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65879-4

NO. 65879-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

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KEITH A. BROWN,

Appellant and Cross-Respondent.

v.

CHRYSALIS SCHOOL, INC.,  
a Washington corporation,

Respondent and Cross-Appellant,

---

**REPLY BRIEF OF RESPONDENT/CROSS-APPELLANT  
CHRYSALIS SCHOOL, INC.**

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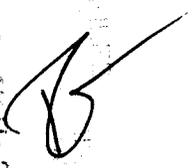


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## I. INTRODUCTION

Brown's response to Chrysalis's cross-appeal misinforms the court on Washington appellate procedure and substantive witness immunity law. Chrysalis's cross-appeal on absolute witness immunity issues is an appeal of right, not a motion for discretionary review. A motion for discretionary review is judged by different and more demanding standards of review (for "disfavored" interlocutory appeals) which do not apply here for *de novo* review of the trial court's February 2010 denial of Chrysalis's *first* motion for summary judgment. The court should decide the Chrysalis's cross-appeal on its merits as a *de novo* appeal as a matter of right.

Brown's response to Chrysalis's cross-appeal intentionally or carelessly confuses the policies behind and the law on absolute witness immunity. The immunity at stake here is not termed absolute "testimonial" immunity; it is recognized as absolute *witness* immunity. The difference between the broader concept of granting absolute immunity to a *witness* for statements made in and for judicial proceedings versus affording immunity only for a witnesses' in court *testimony* is meaningful. Absolute witness immunity should be afforded here to Murdoch's statements at issue and shield Chrysalis from any liability to Brown.

Contrary to Brown's assertions, a "witness" does not have to testify live in proceedings as condition to absolute witness immunity for

the witness' prior statements used in judicial proceedings. The fact that the witness' statements *were made and used in judicial proceedings* (with *available* safeguards) creates the witnesses' integral role in and relationship to pending judicial proceedings, triggering the absolute witness immunity. Put another way, if the witness does not testify live in court to the statements, but *the statements are for and used in the proceedings and the witness can be compelled to testify about them*, then absolute witness immunity applies.

The boundaries for the court to apply absolute witness immunity for the witness statements of Ms. Murdoch are: (1) the witness statements are given as part of a court-ordered investigation by a guardian ad litem or parental evaluator; (2) prior notice is given to the parties in court proceedings that the "report" containing the statements is published and will be used in the proceedings; (3) actual use of the report or its contents in the proceedings; and (4) the ability of the parties to subpoena the witness for a deposition or in court testimony. All of these boundaries meet the adequate safeguards afforded in RCW 26.09.220(1), (2) and (3).

Finally, "qualified privilege" is only an issue on this cross-appeal because it was an independent complete defense available to Chrysalis, it applied to the Murdoch statements without regard to the application of absolute witness immunity, and it was not considered by the Superior

Court in its ruling denying Chrysalis's *first* motion for summary judgment. Because Brown never presented "clear and convincing" evidence of an abuse of the qualified privilege by Murdoch/Chrysalis, qualified privilege should alternatively be applied to reverse the trial court's denial of Chrysalis *first* motion for summary judgment.

## II. ARGUMENT

### A. The standard of review for Chrysalis's cross-appeal is *de novo*.

Brown argues that the Chrysalis cross-appeal is really a motion for discretionary review. The apparent purpose of this tactic is unclear. It may be a way to make the Court aware that the Washington Supreme Court Commissioner denied Chrysalis's request for *direct* discretionary review by the Washington Supreme Court to Chrysalis upon the denial of its first summary judgment motion. This denial was not *res judicata* of the absolute immunity issue and resulted only from the Commissioner's view that Chrysalis failed to meet the high standards needed for the granting of *direct* discretionary review of a trial court decision *by the Supreme Court*. See RAP 2.3(b)(1) – (4) and RAP 4.2(4).

RAP 4.2(e) states that the denial of the request for direct discretionary review by the Supreme Court of a trial court decision precludes the filing "of the same motion" for discretionary review in the

Court of Appeals. However, this appeal by Chrysalis of the trial court's denial of its *first* motion for summary judgment is being pursued as a cross-appeal of right (filed concurrently with Brown's appeal of right from the granting of Chrysalis's *second* motion for summary judgment). Both decisions are now final judgments.

Brown cites Roth v. Bell, 24 Wn. App. 92, 104, 600 P.2d 602 (1979) and RAP 2.2 for the general proposition that a litigant cannot file an interlocutory appeal, as a matter of right, from a denial of a motion for summary judgment. Chrysalis agrees. Chrysalis, however, is cross-appealing *after* Brown filed a notice of appeal from the Court's dismissal of the Brown action via Chrysalis's *second* motion for summary judgment which was a final judgment. After that discussion, it was a final judgment. No claims were left for trial.

Both parties are properly appealing as a matter of right from successive Chrysalis motions for summary judgment with the *first* motion being denied and the *second* motion being granted. Both appeals of the denial and granting of summary judgment should be reviewed *de novo*.

