test is used where a similar, but not identical, result would have followed without the defendant's act.

*Daugert v. Pappas*, 104 Wn.2d 254, 262, 704 P.2d 600 (1985), citations omitted.

It is no argument to say this test has not previously been used in this sort of case: Whenever the test was applied for the first time to certain sorts of circumstances, it had, by definition, never been applied to those sorts of circumstances before. If application of legal analyses to new sorts of facts was precluded by rule, no analysis would ever be

applied to any new set of circumstances. The common law would be frozen in place, doomed to never evolve.

**ISSUE B: THE SCHOOL'S FALSE AND MALICIOUS STATEMENTS TORTIOUSLY INTERFERED IN THE RELATIONSHIP BETWEEN BROWN AND HIS DAUGHTER.**

In its Response the school does not seriously challenge Brown's claim for tortious interference with familial relations, only stating in a completely conclusory fashion that its statements were "not actionable as a matter of law" (Response, p. 3) and that Brown did not produce sufficient "proximate cause evidence" (Response, pp. 5 and 27).

In alleging that Brown's tortious interference claim is "not actionable," the school entirely fails to address the case of *Strode v. Gleason*, 9 Wn. App. 13, 510 P.2d 250 (1973), which establishes the cause of action<sup>9</sup>. Nor does the school otherwise explain in any fashion why it takes the position that Brown's claim is not actionable.

The school's mere conclusory denial, unsupported by argument or citation to authority is undeserving of consideration.

The alleged absence of causation evidence exists only in respondent's overly-optimistic imagination. If Ashley's Declaration is to be believed (and it is for purposes of summary judgment), Murdoch was

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<sup>9</sup> See Brown's Opening Brief, pp. 20-21.

motivated to publish these falsehoods by a dislike for Brown, which stemmed from her friendship with Ms. Garth, and her own idiosyncratic personal history and beliefs. CP 833-835; CP 854-863; CP 943-948. When Brown encountered the Murdoch's falsehoods as repeated in Ms. Hedrick's report, he assumed they were true and was understandably shocked and hurt that his daughter would behave in such a fashion in regard to him. CP 828. Ultimately, as more fully discussed above, these same false statements were a significant factor in Brown's loss of custody and his loss of the right to be involved in his daughter's education.

All of this is evidence that Murdoch's false statements caused injury to the relationship between Brown and his daughter. This evidence at the very least creates an issue of fact precluding summary judgment.

**ISSUE C: A SCHOOL'S FALSE AND MALICIOUS STATEMENTS TO A PARENTING EVALUATOR IN THE COURSE OF A CHILD CUSTODY DISPUTE WERE OUTRAGEOUS.**

Both parties agree that outrageous conduct is conduct which would arouse the resentment of the "average member of the community," causing him to exclaim "Outrageous!" *Contreras v. Crown Zellerbach*, 88 Wn.2d 735, 740, 565 P.2d 1173 (1977).<sup>10</sup>

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<sup>10</sup> The school quotes the same law, albeit from a different case, at page 30 of its Response.

Based on the evidence and reasonable inferences therefrom, in the course of child custody litigation the school, by and through a school counselor, fabricated evidence<sup>11</sup> about a student and her relationship with her father, and then communicated these falsehoods to a court appointed parenting evaluator. The only evidence of the counselor's motive in publishing these untruths is the daughter's testimony regarding that counselor's close friendship with Garth, and prejudice against the father based on nothing more than the counselor's personal history and political beliefs. CP 834-835. The parenting evaluator passed these calumnies on to the trial court and, predictably, that court excluded the father from further involvement in his daughter's education.

The school would have this court rule, as a matter of law, that an average member of the community would not find this conduct outrageous. Perhaps everyone would not find this conduct outrageous (people have different opinions), but Brown submits that many, and probably most, members of this community would be outraged: Such malicious interference in the parental relationship by a school counselor is shocking. Perhaps this is an unreasonable belief, but perhaps not. It is for

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<sup>11</sup> Regardless of who else might be outraged by this, it is to be hoped that our courts would be shocked by malicious falsehoods intended to prejudice judicial proceedings.

a jury, representing the conscience of average members of the community, to decide exactly these sorts of questions.

Though it is initially for the trial judge to determine if reasonable minds could differ on the extremity of the conduct,

The question of whether certain conduct is sufficiently outrageous is ordinarily for the jury.

*Dicomes v. State*, 113 Wn.2d 612, 630, 782 P.2 1002 (1989), citations omitted.

