

65879-4

65879-4

NO. 65879-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

KEITH A. BROWN,
Appellant and Cross-Respondent.

v.

CHRYSALIS SCHOOL, INC.,
a Washington corporation,
Respondent and Cross-Appellant,

RECEIVED
APPELLATE DIVISION
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**BRIEF OF RESPONDENT/CROSS-APPELLANT
CHRYSALIS SCHOOL, INC.**

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I. INTRODUCTION

This appeal involves two motions for summary judgment filed by Chrysalis School, Inc. (“Chrysalis”). The *first* motion invoking witness immunity was denied and should have been granted. That motion involved the important policy issues of the protection of interviewees/witnesses for their out-of-court statements to court-appointed experts used in court proceedings *and* the resulting efficacy of the family court system.

This matter itself is a sequel to and arose out of 2006 modification of parenting plan/custody litigation in King County Superior Court between respondent Keith A. Brown (“Brown”) and his former wife Rebecca Garth. Brown lost joint custody of his two children in the proceedings and the court removed him from any decision-making regarding the children. That custody modification decision was appealed by Brown to *this Court* and affirmed.¹ The loss of the custody dispute morphed into a lawsuit brought by Brown against Chrysalis, whose staff members gave interviews to a court-appointed psychologist as part of the parenting plan modification proceedings.

Brown sued Chrysalis in tort, asserting causes of action of defamation, intentional infliction of emotional distress, negligent infliction

¹ See In Re Marriage of Garth and Brown, 2007 WL 4296603, at *1 (Wn. App. Div. 1) (2007). CP 345-355.

of emotional distress, and tortious interference with parent/child relationship. The tort action was based exclusively on interview statements made by a counselor/ teacher at Chrysalis, Shannon Murdoch. It is undisputed that the Murdoch interview was given to a court-appointed Parenting Evaluator, Dr. Marsha Hedrick, Ph.D., for the *sole* purpose of Dr. Hedrick's "Parental Access Evaluation" report utilized by the court in deciding the underlying custody dispute. Dr. Hedrick also testified in court where she gave her opinions about the parenting parties.

Chrysalis brought a *first* motion for summary judgment in this matter to dismiss the entire Brown action on the grounds of witness immunity and qualified privilege applying to the Murdoch interview statements captured in the Hedrick report used in the custody dispute. Chrysalis relied on the public policy grounds of broad witness immunity reaffirmed as recently as Wynn v. Earin, 163 Wn.2d 361, 181 P.3d 806 (2008). Chrysalis asserted that the counselor/teacher interview statements were immunized because they were given in response to a court-ordered mandate. Additionally, the defense of qualified privilege was argued as a total defense to all tort claims.

Brown opposed the *first* motion arguing that immunity did not apply because Murdoch did not testify live in court about her interview statements. The King County Superior Court entered an Order on

February 5, 2010 in this matter denying Chrysalis' *first* motion for summary judgment. The Order referred *only* to the immunity issue.

Chrysalis took the depositions of numerous witnesses and then brought a *second* motion for summary judgment on different grounds. In that motion, Chrysalis asserted that the Brown action should be dismissed because (1) Brown could not show legal or proximate causation of his alleged damages in any cause of action by the alleged false statements of Murdoch, (2) Brown could not show the statements were even false and defamatory statements of fact *about him*, (3) the statements were not extreme conduct as a matter of law to be actionable as the tort of "outrage," and (4) the statements were not actionable as a matter of law under the causes of action of negligent infliction of emotional distress and tortious interference. The Superior Court granted this *second* motion for summary judgment and dismissed the Brown action with prejudice. Chrysalis seeks affirmance of that dismissal.

Brown now appeals the Superior Court's dismissal of his action via Chrysalis's *second* motion for summary judgment. Chrysalis cross-appeals the trial court's denial of its *first* motion for summary judgment seeking dismissal based on application of witness immunity and privilege. Because of public policy importance, Chrysalis seeks reversal of the *first* motion dismissal denial even if the *second* motion dismissal is affirmed.

This Court should both affirm the dismissal of the Brown action based on the grounds asserted in the *second* motion for summary judgment and reverse the Superior Court's denial of Chrysalis's *first* motion for summary judgment. This Court has upheld the summary judgment dismissal of tort actions against witnesses in judicial proceedings on *both* grounds of immunity and lack of proximate causation. See Childs v. Allen, 125 Wn. App. 50, 105 P.3d 411 (2005).

Unless the Court of Appeals reverses the trial court's ruling denying immunity and privilege to Chrysalis in this case, parents like Brown (dissatisfied with child custody/parenting judicial proceedings) will sue court ordered interviewers in tort for statements given to court-appointed guardians *ad litem* (GALs) and Parenting Evaluators and argue immunity does not apply if the interviewees/witnesses do not testify in court. To avoid such suits, witnesses will refuse to be interviewed and insist on being called as live witnesses to secure immunity for testimony.

The perceived unavailability of immunity and privilege defenses for witnesses interviewed out-of-court by court-appointed experts in the thousands of child custody/parenting plan proceedings occurring in Washington each year will have a chilling effect on witness cooperation with the court-appointed GALs and parental evaluators. This, in turn, will reduce the efficacy and integrity of the family law judicial system. These

potential harmful results merit reversal of the trial court's denial of Chrysalis's *first* motion for summary judgment and this Court's affirming of Chrysalis's *second* summary judgment motion.

II. ASSIGNMENTS OF ERROR FOR CHRYSALIS' CROSS-APPEAL

1. The Superior Court erred when it denied Chrysalis's *first* motion for summary judgment based on a mis-application of witness immunity law and principles.

2. The Superior Court erred when it denied Chrysalis's *first* motion for summary judgment and ignored the issue of privilege.

III. ISSUES ON BROWN APPEAL AND THOSE PERTAINING TO ASSIGNMENTS OF ERROR FOR CHRYSALIS'S CROSS-APPEAL

1. In regard to Brown's appeal, the Murdoch statements were not "defamatory" in nature and not statements of fact about Brown.

2. In regard to Brown's appeal, Brown did not produce sufficient proximate causation evidence to support recovery for *any* of his causes of action, including defamation.

3. In regard to Brown's appeal, Brown failed to raise with the trial court the issue of the "substantial factor" test applying in this case, waiving that issue raised for this appeal; even if the issue had been raised below, the substantial factor test would not apply here.

4. In regard to Brown's appeal, the Murdoch statements were

not of the required “extreme” nature to be actionable as “outrage.”

5. In regard to Brown’s appeal, the judicially-limited tort of “negligent infliction of emotional distress” was not available to Brown.

6. In regard to *Chrysalis’s appeal*, absolute witness immunity should be applied to Chrysalis employee Murdoch’s interview statements taken by a court-appointed “Parenting Evaluator” for a court-ordered report (used pursuant to RCW 26.09.220) and in live court testimony, even though Murdoch did not testify live in the proceedings.

7. In regard to *Chrysalis’s appeal*, Chrysalis should have been immunized from liability by qualified privilege (as a separate and independent complete defense).

IV. STATEMENT OF THE CASE

A. Facts Regarding Appeal and Cross-Appeal

1. Chrysalis’ *First Motion for Summary Judgment.*

As noted above, this matter has its genesis in parenting plan/custody modification proceedings between Brown and his ex-wife, Rebecca Garth. On June 8, 2005, as part of those parenting plan modification proceedings going on between Brown and his former wife, King County Superior Court Commissioner Bonnie Thurston ordered the appointment of a Parenting Evaluator and Guardian Ad Litem for Ashley and Connor Brown, the children of Brown and his former wife. CP 189-195. The

children were 15 and 12 years old at the time. CP 190.

The Court appointed Dr. Marsha Hedrick, Ph.D. as a designated Parenting Evaluator. CP 190. Dr. Hedrick is a clinical psychologist specializing in Forensic Psychology. CP 345.² Dr. Hedrick has performed nearly five hundred forensic evaluations in the family law context and has been evaluating parents for over twenty years. CP 345.

