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COURT OF APPEALS NO. 84426-1-I

SUPREME COURT
OF THE STATE OF WASHINGTON

DAN YOUNG, APPELLANT

v.

TODD S. RAYAN ET UX., SAMUEL WILKENS ET UX.,
PENNY ROHR ET VIR, AND ALTHAUSER RAYAN
ABBARNO, a Washington Limited Partnership,
RESPONDENTS.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner is appellant Dan Young who asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

The published decision is *Dan Young v. Todd S. Rayan*, No. 84426-1-I (Wash. Ct. App. July 24, 2023) (“*Rayan*”). A copy of the Slip Opinion (“Slp. Opn.”) is in Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Should the Supreme Court resolve the express conflict between published decisions of the Court of Appeals in the instant case (Div. I) and *Mason v. Mason*, 19 Wn. App.2d 803, 831, 497 P.3d 431 (2021) (Div. II), *review denied*, 199 Wn.2d 1005 (2022) and *Scott v. Am. Express Nat'l Bank*, 22 Wn. App.2d 258, 514 P.3d 695 (2022) (Div. II), *review denied*, 200 Wn.2d 1021 (2022) by adopting the rule expressed by Division II?

2. Should the Supreme Court recognize exceptions to the application of the litigation privilege based on considerations of

public policy?

D. STATEMENT OF THE CASE

The ultimate issue in this case is whether the litigation privilege shields attorneys and a law firm receptionist from being sued for defamation and a larger actionable conspiracy. The acts giving rise to the claims are their signing perjured declarations and a stray defamatory comment by respondent Todd Rayan in a letter. These acts were in furtherance of a scheme to cause appellant Young harm.

To understand the context in which the instant case arises, one needs to consider a series of events involving the 2004 will of Robert Parman, his death in 2005, a divorce in 2017, two underlying lawsuits related to the 2004 will, the *intestate* probate of Robert's estate in 2020, appellant Young's obtaining a copy of the 2004 will in 2021 following two telephone calls to the receptionist at the law firm acting as custodian of the will, and Young's subsequent filing of the will in both of the underlying lawsuits in which Young was representing the plaintiff.

The perjured declarations at issue in this appeal were filed by M. Owen Gabrielson, defense attorney in two underlying lawsuits, with the purpose of hiding Robert's will, undermining Young's relationship with his client, and attacking Young's character before the superior court judge hearing the case, and not for any legitimate purpose related to the defense of the underlying lawsuit.

Robert Parman's Will. Robert Parman died of esophageal cancer on February 15, 2005. CP 208, ¶ 10. Robert and Ruth signed their wills, prepared by attorney John Turner, on October 6, 2004. CP 208, ¶ 9; CP 226 (Robert's will); CP 222 (Ruth's will). The wills were parallel, each providing that upon the death of the survivor, Shawn and Elizabeth would each receive 50% of the Renata Lane property. *Id.*

Shawn Parman was the only son and heir of the senior Parmans. CP 181-182. Elizabeth Bartlett (f/k/a Elizabeth Parman) was Shawn's wife and Robert's daughter-in-law. CP 225.

Shawn and Elizabeth's Divorce. Shawn and Elizabeth divorced in 2017. One property not disposed of in the divorce was a house on Renata Lane and a contiguous seven-acre horse farm developed by Elizabeth over the years. CP 287. The senior Parmans lived with Shawn and Elizabeth and their two sons in the house and shared expenses for many years. CP 388. Elizabeth had invested significant amounts of her separate property into the development of the Renata Lane property. CP 289-91; 206.

First Underlying Lawsuit. Following the divorce of Shawn and Elizabeth, Ruth Parman changed her will to cut Elizabeth out of any inheritance and left all her property and former community property to Shawn. CP 228-229. Elizabeth filed a lawsuit against Ruth and Shawn in 2018 under theories of unjust enrichment, promissory estoppel, tortious interference with business expectancy, and other theories, based upon the senior Parmans' promises to leave Elizabeth 50% of the Renata Lane property in their wills. CP 287-294. That lawsuit was

entitled *Parman v. Parman*, Thurston County Superior Court cause no. 18-2-03269-34. *Id.*

On August 19, 2020, Attorney M. Owen Gabrielson, representing the Estate of Ruth Parman, whose personal representative was Shawn Parman, took the deposition of Elizabeth in *Parman v. Parman*. CP 178. Elizabeth testified that she had seen the wills of Ruth and Robert and described the parallel provisions. CP 181-82, 183; 208, ¶ 9. Elizabeth also testified that she did not have a copy of Robert's will. CP 184.

Intestate Probate of Robert's Estate. Gabrielson also represented Shawn Parman and the Estate of Robert Parman. CP 49. The very next month, on September 17, 2020, he filed an intestate probate of Robert Parman's estate. CP 295-297. Shawn was appointed personal representative. *Id.* In his declaration of completion of the Estate of Robert Parman, filed on October 28, 2021, Shawn represented to the probate court that Robert Parman died without a will. CP 298, ¶ 1.

Second Underlying Lawsuit. Meanwhile, in *Parman v.*

Parman, Gabrielson represented and argued that there was no evidence that Robert Parman ever agreed to will Elizabeth anything. CP 34; CP 170, ¶ 2. Robert’s will on its face shows otherwise. CP 224; CP 387.

Attorney Young, representing Elizabeth in *Parman v. Parman*, interpreted Gabrielson’s initiation of the Robert Parman intestate probate as a brazen attempt to carve out Robert Parman’s interest in the community property of his widow, Ruth, so as to reduce the property available to be recovered by Elizabeth in *Parman v. Parman*. CP 379-380. This gave rise to the second underlying lawsuit of *Bartlett v. Estate of Robert Parman*, Thurston County Superior Court cause no. 21-2-01093-34. CP 390. Elizabeth later sought to have the first and second lawsuits consolidated. For ease of reference, these two lawsuits are referred to as the “underlying litigation.”

Search for Robert’s Will. Young decided to telephone attorney Turner, the drafter of Robert’s will, and found his name on the WSBA website. CP 170, ¶ 2. Young called that number

on October 22, 2021, and asked for him (CP 170, ¶¶ 2-3.), but the receptionist, respondent Penny Rohr, only offered that Turner was not there. CP 131. In actuality, Turner had retired (CP 100; CP 397), and the telephone number was that of the law firm of Althaus, Rayan and Abbarno, who had custody of Turner's former client files. CP 170, ¶ 3.

Rohr asked Young what he was calling about, and Young stated he was looking for the will of Robert Parman. CP 170, ¶ 3. She said she would look into it, then after a pause stated that attorney Sam Wilkens was handling that matter, and that Wilkens would call Young the following week. CP 170, ¶ 3.

When Wilkens did not call Young back as promised, Young called again on November 8, 2021 to follow up, and again spoke with Rohr, who answered the telephone. CP 171, ¶ 6. Young asked to speak to Sam Wilkens. *Id.* Rohr asked what it was about, and when Young stated, "the will of Robert Parman," she recognized Young from the previous call and placed Young on hold for several minutes. *Id.* When she came back on the

line, she voluntarily stated that she would mail Young a copy of Robert's will, apparently at the direction of Samuel Wilkens. *Id.* Young received a copy of the will the next day by email. *Id.*; CP 224.

After Young obtained a copy of the will from the Althausser firm, he filed it with the court in connection with a motion for reconsideration of the court's dismissal of *Bartlett v. Estate of Robert Parman*. CP 98; CP 218, ¶17; CP 224-227.

Later Young subpoenaed the Althausser firm for a copy of Robert's will. CP 51. Rayan responded with a letter objection and the gratuitous defamatory statement that Young had obtained the will "through fraudulent means." CP 52. The letter was sent to others not representing the parties. CP 165.

Gabrielson's Procurement of Perjured Declarations.