### **III. CONCLUSION - DEFENDANT'S FALSE STATEMENTS ABOUT BROWN CAUSED BROWN'S DAMAGES.**

### **IV. BROWN'S ARGUMENT IN RESPONSE TO CHRYSALIS SCHOOL'S "CROSS APPEAL"**

ISSUE A: A THIRD PARTY'S MALICIOUSLY FALSE OUT-OF-COURT STATEMENTS SHOULD NOT BE ABSOLUTELY IMMUNIZED WHEN THAT THIRD PARTY NEVER APPEARS BEFORE THE COURT OR TESTIFIES ON OATH, EVEN IF THESE FALSEHOODS ARE REPEATED IN THE TESTIMONY AND REPORT OF A COURT APPOINTED INVESTIGATOR

#### **1. Discretionary Review Should Be Denied:**

To avoid "piecemeal, multiple appeals" discretionary review is only granted in limited circumstances. RAP 2.3(b); *Right-Price*

*Recreation, LLC v. Connell's Prairie Community Council*, 105 Wn. App.

813, 21 P.3d 1157 (2001), citations omitted; *remanded* 146 Wn.2d 370, 46 P.3d 789 (2002)<sup>12</sup>.

Discretionary review of an order denying summary judgment is “not ordinarily granted” because such orders “can be reviewed after trial in an appeal from final judgment.” *DGHI Enterprises v. Pacific Cities, Inc.*, 137 Wn.2d 933, 949, 977 P.2d 1231(1999)<sup>13</sup>.

The issue actually presented by the denial of the school’s first Motion for Summary Judgment is narrow and fact specific: it applies only to persons who maliciously provide false information to court appointed investigators, but do not testify as witnesses. This is not an issue implicating significant public concerns and requiring immediate review. Without any adverse consequences, the privilege issue can be reviewed on a fully developed record after the trial court renders final judgment.

Granting absolute immunity under these circumstances serves only to protect malicious liars. A qualified immunity would, in the absence of malice, serve to protect honest communication. In instant case the presence or absence of malice is an issue of material fact for trial.

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<sup>12</sup> While agreeing with the general proposition, the Supreme Court disagreed with the Court of Appeals application of this principle after review had been previously granted. *Id.*, at 380.

<sup>13</sup> While the very unusual circumstances presented in *DGHI, Enterprises* supported the grant of discretionary review, no similar circumstances obtain in regard to the case *sub judice*.

Pursuant to RAP 2.3(b), without the parties' stipulation, or a departure from the accepted and usual course of judicial proceedings [RAP 2.3(b)(3)(4)], discretionary review should only be granted in the event of obvious error rendering further proceedings useless [RAP 2.3(b)(1)], or probable error, altering the status quo or substantially limiting the freedom of a party to act [RAP 2.3(b)(1)]. Here there has been no stipulation and no departure from the usual course of proceedings.

Further, the trial court committed no obvious or probable error in denying the school's Motion for Summary Judgment.

Additionally, further proceedings are not useless. Should Brown's appeal of the trial court's (subsequent) grant of summary judgment succeed, further proceedings would provide a full and adequate record if review as of right ultimately comes before an appellate court. If, or when, the school is found liable on the basis of Murdoch's false, unsworn, out-of-court statements is quite soon enough to review any privilege issues on a fully developed factual record.

Nor has the school's freedom to act been substantially limited by denial of summary judgment; the school remains free to defend on any basis it wishes, and to appeal the final result should it ultimately chose to do so. Prior to trial the school can conduct further discovery, and at trial,

it can dispute the facts and seek an absolute or qualified privilege instruction should it discover support for its position. If the school is found liable at trial, it may appeal the denial of privilege along with any other issue.

However, just as the Washington State Supreme Court has ruled (See appendix A), on the record before it the trial court did not commit obvious or probable error in denying summary judgment on the basis of absolute immunity. Moreover, even assuming for the sake of argument that the school's statements were entitled to a qualified privilege, evidence of the school's abuse of this privilege poses a question of material fact. This question cannot be summarily dismissed.

The trial court was correct in concluding that summary judgment was inappropriate on the basis of absolute privilege, and the Supreme Court was correct in denying discretionary review.

## 2. Defendants Are Not Entitled To Absolute Immunity:

As a general rule, *witnesses* in judicial proceedings are absolutely immune from suit based on their testimony.

*Bruce v. Byrne-Stevens Associates Engineers, Inc.*, 113 Wn.2d 123, 125, 776 P.2d 666 (1989), emphasis added; *see also: Wynn v. Earin*, 163 Wn.2d 361, 369-70, 181 P.3d 806 (2008).

In *Bruce* the court extended this rule to expert witness testimony and "the preparation of that testimony." *Id.*, at 136.

The privilege of absolute witness immunity creates an “extraordinary breadth” of protection and should not be extended absent the existence of compelling public policy justifications.

*Deatheridge v. State of Washington, Examining Board of Psychology*, 134 Wn.2d 131, 136, 948 P.2d 828 (1997), citations omitted.