The Order of Appointment of Dr. Hedrick as Parenting Evaluator specifically stated that Dr. Hedrick “shall have access to the child(ren) and to all records and information including authorization to speak with interested persons, from the following sources: . . . Educational institutions.” CP 192. Chrysalis is a school/educational institution.

Pursuant to the court order, Dr. Hedrick arranged a telephone interview with Ashley’s consulting teacher and counselor at Chrysalis, Shannon Murdoch, to obtain information on the children and their parents. CP 176. Ms. Murdoch holds a Master’s Degree in counseling psychology and is a qualified behavioral assessment evaluator. CP 175-176; 180-182. Brown had signed a release for information from Chrysalis, which he subsequently “rescinded.” CP 197 and 184.

² See *In Re Marriage of Garth and Brown*, 2007 WL 4296603 at *1 (Wn. App. Div. 1) (2007). Although unpublished opinions cannot be relied upon as precedent, they can be relied upon as evidence that certain facts have been conclusively determined in prior litigation. *Island County v. Mackie*, 36 Wn. App. 385, 391, 675 P.2d 607, 611 (1984).

Acknowledging the “rescission”, Dr. Hedrick nonetheless stated that there was a court order directing inquiry to school personnel and mental health professionals. CP 176-177. Ms. Murdoch then proceeded to answer Dr. Hedrick’s questions regarding her observations of the Brown children and parents. CP 177.

Dr. Hedrick interviewed many other people as part of her investigation. Hedrick eventually summarized fourteen witness interviews, including Ms. Murdoch’s, in a 20-page “Parental Access Evaluation” (“PAE”) that she submitted to the Court. CP 199-218. Hedrick also gave live testimony about her investigation in the proceedings. The PAE contained statements from six doctors, Connor Brown’s school counselor, Ashley Brown and Connor Brown’s former teacher, Brown, Brown’s personal therapist, Brown’s former wife, and the children, Ashley and Connor. CP 200-215.

Only three paragraphs of the 20-page PAE summarized the interview statement given by Shannon Murdoch. CP 210-211. (These are set out below at pages 15-16, infra.) The PAE also provided summaries from Dr. Hedrick’s interviews with each of the fourteen sources. CP 200-215. The input was not flattering to Brown.

In June of 2006, Dr. Hedrick presented her 20-page PAE to the parties and to the Court, which included the interview with Ms. Murdoch.

Brown and his attorneys had the report well before the modification trial. Shannon Murdoch was not subsequently subpoenaed by Brown to testify or cross-examined as to her witness statements in the modification proceedings, although she could have been forced to testify via subpoena. RCW 26.09.220(3) applied to the modification of parenting plan proceedings and states, “Any party to the proceeding may call the investigator and any person whom the investigator has consulted for cross-examination. A party may not waive the right of cross-examination prior to the hearing.” (Emphasis added.) Dr. Hedrick herself testified in the proceedings.

Relying on the total evaluation and Dr. Hedrick’s in-court testimony and the testimony of others, the Court rescinded Brown’s joint custody, and revoked his decision-making authority regarding his children. Brown unsuccessfully appealed the decision to *this Court*. CP 345-355.

Brown then sued Chrysalis and alleged in his action that Chrysalis (through Ms. Murdoch) misrepresented his daughter’s statements when Murdoch communicated her observations/opinions to the court-appointed Parenting Evaluator. As noted above, *all* of Brown’s causes of action are based solely on the court-ordered communications between Shannon Murdoch and Dr. Hedrick.

Chrysalis brought a *first* motion for summary judgment to dismiss

the action by Brown on the grounds that longstanding witness immunity and privilege doctrines for litigation witnesses apply to insulate Chrysalis and staff (and Shannon Murdoch) from liability for defamation and other tort claims. On February 5, 2010, the Honorable Bruce W. Hilyer entered an order denying Chrysalis' motion for summary judgment on the reasoning that the "adequate safeguards" cited in Gustafson v. Mazer, 113 Wn. App. 770, 54 P.3d 743 (2002) and Bruce v. Byrne-Stevens & Assocs. Eng'rs Inc., 113 Wn.2d 123, 776 P.2d 666 (1989) "are not present here." CP 263-264. Those safeguards were identified in Gustafson v. Mazer, 113 Wn. App. 770, 778, 54 P.2d 743 (2002) as: (1) statements being made under oath; (2) the hazard of cross-examination; and (3) the threat of prosecution for perjury. The order was silent on the issue of qualified privilege. CP 263 and 264.

2. Chrysalis' *Second* Motion for Summary Judgment.

Chrysalis later brought a *second* motion for summary judgment asserting that the Murdoch statements at issue were not actionable in defamation as they were not defamatory and were *about Brown's daughter's alleged statements and actions* – not Brown's. Chrysalis also asserted the statements were not actionable under negligent infliction of emotional distress ("NIED") or "outrage" causes of action. Finally,

Chrysalis' *second* motion argued Chrysalis could not be shown to have proximately caused any damages because the causation evidence was insufficient as a matter of law to withstand summary judgment.

Brown's "Statement of Case" for his appeal (pp. 2-7) focuses almost exclusively on his own self-serving declaration (CP 235-239) to prove that sufficient proximate causation evidence was presented by him to the court below to withstand Chrysalis' *second* motion for summary judgment.

Brown's brief ignores (and wants this Court to ignore) the (1) complaint allegations of the case, (2) the evidence of the modification proceedings testimony presented by the Parenting Evaluator (Dr. Hedrick), (3) all of the *other* evidence presented for the modification trial/hearing, (4) the transcript of the judge's oral custody modification ruling "findings of fact," (5) the written modification ruling (with basis and written "findings of fact"), (6) Dr. Hedrick's deposition testimony *in this case* about her recommendations and testimony to Judge Carey in the modification proceedings, (7) the deposition testimony of Brown's daughter and ex-wife *in this case*, and (8) the modification proceeding judge's (Judge Cheryl B. Carey) testimony *in this case* about the basis of her custody modification ruling. Brown's avoidance of the evidence is telling. The selective recitation of the evidence also requires Chrysalis to

set out the relevant facts/evidence in its own “Statement of Case.”

It is important to remember that Brown based all of his claims against Chrysalis on a small part of three paragraphs of Dr. Hedrick’s 20-page PAE Report. This is the report excerpt at issue:

Shannon Murdoch is Ashley’s teacher and counselor at Chrysalis School. She was joined in the telephone conversation by Wanda Metcalf and Colleen Holder, also school staff, via speaker phone. Shannon began by indicating that Keith had “rescinded his permission” for them to convey information to this evaluator after they had not agreed that he could meet with Ms. Murdoch. This evaluator indicated to them that there was a court order allowing access to school personnel and mental health professionals. Ms. Metcalf indicated that Ms. Murdoch had not agreed to meet with Keith after it had become apparent that Keith “wanted to bring in personal things.” She went on to say that they had a policy of talking with parents once a month but “he calls and emails constantly. He’s concerned that Rebecca is making disparaging comments about him...He makes it sound like he wants to talk about Ashley but he really wants to find out exactly what his ex-wife has been saying.” Ms. Murdoch then stated, “I keep parents updated and we have an end of the year conference. We’re not getting involved in the other stuff...A couple emails ago he said something about not undermining the joint parenting and something about a legal battle. I put two and two together and thought there must be a custody fight going on. Then he wanted to know who had told me that.” Ms. Murdoch related that in replying to both Keith and Rebecca, she accidentally forgot to erase Keith’s email and “Rebecca did tell me at that point about the legal issue. That was a week and a half ago.” Ms Murdoch indicated that she had not known about the custody fight prior to that and “Rebecca doesn’t talk about Keith.”