After learning of the Althausser firm's voluntary release of the will of Robert Parman to Young, Gabrielson developed a scheme designed to prevent access to the contents of Robert Parman's will, put Young in a false light, attack Young's character, and

create a conflict of interest between Young and his client by obtaining declarations from the Althaus firm. CP 329-330 at 9-10. Respondents knowingly and willingly participated in Gabrielson's scheme. CP 330-331 at 13-14.

Respondents' participation was procured when Gabrielson had a conversation with respondent Rayan, in which conversation Rayan does not recall exactly what was discussed, but "the crux of it was that [Rayan] was going to obtain written statements from [his] staff so [Rayan] could figure out exactly what happened and why [Robert Parman's will] was released." CP 329-330 at 9-10. Rayan testified at his deposition that the will "shouldn't have been" released. CP 330 at 10. Gabrielson intimated a potential lawsuit against the Althaus firm by stating that "there might be a remedy with the Althaus firm for opening a former client's file to someone else." CP 104.

Gabrielson "asked what the circumstances were surrounding the release of [the will] to someone who is representing a party opposed to his client." CP 330 at 12. Rayan and his

firm stood ready to support Gabrielson without further investigation. CP 330 at 11-13.

Rohr and Wilkens each signed declarations under penalty of perjury, indicating their understanding that their declarations would be used in litigation they admittedly knew nothing about for Gabrielson's benefit. CP 330 at 11. Receptionist Rohr admitted as much. CP 341 at 24. She signed a declaration without a caption. CP 343-344. Rohr never saw her full declaration with the caption as filed. CP 341 at 25. Yet her declaration with a caption for both of the underlying cases was filed. CP 121-122.

Penny Rohr stated in her declaration dated December 17, 2021, and filed with the court that Young "indicated that he represented the Personal Representative of the Estate of Robert Parman." CP 121, ¶ 4. This statement is intentionally false and perjurious, because Young never represented the Estate of Robert Parman, and never told anyone that he did. CP 171, ¶ 6. Rohr also forgot the first telephone call Young made to the

Althaus firm on October 22, 2021. CP 337, dep at 7-8. Young's second conversation with Rohr was also on November 8th, not November 9th, as stated by Rohr. CP 337 at 8; CP 170, ¶ 3.

Similarly, attorney Wilkens signed an uncaptioned declaration. CP 349 at 4; CP 360-61. He believed when he drafted the declaration, it would be used in a legal proceeding. CP 357 at 36. But his same signed declaration with a caption filled in with respect to both underlying cases was also filed. CP 118-119. They acted with reckless disregard of how their declarations would be used and for what purposes. It was an expedient way out of their perceived predicament: they blamed Young for what Gabrielson alleged to be their violation of RPC 1.6 and actually claimed that Young misrepresented who he was to obtain the will of Robert Parman.

Respondent Wilkens stated in his declaration dated December 17, 2021, and filed in the case that "to the best of my recollection, I talked with Mr. Dan Young over the phone on or

around November 9, 2021. Mr. Young was in search of the original Last Will and Testament of Robert Parman, if any. Mr. Young represented that he was an attorney representing the Personal Representative of the estate of Robert Parman.” CP 118, ¶ 4. This statement was knowingly false, as Young never talked to Samuel Wilkens at any time; never sought the “original will” of Robert Parman; and never stated that Young represented the PR of the Estate of Robert Parman. CP 171-172, ¶¶ 6-7.

Gabrielson then procured those declarations from Wilkens and Rohr and filed them with the court on January 10, 2022, in support of Gabrielson’s motion to strike and seal Robert Parman’s will (CP 118, 121) both in *Parman v. Ruth Parman* and in *Parman v. Robert Parman*. CP 98, 100. Six pages of the ten-page motion constituted a purposeful attack on Young’s character and an attempt to put him in a false light due to Young’s alleged misconduct in obtaining a copy of Robert’s will, rather than the contents of the will itself and the merits of the case. CP 98-99; CP 104-107. Robert’s and Ruth’s wills support the

contention that the senior Parmans wanted to leave 50% of the Renata Lane property to Elizabeth. CP 220, 224.

False Criminal Allegation. Gabrielson also leveled in his motion the serious criminal charge of impersonation against Young – criminal impersonation by “pretend[ing] to be a representative of some person or organization and do[ing] an act in his . . . pretended capacity with intent to defraud” in violation of RCW 9A.60.040. CP 107. Gabrielson furthered his scheme to place Young in a false light by actually calling the Centralia Police Department to report Young’s alleged conduct, conduct of which Gabrielson had no personal knowledge whatsoever, and which did not involve court testimony. CP 420-424.

The declarations (CP 343-44; CP 360-361) and Rayan’s letter (CP 52) allowed Gabrielson to attack Young before the superior court judge within the underlying litigation. CP 98-101; CP 67-72. There was no evidentiary hearing or oral testimony – just the perjured declarations from Wilkens and Rohr procured by Gabrielson, the defamatory letter from Rayan, and

the continued efforts by Gabrielson to place Young in a false light.

In ruling on Gabrielson's motion to strike and seal the will of Robert Parman, the trial court explicitly stated that it was not making "any credibility determinations or resol[ving] the differences between the statements of Mr. Wilkens, Ms. Rohr, or Mr. Young." CP 93-94; CP 47, ¶ 12.

At the motion hearing, the trial court found that Young had obtained the will in a manner that was "not . . . lawful." CP 47, ¶12. The trial court stated that the circumstances of how the will was obtained was "a violation of the RPCs, RPC 1.6." CP 87. However, RPC 1.6 is not a "law," and it was Wilkens, not Young, who had the burden to protect confidential information under RPC 1.6, if in fact the will was confidential. RPC 1.6.

Gabrielson's accusing Young of criminal conduct in a case in which Young was simply plaintiff's attorney deprived Young of a way to meaningfully clear his name and was aimed at driving a conflict-of-interest wedge between Young and his client while

undermining Young's credibility through putting him in a false light before the court in the underlying case.

Bar Grievance. Based on Wilkens's perjured declaration, Young filed a grievance with the WSBA on January 12, 2022. CP 124-26. The WSBA is likely waiting for this litigation to conclude before making any findings. Nevertheless, in his response to the grievance Wilkens contradicted his declaration by stating that (1) Young did not directly represent who Young was representing in the fictitious telephone call Wilkens described in Wilkens's declaration but (2) Young misrepresented by omission in not stating who Young was representing. CP 384. Wilkens's earlier assertion under penalty of perjury in his declaration was that Young expressly represented that Young was representing the Estate of Robert Parman. CP 118-119, ¶ 4. This is a major pivot and change in Wilkens's story.

Young filed the instant lawsuit on January 18, 2022, alleging defamation, false light invasion of privacy and civil

conspiracy against the Althaus law firm, Todd Rayan, Penny Rohr and Samuel Wilkens. CP 1-7.

The Larger Actionable Conspiracy. In addition to the procured perjured declarations, Gabrielson engaged in other conduct to pursue an improper and extrinsic end in *Parman v. Parman*.

Gabrielson was methodical and calculating in his efforts to place Young in a false light. On December 14, 2021, in a “limited objection” to a motion to set supersedeas filed by Young in *Parman v. Parman*, Gabrielson agreed with the supersedeas amount but out of the blue objected to Young’s “mischaracterization of facts” (CP 367), asking the court to somehow “take notice.” CP 369. Young filed a reply denying any misrepresentation to the court. CP 377. This set the stage for the next step in Gabrielson’s scheme.

Continuing a little more than a week later, having already obtained the perjured declarations of Wilkens and Rohr, but not disclosing their existence to Young, Gabrielson purported to

conduct a CR 26(i) conference in the underlying litigation. He and his co-counsel Brian Muchinsky, who represented Shawn personally in *Parman v. Parman*, attempted to browbeat Young and demanded that Young “refute” the accuracy of the perjured declarations of Wilkens and Rohr which Young had never seen. CP 362-366. Young refused to do so, although he denied any misrepresentation. CP 362.