Absolute immunity is confined to cases where there is supervision and control by judges or other authorities. *Id.*, at 140. Application of absolute immunity rests on the presence of “safeguards against false or inaccurate testimony,” including a sworn oath, cross examination, and the potential threat of perjury. *Wynn, supra*, at 378; *Bruce, supra*, at 126.

Defendant’s reliance on the *Bruce* and *Wynn* cases is ill-advised: Neither of these cases stands for the proposition that maliciously false out-of-court statements, published by one who never appears as a witness, are absolutely immune.

In *Wynn v. Earin*, 163 Wn.2d 361, 181 P.3d 806 (2008), the court affirmed a Court of Appeals ruling that, under the circumstances presented in that case, “the witness immunity rule does not apply.” *Id.*, at 385. The precedential value of this case is limited: The *Wynn* plurality held only that Wynn waived his claims relating to the testimony in question. *Id.*, 386-87. That plurality emphasized,

[O]ur opinion today largely concerns the truthful testimony of a witness in response to direct questions.

*Id.*, at 386. This caveat clearly implies that the non-testimonial false statements of a non-witness (such as Ms. Murdoch) would present a different problem, leading to a different result.

The *Wynn* court further cautioned, “[W]hile some statements of the rule make it appear to be absolute, it is not.” *Id.*, at 374.

The pivotal circumstance in analyzing the propriety of the grant of an absolute privilege is whether the statement at issue was offered in court by a witness. In *Demopolis v. Peoples Bank*, 59 Wn. App. 105, 796 P.2d 426 (1990) it was alleged that an attorney defamed an opposing party during a break in trial proceedings. The appellate court denied absolute privilege to these statements<sup>14</sup>, noting

[O]rdinarily, in judicial proceedings the safeguards requirement is satisfied by the trial judge’s ability to strike statements from the record, or by his power to impose perjury and contempt sanctions... here, the defamatory statement occurred off the record and out of the courtroom. Thus, ordinary safeguards are unavailable.

*Id.*, at 113, citations omitted.

Similarly, in denying CPS the shield of absolute immunity in regard to an investigation of sexual abuse allegations, the court in *Tyner v. Department of Social and Health Services, Child Protective Services*, 92

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<sup>14</sup> As will be discussed *infra*, a qualified privilege was granted and, therefore, the question sent back to be resolved in the trial court.

Wn. App. 504, 963 P.2d 215 (1998), *reversed on other grounds*<sup>15</sup>, 141

Wn.2d 68, 1 P.3d 1148, stated,

Absolute immunity is accorded only to those functions that are an integral part of a judicial proceeding.

*Id.*, at 520, citations omitted.

Application of the absolute immunity rule rests on the presence of safeguards. *Wynn. Supra*, at 370 and 377.

When absolute immunity is granted there need to be “safeguards against false or inaccurate testimony.” *Wynn, supra*, at 378. These safeguards include an oath, with the consequent possibility of prosecution for perjury, and cross-examination. *Wynn, supra*, at 371, 378; *Bruce supra*, at 126.

An absolute privilege is therefore allowed only in “situations in which authorities have the power to discipline as well as strike from the record statements which exceed the bounds of permissible conduct.

*Story v. Shelter Bay Co.*, 52 Wn. App. 334, 338, 760 P.2d 368 (1988), citations omitted.

Ignoring these authorities, the school quotes *Wynn* and emphasizes that “witnesses who *participate in judicial proceedings* are immune based

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<sup>15</sup> In reversing on other grounds, the Supreme Court explicitly stated its agreement with the appellate court’s conclusion denying absolute immunity. 141 Wn.2d 68, at 71.

on their testimony.” Response/Cross Appeal, p. 32. In this the school fails to grasp the meaning of the word “testimony”:

A declaration or statement made under oath or affirmation of a witness in a court...

WEBSTER’S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE, 2d College Ed. (1970).

The school should have, but did not, emphasize the phrase “based on their testimony,” no doubt because Murdoch’s statements were not sworn under “oath or affirmation,” or “in a court,” and were in fact not “testimony” at all.

The school’s reliance on *Bruce, supra*, and *Gustafson v. Mazer*, 113 Wn, App. 770, 84 P.3d 743 (2002) is similarly unsound: Unlike Ms. Murdoch, in both *Bruce and Gustafson* the defendants actually testified to the statements at issue. *Bruce, supra*, at 124; *Gustafson, supra*, at 777. Therefore, unlike the situation presented in the case *sub judice*, in *Bruce and Gustafson* the safeguards provided by oath, cross examination, and potential liability for perjury actually existed. *Bruce, supra*, at 126; *Gustafson, supra*, at 778.

In the absence of any Washington authority supporting its position, the school inundates the court with a plethora of out of state case law,

cherry picked to suit its purposes. Unfortunately for the school, whatever other courts may say, Washington courts clearly require safeguards.