When asked how Ashley was doing, Ms Murdoch stated, “She’s doing very well...She’s turning in homework on

time, she's participating more. It's a big improvement." *When asked if Ashley had said anything about her situation with her parents, Ms. Murdoch stated, "A present was dropped off for her by her father right after the vacation. The front desk told me she was not excited, she was ambivalent about it...Keith wanted a meeting to discuss her plans for college. I scheduled a meeting for both Keith and Rebecca to come in...I wanted to talk to Ashley first. I thought she had really good ideas about college. She was really clear. She knew what classes she needed and had a really good understanding of what she needed to do. At the end, she pushed in her chair and asked if she needed to be involved in the meeting. She said, 'I'd really rather not be there. I haven't seen my dad in a while and I don't want to be there. I said 'okay'. Then she said 'Do you have to have it on a day I'm here?' We're about students being safe and comfortable. Then I thought about it more and thought, 'I don't think we really need a meeting.' She's clear about her classes, nothing has changed since the last meeting."*

Ms. Murdoch also noted, "Wanda and Colleen will meet with Keith to explain the policies regarding communication and tuition...He doesn't like the policy about communication and never misses an opportunity to let us know 'We [Keith and Rebecca] share the tuition equally'...Our policy is to only communicate with one parent, whoever is the responsible parent. The first year, anytime I sent a communication to Rebecca it would also go to Keith and the way I know is that he would then call me for clarification. Now we directly send information to him too. It's not our usual policy. We're bending over for these parents."

CP 210-211 (emphasis added).

Brown specifically asserted in his complaint that the statements italicized above (about *his daughter's words and actions*) were false and he allegedly discovered the falsity of these "statements" from his daughter on or about May 24, 2007. CP 270, ll. 9-17; CP 271, ll. 3-5. Brown

characterized these italicized statements as *three* separate and actionable false statements of fact *about him* in his complaint. CP 271, ll. 3-4. The statements were characterized by Brown as follows:

- That *Ashley Brown* told Shannon Murdoch that Ashley did not like a gift left at Chrysalis by her father Brown (plaintiff);
- That *Ashley Brown* did not want her father Brown to attend a school conference; and
- That *Ashley Brown* provided non-specific negative comments about her father.

CP 270, ll. 14-17 (emphasis added).

Chrysalis's *second* motion for summary judgment proximate causation argument focused on the following about the Murdoch statements: (1) they were never referred to at all in the recorded testimony by Dr. Hedrick in the parenting plan modification proceeding (CP 380-528; CP 534-616); (2) they were not listed or referred to at all by Judge Carey in the written transcript of her *hearing* explaining her Findings of Fact and Conclusions of Law supporting her August 21, 2006 Order (CP 701-741); (3) they are not included or referred to in the actual August 21, 2006 written Order Re Modification, etc. (CP 312-328); and (4) finally, they are not referred to at all in In re Marriage of Garth and Brown, 2007 WL 4296603 (Wn. App. Div. 1) (2007). CP 345-355. All of this evidence is ignored by Brown in his brief.

The parenting evaluator, Dr. Hedrick, testified in her deposition taken in this Brown action that (1) she did *not* even testify at the modification proceedings about the Murdoch statements concerning the gift that was dropped off for Ashley (and Ashley's reaction) and Ashley not wanting her father to be at a college plans meeting (CP 747, l. 17-748, l. 12) and (2) as far as the recommendations in Dr. Hedrick's report were formed, the Murdoch statements about the gift to Ashley and college plans meeting "had virtually no impact" on her recommendations and were "not the driver of anything." CP 749, l. 18-750, l. 6. Dr. Hedrick testified that, even if the information given to her by Shannon Murdoch would have turned out to be incorrect, she would have found *a different example* of the dynamic between Brown and others to elaborate upon in her report. CP 751, l. 19-752, l. 7. Brown ignores this evidence.

Judge Cheryl B. Carey, who was the ultimate decision-maker for the parenting plan modification proceedings, testified in her deposition taken in this Brown action that (1) she reviewed the written transcript of the July 6, 2010 findings of fact hearing (where she explained the findings of fact supporting her August 21, 2006 Order) and could not find reference by her to any testimony about Ashley Brown's reaction to a gift being considered (CP 760, ll. 3-17), (2) Judge Carey could not find anything in the August 21, 2006 Order/Judgment mentioning the school counselor

(i.e., Shannon Murdoch) (CP 760, l. 18-761, l. 2), (3) if something is important in any decision Judge Carey makes, and it is a case where she is required to make findings, her standard practice is that she would have mentioned it in her findings (CP 761, ll. 3-9), and (4) Judge Carey's practice is that, if a particular fact that came out from the testimony or documentary evidence is not mentioned in her findings of fact, then it did not affect her ultimate decision. CP 761, ll. 14-18. Brown's brief is silent about this evidence.

Brown's daughter, Ashley Brown, testified in this action that the Murdoch statements at issue were solely about *her*. CP 945, ll. 20-25; CP 946, ll. 14-16. Ashley Brown further testified that her relationship with her father *improved* after her father lost custody of her following the parenting plan modification. CP 947, l. 12-948, l. 2; CP 948, ll. 15-21. Brown's ex-wife, Rebecca Garth, testified in this action about the "choice" being given to Ashley Brown, as a result of the custody modification, as to how much time Ashley wanted to spend with her father. Garth testified to the improved relationship between Ashley and Brown from that choice/freedom. CP 955, ll. 2-13; CP 956, l. 19 – 957, l. 1. Brown's brief omits this evidence.

Brown even made a claim in this matter of harm supposedly caused to his reputation as an Air Force reserve officer by the Murdoch

statements. Rod Zimmer allegedly told Brown that the Air Force was holding up Brown's security clearance as a result of "court findings" in the modification proceedings.

Zimmer, however, testified under oath in the case that (1) Zimmer did not recall *specific issues* in any conversation with Brown and (2) Zimmer had never seen or heard of the Hedrick PAE (let alone the Murdoch statements) or told Brown it was affecting Brown's security clearance. CP 963, l. 14-964, l. 11; CP 965, l. 3 - 968, l. 19. Chrysalis contended that this testimony was representative of Brown's causation "evidence" (*i.e.*, speculation and misrepresentation) in this case. Brown ignores the Zimmer testimony evidence.

Chrysalis asserted in the *second* motion for summary judgment that what caused the outcome of the modification proceedings is all the *other* "damaging" evidence about Brown's conduct from the parenting plan proceedings that is *specifically set out* by Judge Carey in her oral explanation of the Findings of Fact and Conclusion of Law, the written Findings of Fact and Conclusion of Law of the judgment on the proceedings, and cited in In re Marriage of Garth and Brown, 2007 WL 4296603 (Wn. App. Div. 1) (2007).

Brown opposed Chrysalis' *second* motion for summary judgment by suddenly extracting and increasing the number of allegedly false and

defamatory Hedrick report statements made by Murdoch from three (3) to nine (9) -- six (6) “new” statements plus the “original” three. See CP 807-808. Chrysalis objected to this attempt to broaden the number of alleged defamatory statements at issue as being time barred by the statute of limitations. CP 928; RP 13-14.

Additionally, Chrysalis argued that neither the three original statements nor any of the “new” 6 statements could be shown to have *caused* the decision of Judge Carey and the outcome of the modification proceedings (or any other damages). No statement was ever (1) referred to in testimony by Dr. Hedrick in the parenting plan modification bench proceedings (CP 380-528; CP 534-616); (2) listed or referred to at all by Judge Carey in her Findings of Fact and Conclusions of Law (CP 701-741); (3) referred to in Judge Carey’s August 21, 2006 Order deciding the case (CP 312-328); or (4) referred to at all in In re Marriage of Garth and Brown. CP 345-355.

Given these undisputed facts, Chrysalis asserted that a jury would have to speculate to be able to isolate the Chrysalis staff court-ordered interview (out of the 14 Hedrick interviews) as a proximate cause of any damages to Brown. CP 289-293. This was insufficient proximate cause (“but for”) evidence to survive summary judgment as to any tort causes of action asserted by Brown.

The Superior Court heard argument on Chrysalis's *second* motion for summary judgment on July 23, 2010. At no place in Brown's briefing (CP 803-822) and at no time in the argument (RP 1-33) did Brown raise the issue that the "substantial factor" test of causation should apply in the court's analysis of the causation issues. As noted above, the Superior Court granted Chrysalis' *second* motion for summary judgment. Brown's appeal and Chrysalis's cross-appeal now follow.