At around the same time on December 22, 2021, Gabrielson called Detective Timothy O’Dell of the Centralia Police Department. CP 420. In furtherance of his scheme to put Young in a false light, Gabrielson filed a telephonic report of a crime having been committed by Young based upon the sworn declarations of Rohr and Wilkens alleging that Young misrepresented his status to them. CP 421.

As part of his investigation, Det. O’Dell called Rayan, who “stated that he himself drafted the Declaration for [Rohr] and [Wilkens] based on their accounts.” CP 424. But his account contradicts Rohr’s sworn testimony at her deposition,

where she stated, referring to her declaration, “I wrote it myself.” CP 337 at 8. It also contradicts Wilkens’s testimony that Rayan approached Wilkens and asked Wilkens “to put down [Wilkens’s] memory of the incident . . . into a declaration.” CP 349 at 5. Young later asked Wilkens’ at the deposition, “So the declaration shown in Exhibit 1 is something you wrote down yourself?” CP 350 at 8-9.¹ Wilkens answered, “Correct.” CP 350 at 9.

Some two and one-half weeks after Gabrielson’s report to the police, Gabrielson filed a motion to strike and seal the copy of Robert Parman’s will that Young had filed. CP 98. Gabrielson attached the perjured declarations of Rohr and Wilkens. Gabrielson then argued that “[a]ccording to two sworn declarations,” Young obtained a copy of the will “**by representing himself as the attorney for Robert Parman’s Estate.**” [Bold in original.] CP 98. A majority of the motion

¹ Exhibit 1 at the deposition was the Declaration of Samuel Wilkens without caption. CP 349 at 2.

addressed Young's alleged criminal impersonation in violation of RCW 9A.60.040 (CP 107) and Young's alleged improperly obtaining of a copy of the will. CP 104-107.

The court entered an order in the underlying litigation striking and sealing the copy of Robert Parman's will in *Bartlett v. Estate of Robert Parman* (CP 48) and an order only sealing the will in *Parman v. Parman*. CP 87-89.

Procedural Background. Following discovery, respondents moved for summary judgment of dismissal of Young's claims, based primarily on the litigation privilege. CP 24-25. Young argued that the "larger actionable conspiracy" exception set forth in *Dexter v. Spokane County Health Dist.*, 76 Wn. App. 372, 375, 884 P.2d 1353 (1994) (Div. III) was applicable. CP 142-145.

The trial court granted respondents' motion and dismissed all of Young's claims on summary judgment. CP 428. The trial court rejected the arguments that the statements at issue were not related to the underlying litigation and were part of a larger

conspiracy, thus concluding that the litigation privilege applied to the declarations of Rohr and Wilkens and Rayan's letter. RP (8-22-22) 35-37. Young timely filed a notice of appeal. CP 429.

In a published opinion, Division I affirmed the trial court's dismissal of Young's case on summary judgment, declining to consider any public policy exceptions to the litigation privilege, which the Court considered absolute.

Appellant timely filed this petition for review.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. The *Rayan* Decision of Division I is in Conflict with Recently Published Decisions in Division II. RAP 13.4(b)(2).

In the ruling at issue here, Division I has expressly declined to follow a Division II case, namely *Mason v. Mason*, 19 Wn. App.2d 803, 831, 497 P.3d 431 (2021), *review denied*, 199 Wn.2d 1005 (2022). *Rayan, Slp Op.* at 15.

By extension, Division I has also declined to follow the progeny of *Mason* in Division II, e.g., *Scott v. Am. Express Nat'l*

Bank, 22 Wn. App.2d 258.

The "litigation privilege" is a judicially created privilege that protects participants – including attorneys, parties, and witnesses – in a judicial proceeding against civil liability for statements they make in the course of that proceeding. *See, e.g., Mason v. Mason*, 19 Wn. App.2d 803, 830-31, *Deatherage v. Examining Bd. of Psychology*, 134 Wn.2d 131, 135-36, 948 P.2d 828 (1997). As applied to witnesses, the privilege is sometimes referred to as witness immunity, and under it, "[a]s a general rule, witnesses in judicial proceedings are absolutely immune from suit based on their testimony." *Bruce v. Byrne-Stevens & Assocs. Eng'rs, Inc.*, 113 Wn.2d 123, 125, 776 P.2d 666 (1989).

However, the Supreme Court later stated that “while some statements of the rule make it appear to be absolute, it is not.” *Wynn v. Earin*, 163 Wn.2d 361, 373-374, 181 P.3d 806 (2008) (“public policy justification for applying witness immunity rule is outweighed by the interest in protecting confidential disclosures made during medical treatment”). Division II stated

that “we apply litigation privilege where the conduct bears some relation to a judicial proceeding and where compelling public policy justifications support its application.” *Scott*, 22 Wn. App.2d 258, 265-266.

In *Mason*, Division II noted that “litigation privilege does not apply when the facts are such that application of the privilege would defeat the public policy considerations justifying the privilege.” *Scott*, 22 Wn. App.2d 258, 267-68 (citing *Mason*, 19 Wn. App.2d 803, 830). Under *Mason*, this “exception applies in a narrow set of circumstances where an attorney misappropriates a judicial proceeding to achieve an improper and extrinsic end, immunity neither preserves integrity of the judicial process, nor further[s] the administration of justice.” [Internal quotation marks omitted.] *Mason*, 19 Wn. App.2d at 837 (quoting *Bruce*, 113 Wn.2d at 126; *Fite v. Lee*, 11 Wn. App 21, 28, 521 P.2d 964 (1974)); *Scott*, 22 Wn. App.2d at 268.

Stated a different way, if an attorney’s conduct is to accomplish an end unrelated to the legitimate goals of the legal

proceedings, such conduct is not shielded by the litigation privilege. *Mason*, 19 Wn. App.2d 803, 840.

However, contrary to *Mason*, Division I “decline[d] to follow *Mason*’s recognition of a public policy exception to the litigation doctrine[,]” adding that the court does “not recognize a case-by-case ‘public policy exception’ to the litigation privilege doctrine that looks to a defendant’s intent.” *Rayan, Slp. Opn.* at 11, 15. This contrasts with *Scott* that “parties and attorneys can be liable for tortious use of the legal process so long as a plaintiff can prove the elements of malicious prosecution or malicious use of the legal system.” *Scott*, 22 Wn. App.2d 258, 265.

The Division I rationale for rejecting *Mason* was based on three expressed assumptions: (1) a tortfeasor’s intent in making an actionable statement is not necessarily related to whether the statement was “pertinent” to the proceeding at issue; (2) the main goal of the litigation privilege is to deter even the initiation of lawsuits so as to avoid “chilling the speech” or shading the testimony of potential witnesses; and (3) it is unnecessary in

every individual case to find a “compelling policy justification” for the litigation privilege, because the privilege has *already* been extended “to cover most, if not all, participants in court proceedings.” *Rayan, Slp. Opn.* at 12-15 (citing *Bender v. Seattle*, 99 Wn.2d 582, 600-601, 664 P.2d 492 (1983); *Mason*, 19 Wn. 2d 803, 843; and *Deatherage*, 134 Wn.2d 131, 136-37)).

Division I looked cursorily at Young’s claims of defamation, false light and civil conspiracy and determined that the statements in those claims were “pertinent” to the court proceeding, and therefore affirmed the dismissal of all three claims on summary judgment, noting that “any falsity in the statements was subject to checks by the trial court. . . .” *Rayan, Slp. Opn.* at 17-18.

Division I also declined to adopt the “larger actionable conspiracy” exception to the litigation privilege as advocated by Young, the court finding no binding Washington case law supporting such theory. *Rayan, Slp. Opn.* at 21. Division I rejected the cogent reasoning of *FMC Technologies, Inc. v.*

Edwards, 464 F. Supp.2d 1063, 1068 (W.D. Wash. 2006) because it was non-Washington authority. *Slp. Opn.* at 22-23.