In the instant case no such safeguards existed: Ms. Murdoch was never placed on oath, never testified, and was never subject to cross examination. Brown was under no obligation to elicit her adverse testimony. In fact he had no incentive to do so: Brown had attempted to protect his daughter from exposure to the emotional turmoil of the custody litigation, and had no reason to suspect Murdoch's statements were false or malicious until well after the conclusion of trial. CP 829.

Extension to fields where no such safeguards or remedies are found has been uniformly refused by the courts and justly so, for absolute immunity in defamation matters presents a conflict between two American principles equally regarded in the law, i.e., the right of an individual on the one hand to enjoy his reputation unimpaired by defamatory attacks, and on the other hand the necessity in the public interest of a free and full disclosure of facts in the conduct of the legislative, executive and judicial departments of government.

*Engelmohr v. Bache*, 66 Wn.2d 103, 106, 401 P.2d 346 (1965), citations omitted.

In *Bender v. City of Seattle*, 99 Wn.2d 582, 664 P.2d 492 (1983), the court balanced these equal principles in denying the shield of absolute immunity to the statements of police officers in the performance of their official duties. *Id.*, at 600-601.

Statements of police officers in releasing information to the public and press serve the important functions of informing and educating the public about law enforcement practices. The right to inform the public, however, does not include a license to make gratuitous statements concerning the facts of a case or disparaging the character of other parties to an action.

*Id.*, at 601.

In the case *sub judice*, none of the school's representatives were placed on oath, testified in court, or was subjected to cross-examination. To grant absolute immunity under these circumstances is not to encourage the free and full disclosure of information to the court, but to immunize and invite vindictive calumny. The school's repeated assertion that in the absence of absolute immunity persons with information will be reluctant to come forward (Response/Cross Appeal, pp. 33-34, 34-35), is unsupported by any evidence at all. It is mere conjecture, nothing more than speculation.

In denying defendant's Motion for Summary judgment, Judge Hilyer correctly ruled that in the absence of these safeguards, absolute immunity was unwarranted.

3. Even Assuming, For The Sake Of Argument, That The School Is Entitled To A Conditional Or Qualified Immunity, Whether It Abused That Privilege Is A Question Of Fact Precluding Summary Judgment.:

On certain occasions one is qualifiedly or conditionally privileged to publish false and defamatory matter of another and is not liable therefore, *provided such privilege is not abused*.

*Twelker v. Shannon & Wilson, inc.*, 88 Wn.2d 473, 478, 564 P.2d 1131 (1977), emphasis added.

Such occasions arise when publication is for the protection of the publisher or others, or when persons share a common interest or family relationships. *Id.*, citations omitted.

Assuming for the sake of argument, that some level of privilege should be granted the school's statements, such privilege should be limited to an immunity for good faith statements only. A qualified immunity protects the free flow of information to the court through its appointees, while also providing some protection to the reputational interests of individuals. These are the two conflicting principles implicated by the grant of privilege. *Engelmohr, supra*, at 106. The courts have struggled to balance these equal and highly regarded principles. *See: Id.* As a result,

The policy of limiting the extensions of absolute privilege to fields where no safeguards are available to prevent an abuse of its use, is supported by virtually all courts and text authorities.

*Id.*, at 105.

The extraordinary breadth of absolute privilege seems to us to require some compelling public policy justification for its existence.

*Twelker, supra*, at 478.

Given the importance of the free flow of information in some situations, some level of privilege short of absolute immunity may be appropriate, even in the absence of the above-referenced safeguards. In such situations, our courts have concluded that the public policy interests at stake are adequately protected by a conditional or qualified privilege.

Although the release of information to the press and public by police officers is a very important function, we are persuaded that such communications do not rise to the level of such compelling public policy as to require an absolute privilege. We believe a qualified privilege will adequately protect the police officers in releasing information to the public and press.

*Bender, supra*, at 601.

The granting of a qualified privilege strikes a proper balance between protecting the free flow of important information, and protecting the individual's right to be free from defamation:

A qualified privilege protects the maker from liability for an otherwise defamatory statement unless it can be shown that the privilege was abused.

*Id.*, at 600.

A conditional privilege is abused and lost if the declarant is shown to speak with knowledge of falsity, or reckless disregard of truth. *Story, supra*, at 342, citations omitted. That is to say, loss of a qualified privilege can only occur if the defendant acted with “actual malice.” *Id.*, at 343, citations omitted.

The standard for finding actual malice is *subjective* and focuses on the declarant’s belief in or attitude toward the truth of the statement at issue.

*Id.*, citations omitted, emphasis added.

On a motion for summary judgment,

The court must consider all facts submitted and all reasonable inferences from the facts in the light most favorable to the nonmoving party.

*Wilson v. Steinbach*, 98 Wn.2d 434, 437, 956 P.2d 1030 (1982), citations omitted.