V. ARGUMENT

A. Argument for Brown Appeal

1. Standard of Review for Brown Appeal.

The standard of review of a trial court's granting of summary judgment is *de novo* with the appellate court engaging in the same inquiry as the trial court. See Keith v. Allstate Indemn. Co., 105 Wn. App. 251, 254, 19 P.3d 1077 (2001).

2. The Murdoch statements at issue were not "defamatory" in nature and not statements of fact about Brown.

As noted above, the Murdoch statements at issue are *about Brown's daughter's alleged actions and statements* – not Brown's. This was but one of the fatal flaws in Brown's defamation claim. "To establish a *prima facie* defamation claim, the plaintiff must show (1) that the defendant's statement was false, (2) that the statement was unprivileged,

(3) that the defendant was at fault, and (4) that the statement proximately caused damages.” Eubanks v. North Cascades Broadcasting, 115 Wn. App. 113, 119, 61 P.3d 368 (2003).

“The burden of proving the elements of the cause of action [of defamation] are on the plaintiff, including the requirement that the plaintiff prove that the communication was made of and concerning him. [Citations omitted.]” Sims v. KIRO, Inc., 20 Wn. App. 229, 233, 580 P.2d 642, rev. denied, 91 Wn.2d 1007 (1978), cert. denied, 441 U.S. 945, 995 S. Ct. 2164, 60 L.Ed.2d 1047 (1979).

In a defamation case where plaintiff cannot meet this identification burden, the defamation action may be dismissed on summary judgment as a matter of law. Id. at 235 (“Our holding is based, rather, on the failure of the proof to show with convincing clarity that the plaintiff was the person about whom the telecast was made. The proof presented that the statements were made about the plaintiff gives rise to no more than conjecture as to that element. This is not sufficient. The plaintiff has failed to submit a triable issue.”). Because Brown did not establish the allegedly false statements were about him, his defamation cause of action was properly dismissed.

Additionally, a separate fatal flaw existed as to Brown’s defamation claim based on the Murdoch statements about Ashley Brown.

The statements are not of an actionable “defamatory” nature. “The initial question on summary judgment is whether the statement at issue is capable of a defamatory meaning.” LaMon v. Butler, 44 Wn. App. 654, 658, 722 P.2d 1371 (1986), aff’d, LaMon v. Butler, 112 Wn.2d 193, 770 P.2d 1027, cert denied, 493 U.S. 814, 110 S. Ct. 61, 107 L.Ed.2d 29 (1989). “A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.’ Restatement (Second) of Torts § 559 (1977).” Right-Price Recreation, L.L.C. v. Connells Prairie Community Council, 146 Wn.2d 370, 382, 46 P.3d 789 (2002).

Chrysalis submits that, even if Murdoch’s statements provided to Dr. Hedrick were false, Brown cannot show that the statements about Brown’s daughter “harm[ed Keith Brown’s reputation] as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.” Right-Price Recreation, supra. No third parties in the community or persons not dealing with Brown were ever identified by Brown. Considering the lack of defamatory nature of the statements about his daughter’s alleged words and actions, Brown’s defamation cause of action was properly dismissed.

Brown appears to argue that the statements at issue are

“defamatory *per se*.” (This seems to be a concession that Brown cannot prove the statements caused any special damages.) Brown asserts defamation *per se* is triggered because the statements “clearly conveyed the impression that Brown was a lousy father, as well as a bit of a jerk, whose own daughter disliked him and wanted nothing to do with him. As such, these false statements exposed Brown to contempt and ridicule.” App. Brief at 11.

The Superior Court obviously concluded as a matter of law, as it is allowed, that the Murdoch statements about Ashley Brown’s alleged words and actions did not expose Brown to “contempt and ridicule” or constitute defamation *per se*. Summary judgment was proper.

3. Brown did not produce sufficient “cause in fact” (i.e., “but for” causation) evidence to support recovery for any of his causes of action, including defamation.

As Chrysalis pointed out in its *second* motion for summary judgment, lack of proximate causation evidence for all tort causes of action was the *central issue* for the motion. Proximate cause has two elements: (1) the “but for” consequence of an act, and (2) legal causation. Hartley v. State, 103 Wn.2d 768, 777-79, 698 P.2d 77 (1985).

To establish proximate cause, a plaintiff must prove that the specific conduct caused, in a direct sequence, unbroken by any

independent cause, the injury complained of. Hoffer v. State, 110 Wn.2d 415, 424, 755 P.2d 781 (1988) (citing Alger v. Mukilteo, 107 Wn.2d 541, 545, 730 P.2d 1333 (1987)); Harvey v. County of Snohomish, 124 Wn. App. 806, 819, 103 P.3d 836 (2004); Joyce v. State Department of Corrections, 155 Wn.2d 306, 322, 119 P.3d 825 (2005).

In other words, for each of his causes of action, Brown was required to show a direct link between the alleged false statements of Murdoch about Ashley Brown (made to Dr. Hedrick) and the outcome (*i.e.*, Brown's losing) of the Parenting Plan Modification Proceedings (or any other alleged damages to Keith Brown). See Kim v. Budget Rent A Car Sys., Inc., 143 Wn.2d 190, 203, 15 P.3d 1283 (2001). Brown did not and could not do this.

A similar lack of proximate causation evidence situation was presented to this Court in Childs v. Allen, 125 Wn. App. 50, 105 P.3d 411 (2005). This was a case brought by a parent who lost parental rights in dependency proceedings allegedly as a result of negligent statements made by a counselor in a court-ordered evaluation of the parent. In Childs, this Court dismissed the negligence claim made by a father (who lost custody of his daughter) against a certified chemical dependency counselor on witness immunity *and* proximate causation grounds.

The counselor in Childs had interviewed the father pursuant to

court order. She ultimately concluded in an evaluation report that the father had an alcohol dependency, he abused marijuana, and recommended the father get into a chemical dependency program. Id. at 52. The counselor testified consistent with those conclusions in the dependency hearing, which the father lost. The trial court entered extensive findings of fact and conclusions of law regarding the dependency. Id. at 53. It specifically found that the father (and the mother of the daughter) had neglected and emotionally abused the daughter and the daughter was “dependent.” Id.

In dismissing the action due to the lack of “but for” causation evidence, this court noted:

Childs, however, does not produce any evidence that, but for Allen’s evaluation and testimony, the court would have reached a different decision in the proceedings. Indeed, the court noted that one instance in particular, completely unrelated to Allen’s evaluation and testimony, was sufficient to support the finding of dependency. Thus, under the circumstances of this case, the trial court did not err in determining that as a matter of law, Allen was not the proximate cause of Child’s alleged injuries.

Childs v. Allen, 125 Wn. App. at 57-58 (emphasis added). This same lack of proximate causation evidence ruling was properly made by the trial court in the instant matter. The PAE was overwhelmingly adverse to Brown. Isolating the Chrysalis interview as a causal factor in Brown losing his parenting rights is simply impossible.

To survive summary judgment on this issue of causation, a plaintiff must establish the link between their damages and an alleged breach of duty through something more than mere conjecture or speculation. Ruff v. County of King, 125 Wn.2d 697, 707, 887 P.2d 886 (1995). Brown could not meet his burden given that the only evidence he had was his *own* speculation and conjecture that the Chrysalis statements caused the outcome.

The two most important causation witnesses about what effect the Murdoch statements (about Ashley Brown) made to Dr. Hedrick had, *if any*, on the outcome of the custody modification proceedings were the *source* and *recipient* of the statements. The *source* of the statements was Dr. Hedrick because they were in Dr. Hedrick's report and she testified at the trial. The *recipient* of the statements was Judge Cheryl B. Carey, who presided over the modification trial, saw and heard *all* of the evidence, and made the written decision (supported by findings of fact) to modify custody and award attorneys fees to Brown's ex-wife, Rebecca Garth.