Division I noted that the term “larger[] actionable conspiracy” was used one time in *Dexter v. Spokane County Health District*, 75 Wn. App. 372, 375, 884 P.2d 1353 (1994) in reference to jurisdictions which recognize an exception to the litigation privilege “when perjury is merely a ‘step in the accomplishment of some larger, actionable conspiracy.’” *Rayan*, *Slp. Opn.* at 22. However, the court rejected application of that exception to the instant case because the court believed *Dexter* dealt not with an exception to the litigation privilege, but with “an exception to the general rule that no civil cause of action exists for perjury.” *Id.*

The bottom line is that the published decision of Division I of the Court of Appeals in *Rayan* is in direct conflict with published decisions of Division II in *Mason* and *Scott*. Accordingly, this Court should accept review of *Rayan* to resolve that conflict.

2. The Petition Involves an Issue of Substantial Public Interest that Should Be Determined by the Supreme Court. RAP 13.4(b)(4).

Division I quoted the Connecticut Supreme Court to explain the public policy rationale for the litigation privilege as follows:

[I]n certain situations the public interest in having people speak freely outweighs the risk that individuals will occasionally abuse the privilege by making false and malicious statements. * * * [T]he possibility of incurring the costs and inconvenience associated with defending a [retaliatory] suit might well deter a citizen with a legitimate grievance from filing a complaint.

Rayan, Slp. Opn. at 13 n. 7 (quoting *Rioux v. Barry*, 283 Conn. 338, 343, 927 A.2d 304 (Conn. 2007)).

The court in *Rioux* went on to observe that “whether and what form of immunity applies in any given case is a matter of policy that requires a balancing of interests.” *Rioux*, 283 Conn. 338, 346. That balancing could require a different result depending upon the claims asserted. *Id.* at 346-47.

Division I seems to accept the proposition that those harmed by privileged statements are correspondingly not without

recourse, even if redress is imperfect. *Rayan, Slp. Opn.*, at 15-16. The specific redress mentioned consists of “sanctions, contempt, striking of testimony, cross examination, the threat of perjury, and professional discipline.” *Rayan, Slp. Opn.* at 15. This sort of redress is consistently mentioned in case law, although there is never any evidence proffered that any such means of redress actually deters anyone from giving false testimony.² Furthermore, such “redress” is no recompense to the victim.

Here the trial court, without making a credibility determination, could not impose sanctions, a finding of contempt, or an order striking testimony (which the court

² “No one who tells lies in court can escape punishment; he is doomed.” Proverbs 19:9. “The U.S.'s Christian majority has been shrinking for decades. A Pew Research Center study shows that as of 2020, about 64% of Americans identify as Christian. Fifty years ago, that number was 90%.” <https://www.npr.org/2022/09/15/1123289466/americas-christian-majority-is-shrinking-and-could-dip-below-50-by-2070>. If the Pew research is accurate, more than one-third of Americans would not necessarily feel bound by Proverbs 19:9.

specifically did not do). There was no cross examination because the testimony was solely in the form of declarations without any evidentiary hearing. The threat of perjury was minimal because, as Division I acknowledged, prosecutors are not likely to spend the time and effort to try to prove beyond a reasonable doubt who was telling the truth and who was not. *Rayan, Slp. Opn.* at 18, n. 9. Whether or not the Washington State Bar Association or this Court would impose discipline is also problematic.

Thus, a rational person, sociopath, psychopath or narcissist would have little compunction in filing a perjured declaration, as the odds of being sanctioned would be minimal. Accordingly, in this particular case there was no real remedy to prevent injustice, except to allow Young's lawsuit to proceed to trial. To assume that the greater public interest is nevertheless promoted, even at the expense of a few people here and there who are injured, ignores exceptions which can be applied to minimize injury to those defamed, while at the same time

protecting the public interest. The purpose of the test in Division II, as well as other courts, e.g., in Connecticut, is to achieve a more fine-tuned result that can protect both the public interest and the individual's reputational interest.

Testimony is a fundamental aspect of the justice system. If participants are motivated to lie, fair and honest results cannot be assured. The Court should look at the prevalence of lying in court proceedings, whether there are further checks or safeguards to prevent such lying, and whether such measures really inhibit open and frank testimony in court. This is an issue of substantial public interest.


F. CONCLUSION

For the reasons enumerated above, Appellant requests this Court to accept review of this case to resolve the conflicting opinions in the Court of Appeals and reverse the opinion of the Court of Appeals in *Rayan*.

RESPECTFULLY SUBMITTED this 23rd day of August,
2023.

I certify that under RAP
18.17(b) this brief contains
4,904 words.

Law Offices of Dan R. Young

By 
Camille Minogue, WSBA # 56405
Attorney for Appellant Young

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DAN YOUNG, an individual,

Appellant,

v.

TODD S. RAYAN and JANE DOE
RAYAN, husband and wife; SAMUEL
WILKENS and JANE DOE WILKENS,
husband and wife; PENNY ROHR and
JOHN DOE ROHR, wife and husband;
and ALTHAUSER RAYAN
ABBARNO, a Washington Limited
Liability Partnership,

Respondents.

No. 84426-1-I

DIVISION ONE

PUBLISHED OPINION

SMITH, C.J. — The litigation privilege immunizes participants in legal proceedings from civil liability based on statements they make during litigation. Litigants often strongly and passionately express their position over the course of a case. The privilege exists to encourage frank and open testimony and argument despite this turbulent emotional atmosphere. It protects participants from retaliatory, derivative lawsuits—regardless of the merit of those suits—instead relying on checks by the trial court such as sanctions to address false testimony. The privilege embodies a compromise. It acknowledges that litigants may at times abuse its protection, while recognizing that our legal system depends on reducing the threat that every statement or argument may lead to further litigation.

Dan Young, an attorney, sued Todd Rayan, Samuel Wilkens, Penny Rohr, and the law firm that employs them based on statements they made during court proceedings. Their statements accused Young of acquiring documents from them through misrepresentation. Young insists that the statements were perjured. He asks us to identify an exception to the litigation privilege for statements made in an attempt to abuse and weaponize the legal process. We decline to do so and affirm, concluding that the trial court properly dismissed Young's claims at summary judgment.

FACTS

In 2018, Elizabeth Bartlett, formerly Elizabeth Parman, sued her ex-husband Shawn Parman and his mother Ruth Parman in Thurston County Superior Court over the ownership of a property in Olympia, Washington. She alleged that she had purchased the property in 1997 using a "gift of early inheritance" from her parents and, through the application of much of her own money, time, and effort, transformed it into both a home and a working horse farm. In 2000, she transferred the property to Ruth¹ and her husband Robert via quitclaim deed, trusting that with their names on the title it would be easier to take out a loan to build a house. The transfer, she claimed, was based on the understanding that she and Shawn were entering into a partnership with Ruth and Robert, a condition of which was that Ruth and Robert would convey half of

¹ For the sake of clarity and consistency, we refer to Shawn Parman, Ruth Parman, Robert Parman, and Elizabeth Bartlett (f/k/a Parman) by their first names.

the property to Shawn and the other half to Elizabeth on their deaths. According to Elizabeth, Robert and Ruth included parallel provisions in their wills to effect this testamentary transfer.

The inheritance did not come to pass. Robert died in 2005. In 2015, Shawn and Elizabeth divorced. Concerned about her eventual ownership of the property, Elizabeth sought and apparently received assurances from Ruth about the contents of her will. But in 2017, allegedly at Shawn's urging, Ruth altered her will to exclude transfer of the property to Elizabeth.