On the record presented with the school’s first Motion for Summary Judgment, taking the facts submitted and all inferences from these facts in the light most favorable to Brown, the nonmoving party, one must conclude (1) that the school’s repeated attempts to breach its promise of equal treatment, creates an inference of malice toward Brown, and (2) the school’s “off the record” communication to Ms. Hedrick that it would refuse to permit Ashley’s continued attendance should Brown continue to be involved, reinforces that inference. CP 825-829.

These facts, viewed in the light most favorable to the nonmoving party, create a material factual question as to actual malice.

{I}f there is any evidence tending to show actual malice, the plaintiff has the right, notwithstanding the privileged character of the communication, to have the question of malicious excess of privilege submitted to the jury upon such evidence.

*Kauzlarich v. Yarbrough*, 105 Wn. App. 632, 642, 20 P.3d 946 (2001). Citations omitted; *See also: Ecuver v. New York Life Ins., Co.*, 101 Wn. 247, 256-57, 172 P. 359 (1918).

This inference of malice is solidified by Murdoch's representations, which Ashley testified are untrue. CP 834. These out-of-court statements stand at the very heart of the litigation on this Motion for Summary Judgment. Ashley's Declaration provides a clue to Murdoch's motive in defaming Brown: She was friends with Garth and biased against men in general. CP 835. These facts create a reasonable inference of malice. Therefore, the school's abuse of qualified privilege (should one exist) is an issue of material fact precluding summary judgment.

Stated specifically, the question raised by Ms. Murdoch's false testimony is whether she believed, based on a reasonable investigation, the things she told Ms. Hedrick, or whether her personal experiences, biases, and opinions<sup>16</sup> so colored her attitudes and perception that she

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<sup>16</sup> As Ashley testified in her Declaration, Ms. Murdoch is a self-proclaimed "witch," and a "radical feminist" who believes she has been abused by men. CP 834-835.

intentionally or recklessly uttered these untruths with an intent to damage Brown.

This question of the reasonableness of Murdoch's investigation is one of fact. Whether Murdoch knew, or should have known, that her statements were false is also a question of material fact.

[W]hat a person knew or should have known at a given time is a question of fact.

*Gillespie v. Seattle First National Bank*, 10 Wn. App. 150, 170, 855 P.2d 680 (1993).

Whether Murdoch maliciously intended to damage Brown is yet another question of fact. The question of intent is "clearly a factual question." *deLisle v. FMC Corporation*, 57 Wn. App. 79, 786 P.2d 839 (1990), citations omitted.

The state of a man's mind is as much a fact as the state of his digestion.

*Id.*, at 82.

These determinations are, as noted in *Story*, necessarily subjective. *Story, supra*, at 343. These questions turn on witness credibility, which does not lend itself to resolution on a motion for summary judgment. Genuine issues of credibility should not be resolved on summary judgment. *v. Underwood*, 62 Wn.2d 195, 200, 381 P.2d 966 (1963).

Thus, even if Ms. Murdoch's statements are entitled to a qualified privilege, a question of fact as to actual malice, whether that privilege was abused, is created by the school's breached promises and Ashley's Declaration contradicting Ms. Murdoch's version of events.

These issues of material fact fully support the trial judge's refusal to grant the school's first motion for summary judgment, and the Supreme Court's denial of discretionary review.

#### **V. CONCLUSION - DISCRETIONARY REVIEW SHOULD BE DENIED.**

Discretionary Review should be denied and (if Brown's appeal succeeds) this litigation should be permitted to follow the normal course of events. A finder of fact should be permitted the opportunity to determine the truth (or lack thereof) of the various witnesses' testimony. These witnesses will include, but not be limited to Ashley, Ms. Murdoch, and Keith Brown.

If, after trial, either party is dissatisfied with the resolution of these issues, that party may then bring their complaints before the proper appellate body, which will then have the opportunity to review and decide these issues on the basis of a fully developed record.

**VI. PRAYER FOR RELIEF**

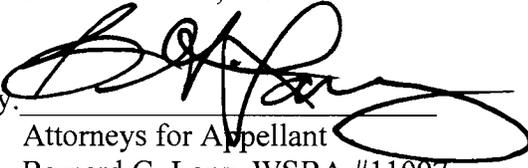
Brown asks this court to reverse the trial court's grant of summary judgment and remand this case to the trial court for a trial on the merits.

Brown further asks that this court strike or deny the school's Motion for Discretionary Review masquerading as a "Cross Appeal."

DATED this 28<sup>th</sup> day of January 2011.

Respectfully Submitted,

THE LANZ FIRM, P.S.