Dr. Hedrick testified at her deposition *in this case* that (1) she did not even testify at the proceedings about the Murdoch statements concerning the gift that was dropped off for Ashley (including Ashley's reaction) and Ashley not wanting her father to be at a college plans meeting (CP 747, 1. 17-CP 748, 1. 12) and (2) as far as Dr. Hedrick's

recommendations in her report were formed, the statements about the gift to Ashley and college plans meeting “had virtually no impact” on Dr. Hedrick’s recommendations and were “not the driver of anything.” CP 749, l. 18-CP 750, l. 6. Dr. Hedrick said that, even if the information given to her by Shannon Murdoch would have turned out to be incorrect, she would have found a different example of the dynamic between Keith Brown and others to elaborate upon in her report. CP 751, l. 19-CP 752, l. 7. This “other evidence was there for the conclusion” scenario was present for the dependency ruling in Childs, supra.

Judge Cheryl B. Carey testified in her deposition *in this case* that (1) she could not find reference to any testimony in the transcript about Ashley Brown’s reaction to a gift being considered (CP 760, ll. 3-17), (2) Judge Carey could not find anything in the August 21, 2006 Order/Judgment mentioning the school counselor (i.e., Shannon Murdoch) (CP 760, l. 18-CP 761, l. 2), (3) if something is important in any decision Judge Carey makes, and it is a case where she is required to make findings, her standard practice is that she would have mentioned it in her findings (CP 761, ll. 3-9), and (4) Judge Carey’s practice is that, if a particular fact that came out from the testimony or documentary evidence is not mentioned in her findings of fact, then it did not affect her ultimate decision (CP 761, ll. 14-18).

All of this testimony is completely ignored by Brown in his opening brief. More tellingly, Brown also wants this court to overlook all of the *other* “damaging” evidence about Brown’s conduct from the PAE and the parenting plan court proceedings. *That evidence* was included in the Hedrick report and proceedings testimony, set out by Judge Carey in her oral explanation of the Findings of Fact and Conclusion of Law, listed in the written Findings of Fact and Conclusion of Law of the judgment on the proceedings, and discussed in In re Marriage of Garth and Brown, 2007 WL 4296603 (Wn. App. Div. 1) (2007). *The presence of that overwhelming adverse evidence*, means that Brown’s case could not survive summary judgment on proximate causation, leading to the correct dismissal of his action (as was the case in Childs, *supra*).

Brown’s final cause of action in this matter was for “tortious interference with parent/child relationship.” The elements of this “tortious interference” cause of action included: “(4) A causal connection between the third [party’s] conduct and the loss of affection [; and] (5) That such conduct resulted in damages.” Waller v. State, 64 Wn. App. 318, 338, 824 P.2d 1225 (1992). Brown spends a lot of space in his brief addressing the alleged bad motives of Chrysalis regarding this cause of action. This is an attempt to obfuscate the lack of proximate causation evidence defect for the “tortious interference” cause of action.

As noted above, Brown could not show that the Murdoch statements caused a loss of custody of Ashley Brown or any of his damages considering the Hedrick and Judge Carey testimony/evidence cited above. More importantly, it was all of the *other* “damaging” evidence about *Brown’s conduct* (set out above) that caused Brown to lose the parenting plan proceedings. This same evidence justified dismissal of all causes of action based on lack of proximate cause evidence. Moreover, Brown’s relationship with his daughter improved following the custody disposition. Feeling free to choose, Ashley desired to see her dad on occasion.

4. Brown failed to raise the issue of the inapplicable “substantial factor” exception/test for proximate causation applying in the case below, waiving that issue for appeal.

Chrysalis argued in its briefing for its *second* motion for summary judgment that “but for” test for proximate cause applied to the causes of action at issue in the motion/case. CP 289. A review of Brown’s opposition to Chrysalis’ *second* motion for summary judgment (CP 803-822) and the transcript of the July 23, 2010 hearing for that motion (RP 1-33) shows that Brown *never* argued the proper standard for “proximate cause” was “substantial factor” (instead of “but for” causation). Brown argues that this standard applies for the first time at pp. 14-19 of his

opening brief.

RAP 2.5(a) and Washington case law applying it establish that the “appellate court may refuse to review any claim of error which was not raised in the trial court.” The language of that rule itself (RAP 2.5(a)) does recognize three exceptions to the rule (*i.e.*, lack of jurisdiction, failure to state a claim upon which relief can be granted, and manifest error affecting a constitutional right). None of those exceptions apply.

Simply put, an appellate court reviewing a summary judgment should only consider those issues and materials called to the attention of the trial court. See Pepper v. J.J. Welcome Constr. Co., 73 Wn. App. 523, 530, n.6, 871 P.2d 601, rev. denied, 124 Wn.2d 1029 (1994). The “substantial factor” test for “cause in fact” prong of proximate causation was not raised with the trial court in the second motion for summary judgment; it should not be addressed by the court in this appeal.

Even if this court did consider the issue of whether the “substantial factor” exception to required “cause in fact” causation applied in deciding the *second* summary judgment motion, Washington law is clear that this defamation/tort case is not in any one of the limited categories in which the “substantial factor” test has been applied. “Since Daugert, Washington courts have applied the substantial factor test in *only four types of cases*—those involving: (1) discrimination or unfair employment practices;

(2) securities; (3) toxic tort cases, including multi-supplier asbestos injury cases; and (4) medical malpractice cases where the malpractice reduces a patient's chance of survival.” See Fabrique v. Choice Hotels Int’l, Inc., 144 Wn. App. 675, 685, 183 P.3d 1118 (2008) (emphasis added). This issue should be resolved against Brown.

5. The Murdoch statements were not of the required “extreme” nature to be actionable under the tort of “outrage”.

The Murdoch statements (set forth, supra) are simply not of the type/degree to trigger liability for the tort of outrage. The type of words/conduct required for liability in outrage is “extreme”:

Outrageous conduct is conduct “which the recitation of the facts to an average member of the community would arouse his resentment against the actor and lead him to exclaim ‘Outrageous!’” [Footnote omitted.] The conduct in question must be “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.”

The question of whether certain conduct is sufficiently outrageous is ordinarily for the jury, *but it is initially for the court to determine if reasonable minds could differ on whether the conduct was sufficiently extreme to result in liability.* While Hope has alleged a fact pattern similar to that in Birklid, Larry's Markets' conduct does not arise to the level sufficient to sustain an outrage claim.... [I]t was not sufficiently extreme to be regarded as utterly intolerable in a civilized society. The court did not err in dismissing the claim for outrage on summary judgment.

Hope v. Larry’s Markets, 108 Wn. App. 185, 196-197, 29 P.3d 1268

(2001) (italics added).

In Hope, the alleged conduct at issue was that plaintiff “was exposed [for approximately seven months] to harsh chemical cleaners at her place of work, the deli department of a Larry's Markets store. She continuously complained to store management that the chemicals were causing her rashes, but the store failed to take adequate measures to prevent her exposure to the chemicals.” Id. at 188. Summary judgment was granted regarding outrage liability for this alleged conduct.

If the type of alleged conduct in Hope does not constitute the tort of outrage as a matter of law, then Murdoch’s *statements about Ashley Brown given to a court-appointed parenting evaluator for use in legal proceedings* surely do not constitute “outrage” as a matter of law here. Summary judgment dismissal of this cause of action was proper.

6. The judicially-limited tort of “negligent infliction of emotional distress” was not available to Brown under the facts of the case.

The tort of negligent infliction of emotional distress (NIED) was simply not available to Brown under these facts, as a matter of law. “The tort of negligent infliction of emotional distress is a limited, judicially created cause of action that allows a family member a recovery for ‘foreseeable’ intangible injuries caused by viewing a physically injured loved one shortly after a traumatic event.” Colbert v. Moomba Sports,

Inc., 163 Wn.2d 43, 49, 176 P.3d 497 (2008). Moreover, Brown could not recover any alleged emotional distress damages given his failure to show any objective symptoms of the alleged distress. Washington v. Boeing Co., 105 Wn. App. 1, 17-18, 19 P. 3d 1041 (2000).

The factual basis of Brown's claims against Chrysalis for Murdoch's statements plainly does not establish Brown's ability to recover for NIED. This cause of action was properly dismissed as a matter of law.