Litigation ensued. Ruth's estate, represented by Shawn, was substituted for Ruth after her death in 2019. In 2020, Shawn petitioned for his father's intestate probate, claiming that Robert had not left a will. Initially filed in King County and then challenged by Elizabeth, the probate matter was transferred to Thurston County to be consolidated with Elizabeth's first lawsuit. Elizabeth's challenge to the probate matter was dismissed as untimely.²

Litigation continued undeterred and with increasing intensity. Seeking to introduce Robert's will into the record to persuade the court to reconsider its dismissal, Dan Young, Elizabeth's attorney, phoned the offices of the law firm Althausen Rayan Abbarno, which, along with several of its employees, is the respondent in this case. Young had learned that an attorney, John Turner, had

² That dismissal was recently affirmed on appeal. Bartlett v. Estate of Parman, No. 56536-6-II, slip op. at 1 (unpublished) (Wash. Ct. App. Nov. 15, 2022), <https://www.courts.wa.gov/opinions/pdf/D2%2056536-6-II%20Unpublished%20Opinion.pdf>.

drafted Ruth and Robert's wills, and that Turner's papers had been held by Althausen Rayan Abbarno since his retirement.

The details of Young's contact with individuals at Althausen Rayan Abbarno are disputed. Young admits that he mentioned he was an attorney but denies ever saying that he represented Robert Parman's estate. Young claims that he spoke with Penny Rohr, the firm's receptionist, who indicated that attorney Samuel Wilkens had inherited Turner's matters. He reports that Rohr said Wilkens would return his call, that Wilkens did not, and that Young followed up several weeks later. During that call, Rohr apparently spoke with Wilkens while Young was on hold and, when she returned to the phone, indicated that she would send him a copy of the will³ by e-mail, which she did.

Rohr describes matters similarly in most respects. She acknowledges receiving a call from Young. She says that she inquired with Wilkens about whether she should send Young a copy of the will, and that Wilkens approved. But contrary to Young's narrative, she asserts that Young "indicated" that he represented Robert Parman's estate and it was based on this understanding, which she had shared with Wilkens, that Wilkens authorized the release of Robert's will.

Wilkens, on the other hand, reports that "[t]o the best of my recollection," he spoke directly with Young. He says that during that conversation, Young

³ What Young received is just that—a copy. The original will was not retained in Turner's files, only an executed copy of it. When this opinion says "the will," it is referring to this copy, not to the original document.

stated that he represented Robert Parman's estate. On that basis, Wilkens reports authorizing Rohr to send Young a copy of the will.

Regardless of precisely what words were exchanged, Young obtained the will. He introduced it into the underlying litigation via a motion to reconsider the dismissal of the probate matter and opposing a motion from Shawn for attorney fees. Young also issued a subpoena directing Althausen Rayan Abbarno to turn over the same materials he had just received. Shawn's attorney, Mark Owen Gabrielson, responded by issuing his own subpoena to Althausen Rayan Abbarno, seeking Ruth and Robert's estate planning records. Todd Rayan, the firm's managing partner, reached out to Gabrielson and, following a discussion, directed Wilkens and Rohr to write down their recollections of the events leading to Rohr sending Young the will. He then supplied their recollections to Gabrielson as sworn declarations. And he objected to Young's subpoena in a letter because "[t]he prior disclosure and emailing of one document was based on a misrepresentation to my staff . . . [which means that the will was] obtained through fraudulent means."⁴

Two motions, a police investigation, a bar grievance, and the initiation of the present lawsuit followed. First, Gabrielson moved to strike the will from the record in the underlying actions and seal it. Young then moved to compel

⁴ Though designated to be part of the record on appeal, the portions of the Clerk's Papers at which this letter should appear are either corrupted or missing. The letter is attached as an appendix to the Appellant's Opening Brief, however. The parties agree that the appendix is an accurate copy of the letter and we may look to it for our review.

production of the will from Althausen Rayan Abbarno. Escalating the dispute beyond the courtroom, Gabrielson called the Centralia Police Department about Young, complaining about the manner in which he acquired the will. Detective Timothy O'Dell investigated and referred the case to the Lewis County Prosecuting Attorney's Office, having concluded that probable cause existed to arrest Young for criminal impersonation in the first degree. Young submitted a bar grievance against Wilkens accusing him of perjuring himself in his declaration. Finally, on January 18, 2022, Young filed the complaint in this lawsuit in King County Superior Court.

Ten days later, the trial court heard the motions to strike, seal, and compel. It struck and sealed the will in the probate proceeding. It sealed but did not strike the will in Elizabeth's first lawsuit, preserving for another day questions about its admissibility. It denied Young's motion to compel. Throughout its oral ruling, the court expressed concern that RPC 1.6—which governs confidentiality of client files but is not an evidentiary rule and does not create a privilege—was implicated.

Meanwhile, the present lawsuit moved rapidly from its initiation to its dismissal. Young sued Rohr, Wilkens, Rayan, and Althausen Rayan Abbarno, bringing claims of defamation, false light, and civil conspiracy. The defendants moved for summary judgment, arguing that Young's claims were based on statements made during the course of litigation, were protected by the litigation

privilege doctrine, and therefore could not stand. The trial court agreed and dismissed the case in August 2022.

Young appeals.

ANALYSIS

This appeal asks whether three causes of action—defamation, false light, and civil conspiracy—may be sustained when they are based on statements made during court proceedings. Young contends that they can be. He attempts to identify a number of exceptions to the application of litigation privilege, which normally prohibits liability for statements made in court. As a general matter, he professes that his claims may be sustained because the statements on which they are based abused the court process itself to do further harm. But his arguments are not grounded in Washington case law, which applies the litigation privilege broadly. We affirm the trial court’s dismissal of his claims as a result.

Standard of Review

We review summary judgment de novo, considering the evidence and reasonable inferences drawn from it in the light most favorable to the nonmoving party. Keck v. Collins, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015). Summary judgment is appropriate only when no genuine issue exists as to a material fact and the moving party is entitled to judgment as a matter of law. Keck, 184 Wn.2d at 370. “A material fact is one that affects the outcome of the litigation.” Owen v. Burlington N. and Santa Fe R.R. Co., 153 Wn.2d 780, 789, 108 P.3d 1220 (2005).

Litigation Privilege Generally

The “litigation privilege”⁵ is a judicially created privilege that protects participants—including attorneys, parties, and witnesses—in a judicial proceeding against civil liability for statements they make in the course of that proceeding. See, e.g., Mason v. Mason, 19 Wn. App. 2d 803, 830-31, 497 P.3d 431 (2021) review denied, 199 Wn.2d 1005 (2022); Deatherage v. Examining Bd. of Psychology, 134 Wn.2d 131, 135-36, 948 P.2d 828 (1997). As applied to witnesses, the privilege is sometimes referred to as witness immunity, and under it, “[a]s a general rule, witnesses in judicial proceedings are absolutely immune from suit based on their testimony.” Bruce v. Byrne-Stevens & Assocs. Eng’rs, Inc., 113 Wn.2d 123, 125, 776 P.2d 666 (1989).

Statements “are absolutely privileged if they are pertinent or material to the redress or relief sought, whether or not the statements are legally sufficient to obtain that relief.” McNeal v. Allen, 95 Wn.2d 265, 267, 621 P.2d 1285 (1980). But statements having “ ‘no connection whatever’ ” with the litigation are not privileged. Demopolis v. Peoples Nat. Bank of Wash., 59 Wn. App. 105, 110, 796 P.2d 426 (1990) (quoting RESTATEMENT (SECOND) OF TORTS, § 586, comment c (AM. LAW INST. (1977))). Thus, not every passing statement made in court avoids liability. But the determination of pertinency is not a high bar. As

⁵ Also historically referred to in Washington as “absolute privilege,” Deatherage v. Examining Board of Psychology, 134 Wn.2d 131, 135, 948 P.2d 828 (1997), and in other jurisdictions variously as “judicial statements privilege,” Maggard v. Kinney, 576 S.W.3d 559, 567 (Ky. 2019), or “official proceedings privilege,” Klem v. Access Insurance Company, 17 Cal. App. 5th 595, 613, 225 Cal. Rptr. 3d 711 (2017).

the Restatement (Second) of Torts indicates, a statement “need not be strictly relevant to any issue” so long as it bears “some reference to the subject matter of the . . . litigation.” RESTATEMENT § 586, comment c.