By: 

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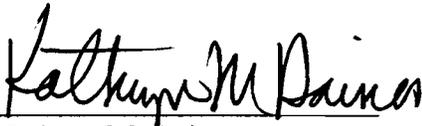
**DECLARATION OF SERVICE**

I, Kathryn M. Daines, declare under penalty of perjury under the law of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over eighteen years of age, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the 28<sup>th</sup> day of January, 2011, I delivered via ABC Legal Messenger Service, Inc. a true and correct copy of the foregoing “Appellant’s Reply Brief in Support of Brown’s Appeal, and Response Brief in Opposition to Chrysalis School’s ‘Cross-Appeal’” to

John P. Hayes  
William C. Gibson  
Forsberg & Umlauf, P.S.  
901 Fifth Avenue, Suite 1400  
Seattle, Washington 98164

Dated this 28<sup>th</sup> day of January, 2011, at Seattle, Washington.

  
Kathryn M. Daines

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

KEITH A. BROWN,

Petitioner,

v.

CHRYSALIS SCHOOL, INC., a  
Washington corporation,

Respondent.

6/3  
NO. 84310-4

RULING DENYING REVIEW

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FILED  
SUPERIOR COURT  
STATE OF WASHINGTON

The question posed by this motion for direct discretionary review is whether witness immunity extends to a person interviewed by a court-appointed investigator who provided the court with a report and testified concerning the investigation. Keith Brown and Rebecca Garth were constantly in dispute over the parenting plan for their children, Ashley and Connor Brown. Ms. Garth sought to modify the plan to change joint decisionmaking and reduce Mr. Brown's time with the children. The King County Superior Court appointed Dr. Marsha Hedrick, Ph.D, as parenting evaluator and guardian ad litem for the children. Dr. Hedrick interviewed numerous people for her evaluation, including Shannon Murdoch, Ashley's consulting teacher and counselor at Chrysalis School. Dr. Hedrick's evaluation, dated February 23, 2006, included discussion of her interviews with "collateral contacts," including Ms. Murdoch. The latter reportedly attributed statements to Ashley that Ashley now disputes. Dr. Hedrick also gave live testimony about the report. Ms. Murdoch was not

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called to testify. The court rescinded Mr. Brown's joint custody and revoked his decisionmaking authority regarding the children.

Mr. Brown later brought this King County action against Chrysalis School, apparently alleging defamation, intentional infliction of emotional distress, negligent infliction of emotional distress, and tortious interference with the parent-child relationship. He apparently based all of his claims on the three paragraphs in Dr. Hedrick's report describing her interview with Ms. Murdoch.<sup>1</sup> Chrysalis School responded with a motion for summary judgment of dismissal, arguing that it had absolute witness immunity for statements Ms. Murdoch made to Dr. Hedrick. But in an order dated February 5, 2010, the superior court denied summary judgment, stating that the "adequate safeguards" cited in *Gustafson v. Mazer*, 113 Wn. App. 770, 54 P.3d 743 (2002) and *Bruce v. Byrne-Stevens & Associates Engineers, Inc.*, 113 Wn.2d 123, 776 P.2d 666 (1989), "are not present here." Those safeguards against false or inaccurate testimony are the witness's oath, the hazard of cross-examination, and the threat of prosecution for perjury. *Bruce*, 113 Wn.2d at 126. Chrysalis School now seeks this court's direct discretionary review of the trial court's order. RAP 4.2 (direct review); RAP 2.3(b) (discretionary review).

An order denying summary judgment, or granting partial summary judgment without directing entry of final judgment under CR 54(b), is not appealable. *Douchette v. Bethel Sch. Dist. No. 403*, 117 Wn.2d 805, 808, 818 P.2d 1362 (1991). Although discretionary review may be requested under RAP 2.3, such piecemeal review is disfavored. *Fox v. Sunmaster Prods., Inc.*, 115 Wn.2d 498, 505, 798 P.2d 808 (1990). Accordingly, an interlocutory ruling such as that presented here will not be reviewed by an appellate court unless the trial court committed an obvious error which would render further proceedings useless, or committed a probable error that

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<sup>1</sup> The record provided by the parties does not include Mr. Brown's complaint.

substantially alters the status quo or limits the freedom of a party to act, or significantly departed from the accepted and usual course of proceedings. RAP 2.3(d).