B. Argument For Chrysalis Cross-Appeal

1. Standard of Review for Cross-Appeal.

The standard of review for the Superior Court's denial of summary judgment on the grounds presented to the Superior Court is de novo. See Ski Acres, Inc. v. Kittitas County, 118 Wn.2d 852, 854, 827 P.2d 1000 (1992).

2. The trial court committed legal error when it refused to apply witness immunity to Chrysalis.

"The witness immunity rule, which provides that witnesses who *participate in judicial proceedings* are immune from suit based on their testimony, is a centuries' old rule. Witness immunity preserves the integrity of judicial proceedings by encouraging full and forthright testimony, as [the Washington Supreme Court] has recognized." (Emphasis added). See *e.g.*, Wynn v. Earin, 163 Wn.2d 361, 376, 181

P.3d 806, 814 (2008). Many other jurisdictions “have also recognized the enormous importance of the witness immunity rule ... to judicial proceedings.” Id. Murdoch “participated” in the judicial proceedings.

The Superior Court too narrowly applied precedent and disregarded the broad policy grounds behind witness immunity and privilege when it failed to apply immunity to Murdoch (and Chrysalis) for Murdoch’s out-of-court interview statements made to Dr. Hedrick, who testified in court.

a. Immunity opens channels of judicial communication.

“[The immunity rule] promotes the effectiveness of judicial proceedings by encouraging open channels of communication and the presentation of evidence” in judicial proceedings. Wynn, 163 Wn.2d 361, 376-377, 181 P.3d 806, 814 (2008). A further purpose of the rule “is to assure utmost freedom of communication between citizens and public authorities whose responsibility is to investigate and remedy wrongdoing.” Id. Such open communication is “a fundamental right to the right of access to judicial and quasi-judicial proceedings.” Id. A court-appointed fact finder is a public authority by extension of the trial judge.

The denial of immunity simply because the statements were not made directly in court acts as a disincentive for persons like Murdoch to

give out-of-court interviews to a court-appointed evaluator in modification proceedings. Denial of immunity to Chrysalis here *discourages* open channels of communication and efficient presentation of evidence, which undermines the efficacy of parenting plan judicial proceedings. In the future, staffs of schools, clinics, counseling centers and other care providers will insist on subpoenas for in-court testimony if the immunity is not recognized.

b. Immunity prevents abusive use of conflict that wastes judicial resources.

In this case, Brown alleged, among other things, that Chrysalis' (*i.e.*, Murdoch's) statements "caused Plaintiff to lose custody and decision-making authority related to his daughter and created a damaged relationship between Plaintiff and his daughter." CP 271.

One of the findings of fact in the underlying modification proceeding was that "Brown delayed proceedings by taking inconsistent, different, and oftentimes contradictory positions with respect to the same factual events." In re Marriage of Garth and Brown, 2007 WL 4296603, at *11 (2007).³ The court concluded that "Mr. Brown [was] responsible for the ongoing conflict within the court system." Id. at *10. The court relied on Exhibit 20, which was a collection of over 50 motions heard by

³ See Johnson v. Allstate Ins. Co., 126 Wn. App. 510, 520, 108 P.3d 1273, 1278 (2005) (a party may cite an unpublished opinion for collateral estoppel or *res judicata* purposes).

20 different judges and commissioners since the original dissolution. The court noted, “There are 17 court files in this case over the years.” Id. at *4. It also found that Brown used the dispute resolution procedure to encourage conflict, “submitted over 20 issues to be dealt with at one time,” and “mediated issues that he had agreed to as a result of other court proceedings.” Id.

Failure to apply the immunity doctrine to Chrysalis here allows Brown to continue the conflict he needlessly escalated, albeit against a third-party and in the form of a defamation/tort lawsuit. This should not be allowed to happen to Chrysalis or any other interviewee of a court-appointed parenting evaluator. Immunity should be granted to this class of professionals to facilitate orderly family court proceedings.

c. Immunity allows witnesses to perform their respective functions without fear of judicial intimidation.

“[W]itnesses should be free from the fear of protracted and costly lawsuits which otherwise might cause them either to distort their testimony or refuse to testify altogether.” Wynn, 163 Wn.2d at 377. “Absolute immunity is thus necessary to assure that judges, advocates, *and witnesses* can perform their respective functions without harassment or intimidation.” Id. at 377-378 (emphasis added). Without immunity, a future Ms. Murdoch will not give out-of-court information to court-

appointed experts. This undermines the functioning of the family court system.

d. Chrysalis is immune because Murdoch's statements were made in connection with an active judicial proceeding.

Our Supreme Court has recognized that “a witness, lay or expert, party or nonparty, is immune from tort damages arising out of his or her testimony.” Bruce v. Byrne-Stevens & Assocs. Eng'rs, Inc., 113 Wn.2d 123, 125-27, 776 P.2d 666 (1989). In finding that “the scope of witness immunity is broad,” the Court commenting on expert testimony stated:

There is good reason for this. Witness immunity must extend *to the basis of the witness' testimony* or the policies underlying such immunity would be undermined. An expert's courtroom testimony is the last act in a long, complex process of evaluation and consultation with the litigant. There is no way to distinguish the testimony from the acts and communications on which it is based. Unless the whole, integral enterprise falls within the scope of immunity, the chilling effect of threatened litigation will result in...adverse effects...regardless of the immunity shielding the courtroom.

Bruce, 113 Wn.2d at 134-35 (italics added).

The Court in Bruce dismissed plaintiff's suit based on the immunity doctrine because it found that immunity applied not only to in-court testimony, but also the “acts and communications which occur in connection with the *preparation of that testimony*.” 113 Wn.2d at 136 (emphasis added). In Bruce, the engineer (Mr. Byrne) was entitled to

absolute witness immunity for engineering work and opinions done by others that formed the basis of his testimony. Id.

The background work performed by the engineering firm fell within the scope of absolute immunity, even though *only* the principal (Mr. Byrne) provided courtroom testimony. Id. at 138. The Court noted that witness immunity applies in a broad range of circumstances and has been extended to witnesses before grand juries and other pretrial proceedings; to guardians, therapists, and attorneys who merely submit reports to family court; and to probation officers allegedly submitting false statements in pretrial bond reports. Id. at 126-27.

Just as the observations in the engineering reports that formed the basis of Mr. Byrne's testimony were protected by the immunity doctrine, the observations in Dr. Hedrick's PAE Report (including the interview of Chrysalis employee Murdoch) formed the foundation of Hedrick's testimony during ongoing parenting plan modification proceedings. Dr. Hedrick had a court order directing her to gather information from mental health and educational professionals, and report to the court. The "basis" of her report, *i.e.*, the Murdoch and other interviews, should be part of the immunity.

It is undisputed that any statements made by Chrysalis employee Murdoch to Dr. Hedrick were made pursuant to court order, and in

connection with an ongoing custody proceeding. Because Chrysalis' "acts and communications [occurred] in connection with the preparation of . . . testimony," Bruce, 113 Wn.2d at 136, the school should be immune from tort damages arising out of these communications.

Washington Court of Appeals decisions have recognized that "[a]ll witnesses are immune from all claims arising out of all testimony." See Gustafson v. Mazer, 113 Wn. App. 770, 775, 54 P.3d 743 (2002). The facts in Gustafson are very similar to those here.

In Gustafson, a court-appointed guardian ad litem ("GAL") recommended that Dr. Mazer, a psychologist, perform evaluations of the mother, father, and child. 113 Wn. App. at 773. Dr. Mazer's role was to "administer psychological tests, and conduct interviews, and report her findings from those tests and interviews" to the GAL. Id. Dr. Mazer wrote a report detailing her suspicion that the mother suffered from Munchausen Syndrome by Proxy ("MSBP"). This report was submitted to the court during the course of a parenting plan dispute. Dr. Mazer did not initially testify in court regarding her opinions. Id.

The mother lost custody of her child. Id. Dr. Mazer subsequently withdrew her report as incorrect and stated that she no longer believed that the mother suffered from MSBP. The mother sued Dr. Mazer for defamation and negligence. The trial court dismissed the claims and the

Court of Appeals affirmed, holding that Dr. Mazer was immune from liability *for her report*. Gustafson, 113 Wn. App. 770.