Litigation privilege therefore prohibits liability stemming from statements (1) made in the course of a judicial proceeding (2) that are pertinent to the litigation. Pertinency is a question of law reviewed de novo. Demopolis, 59 Wn. App. at 110.

The purpose of the litigation privilege doctrine is to encourage frank, open, untimorous argument and testimony and to discourage retaliatory, derivative lawsuits. As applied to attorneys, it furthers “ ‘a public policy of securing to [counsel] as officers of the court the utmost freedom in their efforts to secure justice for their clients.’ ” Mason, 19 Wn. App. 2d at 831 (quoting McNeal, 95 Wn.2d at 267). As applied to witness testimony, it preserves “the integrity of the judicial process by encouraging full and frank testimony.” Bruce, 113 Wn.2d at 126. The rule addresses the concern that a witness may either be reluctant to come forward to testify in the first place or shade their testimony “to magnify uncertainties, and thus to deprive the finder of fact of candid, objective, and undistorted evidence.” Briscoe v. LaHue, 460 U.S. 325, 333, 103 S. Ct. 1108, 75 L. Ed. 2d 96 (1983).

The potential harms of a broad application of litigation privilege—namely, preventing redress for a harm that would otherwise sustain a civil suit—are blunted by forms of accountability not available outside of judicial proceedings.

The rule assumes that false or harmful statements in a judicial proceeding may be addressed through the use of tools such as sanctions, contempt, “[a] witness’ . . . oath, the hazard of cross-examination, and the threat of prosecution for perjury.” Bruce, 113 Wn.2d at 126. Additionally, immunity does not typically extend to professional disciplinary proceedings, which may occur based on testimony or behavior during litigation and which are therefore an additional avenue to confront harm caused by privileged statements. Wynn v. Earin, 163 Wn.2d 361, 378, 181 P.3d 806 (2008). In part because the privilege assumes that improper conduct should not be entirely impossible to address, immunity is not usually extended to settings where judicial authority lacks “the power to discipline as well as strike from the record statements which exceed the bounds of permissible conduct.” Twelker v. Shannon & Wilson, Inc., 88 Wn.2d 473, 476, 564 P.2d 1131 (1977).

Though it often arises in the context of defamation suits, the courts have rejected the notion that litigation privilege applies only to that claim. Our supreme court, in the context of witness immunity, has said that the chilling effect of subsequent litigation “is the same regardless of the theory on which that subsequent litigation is based.” Bruce, 113 Wn.2d at 131-32. More generally, the supreme court has used broad language to describe the litigation privilege’s scope, saying that it “applies to statements made in the course of judicial proceedings and acts as a bar to *any* civil liability.” Deatherage, 134 Wn.2d at 135 (emphasis added). Litigation privilege has been applied to bar liability

under a range of causes of action, including civil conspiracy. Jeckle v. Crotty, 120 Wn. App. 374, 386, 85 P.3d 931 (2004).

Mason's Public Policy Exception

Litigation privilege therefore has the potential to bar any of the three causes of action Young pleaded in this case: defamation, false light, and civil conspiracy. Young, however, attempts to identify an exception to the litigation privilege doctrine that that would preclude its application when it would not further any compelling public policy. Division II of this court has recently taken this approach in Mason, on which Young heavily relies. 19 Wn. App. 2d at 834. We decline to follow Mason's recognition of a public policy exception to the litigation doctrine.

Mason concerned, among other issues, claims made against an attorney based on his statements in an underlying lawsuit. 19 Wn. App. 2d at 830. It reversed the trial court's application of the litigation privilege to dismiss a claim of abuse of process, a tort involving misuse of a judicial proceeding "to accomplish an end for which the process was not designed." Mason, 19 Wn. App. 2d at 834. It likewise refused to apply the privilege to a related claim of intentional infliction of emotional distress by way of abusive litigation tactics. 19 Wn. App. 2d at 843.

Mason reasoned as follows. To begin, it pointed to the nature of the abuse of process tort, which "must be used 'to accomplish some end which is without the regular purview of the process.'" Mason, 19 Wn. App. 2d at 834-35. It then identified what it characterized as a mismatch between the goals of the

judicial system, the intent of an abuse of process tortfeasor, and the litigation privilege's requirement that protected statements pertain to the legal proceeding. It asserted that "[i]ntegral to an abuse of process claim [is that] the complained of conduct, by its nature, must not be related to the legitimate purposes of a judicial proceeding." Mason, 19 Wn. App. 2d at 834. It concluded "[c]onsequently, litigation privilege does not apply, and an attorney can be liable for abuse of process where the attorney was alleged to have intentionally employed legal process for an inappropriate and extrinsic end." Mason, 19 Wn. App. 2d at 835. A more recent Division II case has articulated Mason's rule this way: "we apply litigation privilege where the conduct bears some relation to a judicial proceeding and where compelling public policy justifications support its application." Scott v. Am. Express Nat'l Bank, 22 Wn. App. 2d 258, 265-66, 514 P.3d 695 (2022).⁶

These cases appear to have added a third element to the litigation privilege analysis. It is no longer enough, under Mason and Scott, to ask whether a statement was (1) pertinent (2) to a judicial proceeding. We must now also ask (3) whether immunity furthers public policy under the particular facts of the case, in part by looking to an alleged tortfeasor's intent.

⁶ Scott, which Young relies on in his briefing, declined to apply litigation privilege to bar a consumer protection act claim against a law firm because immunity would " 'neither preserve[] 'integrity of the judicial process,' nor 'further[] the administration of justice.'" 22 Wn. App. 2d at 270 (quoting Mason, 19 Wn. App. 2d at 838). In Scott, unlike in Mason, the court denied immunity because the firm was acting in its capacity as a collection agency when conducting the acts upon which its liability was allegedly based; the court did not consider the defendants' intent. 22 Wn. App. 2d at 270.

We are unconvinced for several reasons. First, it does not follow that a tortfeasor's intent in making a statement informs whether that statement was pertinent to the proceeding in which it was made. A statement made with malice and intent to abuse the process and causing actual harm may be pertinent to a proceeding, even if it would also normally give rise to civil liability.

Second, the litigation privilege's broad purpose is to prevent even the *threat* of litigation and so avoid potentially chilling testimony. A standard that creates exceptions where intent to employ the litigation process for an inappropriate end is simply "alleged" fatally undermines that purpose. Such intent is easy to allege, allowing for artful pleading. It is also likely to actually exist in most tort cases based on perjured testimony—the purpose of the judicial system is never, after all, to educe false testimony, so any false statement arguably pursues an inappropriate end under this analysis. Mason's exception consequently risks swallowing the broader rule. And, perhaps most troublingly, the inherently case-by-case application of Mason's standard, which looks to a particular defendant's actual intent, will most often force prolonged and expensive discovery and litigation. This would hobble the litigation privilege's main goal: to deter even the initiation of lawsuits, and in so doing avoid chilling the speech of those who might otherwise feel threatened by such litigation.⁷

⁷ The principle is well expressed by the Connecticut Supreme Court in Rioux v. Barry:

The purpose of affording absolute immunity to those who provide information in connection with judicial and quasi-judicial proceedings is "that in certain situations the public interest in having people speak freely outweighs the risk that individuals will