This court recently summarized the law of witness immunity in *Wynn v. Earin*, 163 Wn.2d 361, 369-70, 181 P.3d 806 (2008). Whether witness immunity applies is a question of law that is determined de novo by a reviewing court. *Id.*, at 369; *Deatherage v. Examining Bd. of Psychology*, 134 Wn.2d 131, 135, 948 P.2d 828 (1997). The general rule is that witnesses in judicial proceedings are absolutely immune from suit founded on their testimony. *Wynn*, 163 Wn.2d at 369-70; *Deatherage*, 134 Wn.2d at 135; *Bruce*, Wn.2d 123 at 125. The purpose of this common law rule “is to preserve the integrity of the judicial process by encouraging full and frank testimony.” *Bruce*, 113 Wn.2d at 126; *Wynn*, 163 Wn.2d at 370. Absent immunity, witnesses might self-censor in two ways. They might be reluctant to come forward to testify and they might distort testimony due to fear of subsequent liability. *Deatherage*, 134 Wn.2d at 136-37; *Bruce*, 113 Wn.2d at 126 (quoting *Briscoe v. LaHue*, 460 U.S. 325, 332-33, 103 S. Ct. 1108, 75 L. Ed. 2d 96 (1983)). The rule “rests on the safeguards against false or inaccurate testimony which inhere in the judicial process itself ... [R]eliability is ensured by [the witness's] oath, the hazard of cross examination and the threat of prosecution for perjury.” *Bruce*, 113 Wn.2d at 126 (citing *Briscoe*, 460 U.S. at 332); *Deatherage*, 134 Wn.2d at 138; *Wynn*, 163 Wn.2d at 370. These safeguards ensure truthful and accurate testimony. *Deatherage*, 134 Wn.2d at 138; *Wynn*, 163 Wn.2d at 370. In *Bruce* the court held that witness immunity applies not only to testimony, but also to the basis of a witness's testimony; that is, the “acts and communications which occur in connection with the preparation of that testimony.” *Bruce*, 113 Wn.2d at 136; *Wynn*, 163 Wn.2d at 370. Thus, in *Bruce* an engineer hired specifically for litigation purposes was entitled to absolute witness immunity for engineering work he did that formed the basis for his trial testimony.

## APPENDIX A

The court in *Bruce* further observed that witness immunity also applies to guardians, therapists, and attorneys who submit reports to family court. *Id.* at 127; *Wynn*, 163 Wn.2d at 370. And in *Wynn* the court rejected the notion, advanced by the Court of Appeals, that witness immunity does not apply to information that the witness acquires in a prelitigation professional relationship formed for nonlitigation purposes. The court held that claims arising out of a health care provider's participation in litigation should be barred, but claims arising out of malpractice in diagnosis or treatment should not be barred. *Wynn*, 163 Wn.2d at 375-76.

As noted, immunity applies to those who provide reports to the court, based seemingly on the notion that they deserve witness or judicial immunity because they were appointed to fulfill quasi-judicial responsibilities under court direction. *Bruce*, 113 Wn.2d at 127; *Myers v. Morris*, 810 F.2d 1437, 1466 (8th Cir.), *cert. denied*, 484, U.S. 828 (1987). The court in *Bruce* also noted that probation officers who allegedly include false statements in pretrial bond reports have been held immune. *See Tripati v. United States Immigration & Naturalization Serv.*, 784 F.2d 345, 348 (10th Cir. 1986), *cert. denied*, 484 U.S. 1028, 108 S. Ct. 755, 98 L. Ed. 2d 767 (1988).

In one of the cases cited by the superior court, *Gustafson*, a mother sued a clinical psychologist who wrote a report detailing the psychologist's suspicion that the mother suffered from Munchausen Syndrome by Proxy. This report was submitted during the course of the mother's parenting plan dispute with her ex-husband. The mother lost custody of her child. The psychologist subsequently testified that her report was incorrect and that she no longer believed that the mother suffered from that malady. The mother sued the psychologist for defamation and negligence. The trial court dismissed the claims and the Court of Appeals affirmed, holding that the psychologist was immune from liability for her report.

Similarly, in *Childs v. Allen*, 125 Wn. App 50, 105 P.3d 411 (2004), a Department of Social and Health Services social worker assigned a certified chemical dependency counselor to do an evaluation of a parent involved in dependency proceedings. The counselor prepared an evaluation report and testified in the dependency proceedings. The parent's rights were eventually terminated. The parent later sued the counselor for damages, arguing that the counselor negligently performed the drug and alcohol evaluation. The trial court found the counselor absolutely immune, and the Court of Appeals affirmed.

In *Wynn* a former patient sued his marriage guidance counselor for malpractice and for emotional distress resulting from alleged violation of the Uniform Health Care Information Act, relating to the counselor's disclosure of information to the guardian ad litem of the patient's children and for disclosure of information when testifying on behalf of patient's wife at child custody hearing. While this court held that claims based on disclosures in violation of the Uniform Health Care Information Act are not foreclosed by witness immunity, the court also held, as noted, that witness immunity does apply generally to testimony of witnesses, and specifically to testimony relating to information acquired during a professional relationship formed for nonlitigation purposes.

Plainly, under these decisions Dr. Hedrick would be immune from suit based on her evaluation report and testimony. And *Bruce* and cases following it also say that Dr. Hedrick would have had witness immunity even without testifying. *Gustafson* supports this notion directly, since the mother's lawsuit there was based on the report itself, not on the psychologist's later testimony recanting the report.