Similar to Gustafson, the court in our case ordered Dr. Hedrick to prepare an evaluation for use in the underlying parenting plan modification (custody) dispute. Pursuant to that court order, Dr. Hedrick interviewed the mother, father, and both children, as well as 11 other individuals including doctors, therapists, school teachers, and counselors. Dr. Hedrick wrote a 20-page report summarizing her communications with these 14 people, including Shannon Murdoch of Chrysalis. As in Gustafson, Dr. Hedrick's report was introduced into evidence for purposes of the custody hearing. The Superior Court erred by not applying Gustafson and immunizing Ms. Murdoch. The public policy principles supporting immunity apply to Murdoch's interview.

e. Chrysalis is absolutely immune even if Ms. Murdoch did not testify in court.

Washington courts have recognized that statements do not need to be made under oath *or in a courtroom* to be protected by absolute immunity. *See, e.g., Demopolis v. Peoples Nat'l Bank*, 59 Wn. App. 105, 109-10, 796 P.2d 426 (1990); Hill v. J.C. Penney, Inc., 70 Wn. App. 225, 238-39, 852 P.2d 1111 (1993). In Hill, the court held that statements which were relevant to the proceedings of an administrative agency acting

in a quasi-judicial matter were protected by absolute immunity, even though the statements were not made in a courtroom or under oath. Id.

Our Supreme Court in Bruce adopted the reasoning in Middlesex Concrete Prods. & Excavating Corp. v. Carteret Indus. Ass'n, 68 N.J.Super. 85, 172 A.2d 22 (1961) for the same proposition: that absolute immunity applies even where a witness has *not* testified in court. Bruce, 113 Wn.2d at 136, (citing Middlesex, supra). Middlesex sued Carteret over progress payments on a sewage treatment plant. Carteret retained Philip B. Streander as a consulting engineer. Middlesex subsequently added Streander as a defendant, alleging tortious interference based on Streander's negative reports. The trial court dismissed the suit against Streander on grounds of witness immunity.

The Middlesex court held that the Streander reports did fall within the broad scope of immunity for participants in judicial proceedings:

The privilege or immunity is not limited to what a person may say under oath while on the witness stand. *It extends to statements or communications in connection with a judicial proceeding....*

.....

If this were not so, every expert who acts as a consultant for a client with reference to proposed or actual litigation, and thereafter appears as an expert witness, would be liable to suit at the hands of his client's adversary on the theory that while the expert's testimony was privileged, his preliminary conferences with and reports to his client were not, and could form the basis of a suit for tortious interference.

Bruce, 113 Wn.2d at 136 (citing Middlesex, 68 N.J.Super. at 92) (emphasis added). Applying this reasoning, our Supreme Court in Bruce found that:

[T]he immunity of expert witnesses extends not only to their testimony, but also to acts and communications which occur in connection with the preparation of that testimony. Any other rule would be unrealistically narrow, would not reflect the realities of litigation and would undermine the gains in forthrightness on which the rule of witness immunity rests.

Bruce, 113 Wn.2d at 135-136.

If immunity applied to consulting reports in both Bruce and Middlesex and to a psychologist's evaluation in Gustafson, the same immunity is applicable to Murdoch's out-of-court statements included in Dr. Hedrick's report. She gave statements as an educational professional. Brown's lawsuit is based *entirely* on the interview statements contained in Dr. Hedrick's PAE report which became part of the court record. Accordingly, immunity applies and the action should have been dismissed on that basis.

f. Immunity extends to bar all of Brown's claims, not just his claim of defamation.

Although the issue of witness immunity usually arises in the defamation context, Bruce rejected such a limitation. All witnesses are immune from all tort claims arising out of testimony. Bruce, 113 Wn.2d at 131-34. "There is nothing in the policy rationale underlying witness

immunity which would limit its applicability to defamation cases. Witness immunity is premised on the chilling effect of the threat of subsequent litigation. The threat of subsequent litigation is the same regardless of the theory on which that subsequent litigation is based.” Id.

The Court in Bruce supported this reasoning by citing to numerous cases from other jurisdictions in which witness immunity has also been granted to bar causes of action *other than defamation*. Rainier's Dairies v. Raritan Vly. Farms, Inc., 19 N.J. 552, 564, 117 A.2d 889 (1955); Brody v. Montalbano, 87 Cal. App. 3d 725, 738, 151 Cal. Rptr. 206, 215 (1978); O'Barr v. Feist, 292 Ala. 440, 296 So.2d 152 (1974); Snyder v. Faget, 295 Ala. 197, 326 So.2d 113 (1976); Fisher v. Payne, 93 Fla. 1085, 113 So. 378 (1927); Hurley v. Towne, 155 Me. 433, 156 A.2d 377 (1959); Dabkowski v. Davis, 364 Mich. 429, 111 N.W.2d 68 (1961).⁴

3. The trial court erred when it misapplied the holdings of Gustafson and Bruce and failed to consider the effect of RCW 26.09.220(3).

The Superior Court misapplied and incorrectly distinguished the facts and holdings of two Washington cases to deny the Chrysalis’s *first* motion for summary judgment. The Superior Court wrote the “Reasoning” for its denial of Chrysalis’ motion for summary judgment in a very brief fashion: “The ‘adequate safeguards’ cited in Gustafson v.

⁴ Out of state immunity cases were submitted to the Superior Court below (in the order they are cited) and again herein for the convenience of the Court in CP 1-151.

Mazer and Bruce are not present here.” CP 264.

The “adequate safeguards” to which the Superior Court was referring were discussed as follows:

‘A witness’ reliability is ensured by his oath, the hazard of cross-examination and the threat of prosecution for perjury.’ [citing Bruce v. Byrne Stevens & Assocs. Eng’rs, 113 Wn.2d 123, 126, 776 P.2d 666 (1989).] Gustafson claims that these safeguards are missing here because Dr. Mazer (1) was not under oath when she made the allegedly negligent statements . . . , (2) her statements were not subject to cross-examination, and (3) she never faced the threat of perjury.

Gustafson v. Mazer, 113 Wn.App. 770, 778, 54 P.2d 743 (2002).

The Gustafson court actually ruled that these considerations informed a “credibility” concern, but would not deter *negligence/tort* claims which were at issue in that case. Id. In other words, the “safeguards” of testimony under oath and penalty of perjury are not always needed because they will obviously not deter negligence by the witness. The Superior Court here misapplied the holding and failed to realize that the “adequate safeguards” do not need to be present *in every case* for immunity to apply to witness’ out-of-court statements.

The Superior Court’s conclusion that the “adequate safeguards” cited in Gustafson “were not present” for statements of Murdoch included in the Hedrick PAE was error for another reason. First, as noted above, there was no need for in-court testimony for immunity to apply. Second,

as noted above, RCW 26.09.220(3) applied to the modification of parenting plan proceedings and states, “*Any party to the proceeding may call . . . any person whom the investigator has consulted for cross-examination.*” (italics added). This applied to Ms. Murdoch.

Through RCW 26.09.220(3), the “hazard of cross-examination” and “threat of perjury” prosecution for false testimony *were* “present” for the Murdoch statements. Pursuant to the statute, Brown *could have subpoenaed* Murdoch to testify and cross-examine her on the statements she made to Dr. Hedrick (RCW 26.09.220(3)). If subpoenaed by Brown, Murdoch would have been subject to perjury for testimony given under oath. Brown *could have* asserted that the testimony of Murdoch was “false” and tried to prove such.

The adequate safeguards discussion in Bruce v. Byrne Stevens & Assocs. Eng’rs, 113 Wn.2d 123, 126, 776 P.2d 666 (1989), consisted of a citation to the New Jersey case of Middlesex Concrete Prods. & Excavating Corp. v. Carteret Indus. Ass’n, 68 N.J.Super. 85, 172 A.2d 22 (1961). In Middlesex, the report author was *not* subject to prosecution for perjury and the truth or falsity of its contents was *not* subject to the “searching light” of cross-examination. Bruce, 113 Wn.2d at 136. Nonetheless, immunity was applied. The Superior Court’s denial of summary judgment was a misapplied understanding of the holding in

Bruce, because that holding did *not* focus on the presence of “adequate safeguards” in court in recognizing the immunity.