Third, Mason does not root its analysis in relevant case law. For its discussion of public policy it relies on language from Bender v. Seattle, 99 Wn.2d 582, 600, 664 P.2d 492 (1983), that “[g]enerally, some compelling public policy justification must be demonstrated to justify the extraordinary breadth of an absolute privilege.” Mason, 19 Wn. App. 2d at 843. It reads Bender as supporting a search for a compelling public policy justification for applying litigation privilege in each individual case, and finds no such justification where statements abused the purposes of the court system. Mason, 19 Wn. App. 2d at 843. Bender, however, discussed the difference between doctrines of absolute and qualified (and discretionary) immunity in the abstract, not as applied to any particular set of facts. 99 Wn.2d at 600. Its discussion focused on whether to extend a privilege in certain procedural context, or to certain sorts of actor. Bender, 99 Wn.2d at 600-01. Indeed, one of the examples Bender gives of an absolute privilege, contrasted with the qualified privilege extending to statements made by law enforcement officers that was in dispute, is the litigation privilege. 99 Wn.2d at 600.⁸

occasionally abuse the privilege by making false and malicious statements.” “[T]he possibility of incurring the costs and inconvenience associated with defending a [retaliatory] suit might well deter a citizen with a legitimate grievance from filing a complaint.” 283 Conn. 338, 343 927 A.2d 304 (2007) (alterations in original) (citations omitted) (quoting Chadha v. Hungerford Hosp., 272 Conn. 776, 786, 865 A.2d 1163 (2005); Craig v. Stafford Constr., Inc., 271 Conn. 78, 95, 856 A.2d 372 (2004)).

⁸ Mason also relied on Fite v. Lee, 11 Wn. App. 21, 521 P.2d 964 (1974), to support the idea that an abuse of process claim may lie against an attorney unhindered by the litigation privilege. 19 Wn. App. 2d at 835-40. At no point,

Mason's discussion of the extension of privilege appears to conflate extension in the first instance to a type of proceeding or actor, a process requiring recognition of a compelling public policy justification, and its application in an individual case. But our supreme court has emphasized elsewhere that while it is true that extending an absolute privilege in the first instance requires "compelling public policy justifications," the privilege has *already* been extended to cover most, if not all, participants in court proceedings. Deatherage, 134 Wn.2d at 136 (discussing extension of privilege to expert witnesses in Bruce). Fundamentally, the privilege already serves a compelling public policy in any given case as it is currently constituted: it ensures that witnesses, parties, and their counsel may speak freely and openly in court proceedings without fear of ensuing litigation. Deatherage, 134 Wn.2d at 137.

We therefore decline to follow Mason and do not recognize a case-by-case "public policy exception" to the litigation privilege doctrine that looks to a defendant's intent. We emphasize that the privilege, by design, applies where bad behavior may be addressed through means not always available outside the courtroom, such as sanctions, contempt, striking of testimony, cross-examination, the threat of perjury, and professional discipline. And the effects of improper statements on the progress of the lawsuit in which they are made may

however, does Fite discuss the litigation privilege or any other form of immunity. And where a legal theory is not discussed in a case's opinion, that opinion does not control future cases where the theory is properly raised. Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1, 124 Wn.2d 816, 824, 881 P.2d 986 (1994).

be addressed through direct appeal if the trial court errs in its approach. Those harmed by privileged statements are correspondingly not without recourse, even if redress is imperfect. The litigation privilege accepts that imperfection in pursuit of freer speech and conduct in judicial proceedings.

We now proceed to determine whether Young’s particular claims in this case—defamation, false light, and civil conspiracy—are based in language “pertinent” to a court proceeding and so are barred by the litigation privilege.

Young’s Defamation and False Light Claims

Application of the litigation privilege doctrine to the first two causes of action—defamation and false light—is straightforward, and we conclude that the trial court correctly dismissed them at summary judgment.

Analysis of litigation privilege in the context of defamation and false light is made easy because both torts include an element requiring the plaintiff to ground their claim in specific statements. A defamation claim has four essential elements: (1) a false communication, (2) which was unprivileged, (3) and for which the defendant is at fault, (4) caused the plaintiff damages. Mark v. Seattle Times, 96 Wn.2d 473, 486, 635 P.2d 1081 (1981). False light, meanwhile, creates liability when the defendant (1) publicizes a matter (2) that places another in a false light, (3) the false light would be highly offensive to a reasonable person, and (4) the defendant knew of or recklessly disregarded the falsity of the publication and the false light in which the plaintiff would be placed. Eastwood v. Cascade Broad. Co., 106 Wn.2d 466, 470-71, 722 P.2d 1295

(1986). At their cores, both torts are concerned with the harm suffered by a plaintiff because of a defendant's statements.

Here, the defendants are immune from liability stemming from the statements that support both Young's claim of defamation and his claim of false light. Young's complaint makes the foundational nature of these statements clear. His defamation claim is premised on three statements: (1) Rohr in her declaration saying that Young had indicated to her that he represented the estate of Robert Parman; (2) Wilkens in his declaration saying that he had spoken with Young and Young had represented that he was the attorney for Parman's estate; and (3) Rayan incorporating Rohr and Wilkens' statements in his objection to Young's subpoena. Young's complaint does not explicitly state the publications on which it alleges liability under a false light theory, but it reincorporates the factual allegations made earlier in the complaint, which do not mention any other publication. It therefore rests on the same statements.

We conclude that the defendants are immune to any claim for liability based on these statements. We reach this conclusion regardless of the dispute over precisely what was said during Young's phone call to the law firm, because exactly what was said that day is not material to whether litigation privilege applies. The first two statements are sworn declarations providing testimony on the penalty of perjury. The third, though it is not sworn, sits squarely within the type of communication contemplated by the rules of civil procedure as part of a court proceeding. See CR 45(c)(2)(B) (providing ability to object to subpoena,

triggering issuer's ability to move the court to compel production). The statements are all pertinent to the subject matter of the litigation, since they concerned arguments about the admissibility of a copy of a will in actions about the disposition of the decedent's property. And any falsity in the statements was subject to checks by the trial court, such as sanctions, or even by the Washington State Bar Association through a disciplinary action.⁹ As statements made in the course of court proceedings, pertinent to the subject matter of the litigation, the defendants cannot be civilly liable for any harm the statements caused.

Young disagrees, arguing about the statements' pertinency. He asserts that the dispute over whether he fraudulently obtained the will, and whether the will should have been stricken from the record as a result, did not "address the contents of the will nor the merits of the underlying litigation." But this and other similar arguments parse the matter too finely. As case law and other authority have repeatedly held, litigation privilege cannot be applied only where statements are truly relevant to the determination of an issue. See, e.g., RESTATEMENT § 586, comment c; McNeal, 95 Wn.2d at 267 (Statements "are absolutely privileged if they are pertinent or material to the redress or relief sought, whether

⁹ Additionally, "[a] person is guilty of perjury in the first degree if in any official proceeding he or she makes a materially false statement which he or she knows to be false under an oath required or authorized by law." RCW 9A.72.020(1). Perjury charges are thus, theoretically, another potential check on false testimony. Practically, though, it would be highly unusual for criminal charges to be brought based on sworn statements made in a civil case with no major public import.

or not the statements are legally sufficient to obtain that relief.”). To apply the privilege so narrowly could result in a chilling effect as attorneys and parties become reluctant to make less than certain arguments, and witnesses become uncomfortable giving testimony without understanding the use to which it will be put. We are not swayed by Young’s argument.

Young’s Civil Conspiracy Claim

Application of the litigation privilege doctrine to civil conspiracy is slightly more involved than its application to defamation and false light. This is because the tort of civil conspiracy does not necessarily locate liability in defendants’ statements, as opposed to their actions. But we nonetheless conclude that litigation privilege also bars consideration of this claim.

“[C]ivil conspiracy exists if two or more persons combine to accomplish an unlawful purpose or combine to accomplish some purpose not in itself unlawful by unlawful means.” Corbit v. J.I. Case Co., 70 Wn.2d 522, 528, 424 P.2d 290 (1967). “In order to establish a conspiracy the plaintiff must show that the alleged coconspirators entered into an Agreement to accomplish the object of the conspiracy.” Corbit, 70 Wn.2d at 528-29.