But *Chrysalis School* cites no authority, and none has been found, suggesting that those interviewed for a report to the court share the immunity of the person who prepared the report. The superior court held that Ms. Murdoch is not

absolutely immune because the safeguards against false and inaccurate testimony—the witness’s oath, the hazard of cross examination, and the threat of prosecution for perjury—did not attend her statement. This is a creditable position.

Still, statements need not be made under oath or in a courtroom to be protected by absolute immunity. *Demopolis v. Peoples Nat’l Bank of Wash.*, 59 Wn. App. 105, 109-10, 796 P.2d 426 (1990). In *Hill v. J.C. Penny, Inc.*, 70 Wn. App. 225, 238-39, 852 P.2d 1111 (1993), the court held that statements relevant to quasi-judicial administrative proceedings were protected even though they were not made in a courtroom under oath. And it could be argued that safeguards against abuse included the ability to cross examine Dr. Hedrick and call Ms. Murdoch as a witness. Moreover, it could be further argued that in performing her evaluation pursuant to RCW 26.09.220 Dr. Hedrick essentially became an evidence gathering arm of the court, and the court was free to consider the various statements of “collateral contacts” without independent verification. Thus, in that sense these “collateral contacts” could be considered fact witnesses. Perhaps granting immunity to such participants would encourage full and frank statements.

But it is less clear that immunity would produce more reliable statements. And this court endorsed a different view of such evaluations in *In re Custody of Brown*, 153 Wn.2d 646, 105 P.3d 991 (2005), a case also involving a report by Dr. Hedrick. There, a nonparent seeking custody of a child argued that the trial court’s use of Dr. Hedrick’s evaluation violated due process because the protections for truthfulness and reliability inherent in a trial do not apply to those interviewed by parenting evaluators. This court rejected that argument, but not on the basis that such interviews are trustworthy and reliable. Rather, the court noted that the party had received the report well ahead of deadline but had not objected to its admission; that the trial court heard testimony from all of the parties and 12 witnesses and reviewed

## APPENDIX A

33 exhibits; and that the trial court had explained to the parties that the evaluator was an expert with a recommendation and not a fact witness. *Id.*, at 655-56. This may suggest that those interviewed for such reports should not be treated the same as witnesses and report authors.

In sum, this case is not controlled by existing precedent, and no analogous authority calls into question the trial court's decision. Thus, it cannot be said that the court erred by denying Chrysalis School's motion for summary judgment.

And even if the trial court erred, the court's decision does not render further proceedings useless within the meaning of RAP 2.3(b)(1). While this court has said that review can be granted to avoid a useless trial, *Douchette v. Bethel School District No. 403*, 117 Wn.2d at 808-809, the court's former commissioner correctly pointed out that something more must be required. Many pretrial errors can prejudice, and thus in a sense render useless, further trial court proceedings: "Yet the appellate courts want nothing to do with the great majority of those cases until a final judgment is rendered. The appellate system operates with a plain and intentional bias against interlocutory review." Geoffrey Crooks, *Discretionary Review of Trial Court Decisions under the Washington Rules of Appellate Procedure*, 61 Wash. L. Rev. 1541, 1546-47 (1986). More specifically, Commissioner Crooks noted that "[a]ny time a trial court erroneously denies a well-founded summary judgment motion, pretrial review would prevent a useless trial. Yet the appellate courts rarely grant discretionary review of trial court orders denying motions for summary judgment." *Id.*

Nor am I convinced that the trial court's order substantially alters the status quo or substantially limits the freedom of a party to act within the meaning of RAP 2.3(b)(2).<sup>2</sup> The decision has no immediate effect outside the courtroom. *See* Crooks at

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<sup>2</sup> Subsection (b)(2) was originally intended to apply primarily to orders pertaining to injunctions, attachments, receivers, and arbitration, which had formerly been appealable as a matter of right. RAP 2.3, cmt. b. *See* KARL B. TEGLAND, 2A WASHINGTON PRACTICE, RULES PRACTICE at 165 (2004).

1546 (“It can be argued ... that subsection (b)(2) should be applied only when a trial court’s order has immediate effects outside the courtroom.”) And its effect inside the courtroom is to leave the status quo intact.

Finally, by denying review the Court of Appeals did not so far depart from accepted practice as to call for exercise of this court’s revisory jurisdiction. RAP 13.5(b)(3). As the above discussion shows, appellate courts will only rarely grant discretionary review of orders denying summary judgment.

In the proper case this court might grant interlocutory review of a witness immunity issue where the trial court error is apparent and the immunity doctrine would be thwarted by requiring trial court proceedings to go forward. This is not one of those rare cases.

The motion for discretionary review is denied.

  
COMMISSIONER

May 13, 2010