4. Numerous other jurisdictions have extended witness immunity to out-of-court communications and reports.

In addition to the out-of-state cases cited in Bruce, there are many other such cases affording immunity to out-of-court statements. In Collins v. Walden, 613 F. Supp. 1306 (N.D. Ga. 1985), judgm’t aff’d, 784 F.2d 402 (11th Cir. 1986), the court held that witness immunity is equally applicable to out-of-court witnesses and evidence. Collins, 613 F. Supp. at 1314.

The Collins court reasoned:

The search for evidence often requires interviews with persons who may not actually testify at trial but who are nonetheless important to the process because they might know of someone else whose testimony would be more helpful. The possibility that they may be forced to defend a lawsuit for damages can only discourage such people from becoming involved. The court's need for evidence demands that all participants in the process of gathering evidence for use at trial be immune from any liability for damages[.]

Collins, 613 F. Supp. at 1315 (emphasis added). This court should adopt this reasoning as public policy in Washington. See also, Bond v. Pecaunt, 561 F. Supp. 1037, 1039 (D.C. Ill. 1983) (letter written by psychologist to state court judge in connection with child custody matter held absolutely privileged); Zuber v. Buie, 849 So.2d 559, 560, 2002-

1718, 2 (La. App. 1st Cir. 2003) (non-party private investigator immune from liability for preparing surveillance report offered into evidence in child-custody dispute despite never testifying); Bird v. W.C.W., 868 S.W.2d 767 (Tex. 1994) (mental health professional's affidavit to family court was privileged as a statement made in the course of a judicial proceeding despite the fact that the professional never testified in court); Dolan v. Von Zweck, 19 Mass. App. Ct. 1032, 477 N.E.2d 200 (Mass. App. 1985) (absolute privilege applied to psychologist's letter, sent to attorney for children's aunt in connection with guardianship proceeding, and psychiatrist never testified in court); Adams v. Peck, 43 Md. App. 168, 176-177, 403 A.2d 840, 845 (Md. App. 1979) (report prepared by psychiatrist concerning effect of purported sexual activity and molestation suffered by two young boys at hands of husband was related to pending divorce proceedings and was protected by absolute privilege); Todd v. Cox, 20 Ariz. App. 347, 512 P.2d 1234 (Ariz. App. 1973) (affidavit of an attorney was absolutely privileged as statement made in course of judicial proceeding even though attorney never testified in court); Kahn v. Burman, 673 F. Supp. 210, 212 (E.D. Mich. 1987) (immunity entirely shielded an expert witness in a state medical malpractice case even though the reports were not made under oath); Silberg v. Anderson, 50 Cal.3d 205, 212, 266 Cal. Rptr. 638, 786 P.2d 365 (1990) (the California

litigation privilege applies to any communication made in a judicial or quasi-judicial proceeding, by litigants *or other participants* authorized by law, *in or out of court*. (Emphasis added)).⁵

5. The Superior Court committed error when it failed to address/conclude that Murdoch's statements were also protected by qualified privilege.

Qualified privilege was an alternate defense which would have independently justified the trial court's complete dismissal of all of Brown's causes of action. Where a qualified privilege applies is a matter of law for courts to determine. MOE v. Wise, 97 Wn. App. 950, 957, 989 P.2d 1148 (1999). The application of the privilege to the Murdoch statements was explained in Chrysalis' *first* motion for summary judgment. CP 169-170.

An appellate court found that a conditional privilege applied in Hitter v. Bellevue School Dist. No. 405, 66 Wn. App. 391, 400-401, 832 P.2d 130 (1992). In that case, the school principal informed a mother of a special needs child that a school aide had been accused of improper touching. The aide brought negligent investigation and defamation claims against the school.

The Court of Appeals in Hitter held that an occasion is

⁵ These additional out-of-state cases were submitted to the trial court for consideration and are submitted again for this appeal. CP 1-151.

conditionally or qualifiedly privileged “when the circumstances are such as to lead any one of several persons having a common interest in a particular subject matter, correctly or reasonably to believe that facts exist which another sharing such common interest is entitled to know.” Hitter, 66 Wn. App. at 401. The Court of Appeals affirmed the trial court’s decision, finding that the child’s mother had a common interest in the subject matter of the investigation and the principal’s statement was conditionally privileged.

As the statements were conditionally privileged, any claims based upon the statements were subsequently dismissed. 66 Wn. App. at 400-401. The court further held that “Hitter has not offered any evidence from which a reasonable trier of fact could find by clear and convincing evidence that the school principal made statements to Jenny’s mother knowing that they were false or with reckless disregard for their falsity.” Hitter, 66 Wn. App. at 400-401.

Like the principal and mother in Hitter, Murdoch and Dr. Hedrick had a common interest: the safety and well-being of the Brown children. Like in Hitter, there is no evidence that Murdoch made these statements knowing that they were false or with reckless disregard for their falsity. Furthermore, Murdoch relied on Dr. Hedrick’s reassurance that she must speak with Hedrick pursuant to a *court order* and provide Dr. Hedrick

with good faith observations of Ashley's behavior and her experiences with Brown. CP 166-167.

Brown's Opposition to Chrysalis' *first* motion for summary judgment (CP 230-231) argued an abuse of privilege theory recognized in MOE v. Wise, 97 Wn. App. at 963 (the speaker knew the statement to be false or acted in reckless disregard to its falsity). MOE v. Wise held that "abuse" must be shown by "clear and convincing evidence." Id.

At no place in the section of the brief addressing abuse of privilege did Brown set forth "clear and convincing"⁶ evidence that Murdoch "had knowledge of, or exercised reckless disregard for, the falsity of the defamatory matter." See Hitter v. Bellevue Sch. Dist. No. 405, 66 Wn. App. 391, 401, 664 P.2d 130 (1992), and App. 1, Ex. 1, pp. 12-13. Washington law is that the requirement of "clear and convincing" proof of knowledge or reckless falsity in defamation actions is met by evidence showing the defendant "in fact entertained serious doubts as to *the truth of his publication*. [Citations omitted]" Mellor v. Scott Publishing, 10 Wn.App. 645, 656, 519 P.2d 1010 (1974) (emphasis original). This was not shown by Brown in the *first* motion opposition papers.

Brown simply presented the declaration of his daughter (prepared

⁶ "Clear and convincing" has been described as follows: "The more stringent standard of 'clear, cogent, and convincing evidence,' however, requires that the trier of fact be convinced that the fact in issue be 'highly probable' [Citations omitted]." Colonial Imports v. Carlton Northwest, 121 Wn.2d 726, 735, 853 P.2d 913 (1993).

3½ years after the Murdoch statements were submitted in the parenting plan modification proceedings), asserting that the Murdoch statements were false. This did not constitute “clear and convincing” evidence of the abuse of privilege required by MOE v. Wise and Hitter, supra. The Superior Court erred by ignoring the application of qualified privilege defense in the *first* motion and overlooking the lack of clear and convincing evidence presented by Brown of “abuse” of privilege.

VI. CONCLUSION

Chrysalis filed two motions for summary judgment. The *first* motion was denied and the *second* was granted. The *first* motion should have been granted as it involved the important policy issues of protection of interviewees/witnesses by application of witness immunity to their out-of-court interview statements and the resulting efficient functioning of the family court system. The public policy of Washington should reflect adequate protection of interviewees involved in child custody proceedings. A blanket immunity for interviewees of court-appointed experts is that core protection. Chrysalis requests reversal of this decision.

Chrysalis also respectfully requests the Court to affirm the dismissal of the Brown action based on all of the grounds asserted in the *second* motion for summary judgment.

RESPECTFULLY SUBMITTED this 29th day of December, 2010.

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CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws 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 the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the foregoing **BRIEF OF RESPONDENT/CROSS-APPELLANT CHRYSALIS SCHOOL, INC.** on the following individuals in the manner indicated:

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SIGNED this 29th day of December, 2010, at Seattle, Washington.



Jennifer Endres