The plaintiff must demonstrate the existence of the conspiracy by clear, cogent, and convincing evidence. Corbit, 70 Wn.2d at 529. As Young notes, “ [t]o establish liability for conspiracy, it is sufficient if the proof shows concert of action or other facts and circumstances from which the natural inference arises that the unlawful overt act was committed in furtherance of a common design,

intention, and purpose of the alleged conspirators.’ ” Lyle v. Haskins, 24 Wn.2d 883, 899, 168 P.2d 797 (1946) (quoting 11 AM. JUR. CONSPIRACY § 56 at 585 (1937)). But this is not to say that any circumstantial evidence suffices. “ ‘Mere suspicion or commonality of interests is insufficient to prove a conspiracy.’ ” Puget Sound Sec. Patrol, Inc. v. Bates, 197 Wn. App. 461, 470, 389 P.3d 709 (2017) (quoting All Star Gas, Inc. v. Bechard, 100 Wn. App. 732, 740, 998 P.2d 367 (2000)). And if “ ‘the facts and circumstances relied upon to establish a conspiracy are as consistent with a lawful or honest purpose as with an unlawful undertaking, they are insufficient.’ ” Puget Sound Sec. Patrol, 197 Wn. App. at 470 (quoting All Star Gas, 100 Wn. App. at 740).

Young’s complaint describes the alleged conspiracy:

Defendants Penny Rohr, Samuel Wilkens and Todd Rayan combined to accomplish an unlawful purpose, i.e., defame plaintiff and present him in a false light, or they combined to accomplish a lawful purpose by unlawful means, e.g., by attempting to avoid blame for their release of Robert Parman’s will to plaintiff.

...

The conspirators entered into an agreement to accomplish the object of the conspiracy and knowingly made false allegations about plaintiff with the purpose of exonerating themselves in the eyes of their employer, the Firm.

Insofar as Young attempts to show a conspiracy of the sort that seeks to accomplish an unlawful purpose, the only unlawful purposes he identifies are defamation and false light. Since litigation privilege protects the defendants from liability on those claims, they cannot serve as the basis for his civil conspiracy claim.

But Young’s alternative framing of the conspiracy likewise depends on “false allegations” made by Rohr, Wilkens, and Rayan. It does not appear that he is referencing anything other than the statements protected by litigation privilege.¹⁰ Because his civil conspiracy claim, like his other claims, inherently relies on the falsity of privileged statements to demonstrate liability, we conclude that the trial court correctly dismissed this claim as well.

Young asserts that there exists a “larger actionable conspiracy” exception to litigation privilege that would allow this claim to move forward because the litigation privilege does not protect conspiratorial use of perjury to accomplish other ends. But the binding cases he cites do not support this proposition, and we decline to hold that any such exception applies here.

For support in Washington caselaw, Young cites Dexter v. Spokane County Health District, 76 Wn. App. 372, 884 P.2d 1353 (1994). That case uses the phrase “ ‘larger[] actionable conspiracy’ ” only once, during its discussion of

¹⁰ Elsewhere, Young characterizes the conspiracy to involve more than just collusion among the named defendants, but having the same object of creating false testimony:

The greater conspiracy here was threefold: (1) Wilkens attempted to excuse his apparent violation of RPC 1.6 in releasing the will by blaming the release on Young; (2) the Althausser firm attempted to avoid liability for its apparent violation of RPC 1.6 and for not having procedures in place to prevent such a release by blaming Young; and (3) Gabrielson (on behalf of his ultimate client Shawn Parman) “ignored” the RPC 1.6 violation and gained an advantage over Young in the underlying litigation by putting Young in a false light, attacking him personally, undermining his credibility, driving a wedge between Young and his client, and perhaps hiding the will of Robert Parman which had unexpectedly come to the light of day.

whether Washington recognizes a civil cause of action for perjury. Dexter, 76 Wn. App. at 375 (quoting Anderton v. Herrington, 113 Idaho 73, 741 P.2d 360 (Ct. App.1987)). Surveying case law from other states, Dexter concluded that most jurisdictions do not allow for a common law right of action arising out of perjured testimony. 76 Wn. App. at 375. It noted, however, that some jurisdictions create an exception to this general rule where perjury is “merely a ‘step in the accomplishment of some larger, actionable conspiracy.’ ” Dexter, 76 Wn. App. at 375 (quoting Anderton, 113 Idaho at 741.). But that exception did not apply in Dexter, which went on to state: “Mr. Dexter is left with the general rule that absent an authorizing statute, there is no civil claim for perjury.” 76 Wn. App. at 375.

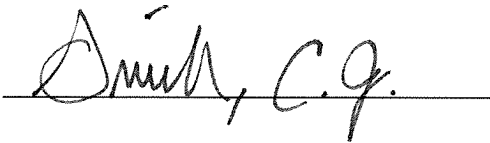
On its face, the exception Young seeks to identify in Dexter is not an exception to the litigation privilege doctrine at all but instead an exception to the general rule that no civil cause of action exists for perjury. And in fact, Dexter declined to allow the plaintiff’s suit to proceed in part because “[a] cause of action for perjury is inconsistent with the principle that a witness, lay or expert, party or nonparty, is immune from tort damages arising out of his or her testimony.” 76 Wn. App. at 376.

Young does not point to any other Washington law that supports his claim, instead relying on out-of-state or federal cases, primarily FMC Technologies, Inc. v. Edwards, 464 F. Supp. 2d 1063, 1068 (W.D. Wash. 2006). The court there, citing Dexter and a series of non-Washington cases, concluded that Washington

does recognize a “larger actionable conspiracy” exception to the litigation privilege doctrine. Edwards, 464 F. Supp. 2d at 1068-72. The court reasoned that broad statements about the protection afforded by litigation privilege were drawn from cases decided before the privilege was extended beyond defamation actions alone, in 1989’s Bruce decision. Edwards, 464 F. Supp. 2d at 1070. In doing so, however, it ignored similarly broad language in later cases. See, e.g., Deatherage, 134 Wn.2d at 135 (saying in 1997 that the privilege “applies to statements made in the course of judicial proceedings and acts as a bar to any civil liability”). Edwards appears to have applied out-of-state law while presenting it as Washington law. See 464 F. Supp. 2d at 1068-69 (citing cases from Tennessee to explain the conspiracy exception).

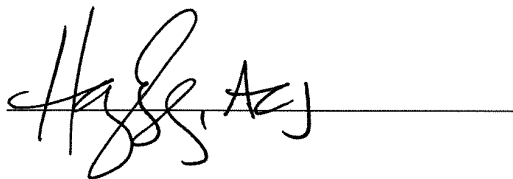
Regardless of the merit of a “larger actionable conspiracy” exception, the case law Young cites does not support the notion that existing Washington law recognizes it.

We affirm.

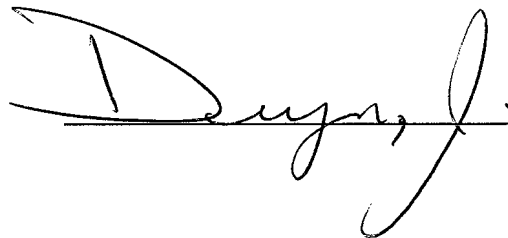


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WE CONCUR:



Handwritten signature of Hyslop, A.J. over a horizontal line.



Handwritten signature of Dwyer, J. over a horizontal line.

CERTIFICATE OF SERVICE

I hereby certify that, on this day, I caused a copy of the foregoing Petition for Review to be served via the Washington State Appellate Court's Portal upon the following counsel for respondent:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated: August 23, 2023, at Seattle Washington.



Camille Minogue

LAW OFFICE OF DAN R. YOUNG

August 23, 2023 - 3:46 PM

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