Brown is also wrong in his apparent belief that the Court here should consider (or defer to) the Supreme Court Commissioner's prior ruling denying direct discretionary review by the Supreme Court under RAP 4.2 in deciding the Chrysalis cross-appeal. The Rules of Appellate

Procedure makes it quite clear that the “denial of discretionary review of a superior court decision *does not affect the right of a party to obtain later review of the trial court decision*” in an appeal of right. See RAP 2.3(c)(emphasis added). The ruling by the Commissioner, denying direct discretionary review of the trial court’s denial of Chrysalis’s *first* motion for summary judgment by the Supreme Court via RAP 2.3(b)(1) – (4) and RAP 4.2(4) is simply irrelevant here. This Court should address the immunity and privilege issues afresh with a *de novo* review of the issues.

- B. Brown ignores the context of a RCW 26.09.220 court-ordered investigation in parenting plan modification proceedings for the Murdoch statements at issue *and* the effect of RCW 26.09.220(3) on the use of the statements.

Brown’s response omits any reference to the RCW 26.09.220 context of the Murdoch statements. This context was that the Murdoch statements were made in/as part of the creation of a court ordered Parental Access Evaluation (PAE) investigative “report” entered into evidence in active parenting plan modification proceeding. Given that statute’s relationship to the Murdoch statements, it cannot be disputed that the statements were given by a participant *in and for a pending judicial proceeding*. The court ordered the witness interviewed by the parental evaluator.

The Murdoch statements were made in an interview to a “parenting

evaluator” appointed by the court to conduct interviews, under the auspices of RCW 26.09.220(1). By appointing Dr. Hedrick as “parenting evaluator” to interview witnesses under that statute, the parenting plan modification court was exercising its judicial power to “order [an] investigation and report concerning the arrangements for the child.” See RCW 26.09.220(1). The court was appointing the expert Dr. Hedrick as a fact-finder to conduct interviews of witnesses and present a report with custodial opinions and recommendations.

Brown ignores RCW 26.09.220(3) and its effect on the Hedrick PAE “report” containing the Murdoch statements. That statute section applied to the Hedrick PAE “report” entered into evidence at the Brown v. Garth modification of parenting plan proceedings. RCW 26.09.220(3) 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.*” (italics added).

After receipt of the Hedrick report, Brown chose not to depose or have Ms. Murdoch testify and be cross-examined on her PAE report statements in the trial proceedings. Brown wants the court here to deny absolute witness immunity to Ms. Murdoch despite his waiver of testimony under oath. His right of cross-examination by Brown of

witnesses identified in the Hedrick report applied to “any person consulted” by Dr. Hedrick for the Hedrick PAE report. See RCW 26.09.220(3). This included Ms. Murdoch. He had the right to compel her testimony in the court proceeding.

Under RCW 26.09.220(3), the safeguards of “hazard of cross-examination” and “threat of perjury” prosecution for false testimony were available for the Murdoch statements. The safeguards were not “utilized” by Mr. Brown through his own tactical decision (“waiving” the right to *use* the safeguards at the hearing). The safeguards, however, were “present,” albeit not exercised.

A reasoned review of Washington immunity decisions and statutes shows that it only requires that the witnesses’ statements be used in and be an integral part of judicial proceedings (with *available* adequate safeguards) before the witness is afforded absolute witness immunity for those statements.

In sum, adequate safeguards for absolute witness immunity were “present” because the Murdoch statements were (1) witness statements obtained *only* via a court-ordered expert (parenting evaluator, Dr. Marsha Hedrick) conducting a court-ordered interview of Murdoch in an ongoing judicial proceeding, (2) included in the 20-page Hedrick Parental Access Evaluation “report” which was an admitted exhibit in the active parenting

plan modification (i.e., judicial) proceedings, and (3) subject to cross-examination by Brown under oath because he could have called her to testify and be cross-examined in the proceedings (pursuant to RCW 26.09.220(3)).

If Brown's "live testimony is required" approach to absolute witness immunity is applied in parenting plan proceedings, parents like Brown (dissatisfied with child custody/parenting judicial proceedings) will sue court-ordered interviewees 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. This will adversely affect the efficient functioning of the court in the parenting plan modification system. Unavailability of witness immunity for witnesses interviewed by court-appointed RCW 26.09.220 experts in the thousands of child custody/parenting plan proceedings occurring in Washington each year will have a chilling effect on witness cooperation with those experts. This, in turn, will reduce the efficacy and integrity of the family law judicial system. These results are avoided by asking if adequate safeguards were available to the party who is dissatisfied.

- C. Washington courts have uniformly recognized that statements made by “participants in the judicial process” after the initiation of judicial proceedings and used in the proceedings are afforded absolute witness immunity.

Brown cites numerous isolated statements from cases for the proposition that actual testimony under oath is required for absolute witness immunity. Brown misreads those cases and ignores other language recognizing the policies behind and the parameters of the absolute immunity.

In Bruce v. Byrne-Stevens Associates Engineers, Inc., 113 Wn.2d 123, 776 P.2d 666 (1989), the Supreme Court recognized that the scope of witness immunity is “broad” and agreed with the holdings of other cases which have held that “guardians, therapists and attorneys *who submit reports to family court* are absolutely immune.” Id. at pp. 126 and 127 (emphasis added). Furthermore, the Bruce court noted that one case had held that probation officers who allegedly include false statements in pre-trial bond reports have been afforded immunity. Id. at 127. In these cases, it was the submission of reports in *and* for the judicial proceeding that triggered the absolute immunity for the statements in the report; not actual testimony.

The Supreme Court in Bruce also noted that the “purpose of granting immunity to participants in the judicial proceedings is to preserve

and enhance the judicial process.” Id. at 128. Ms. Murdoch was a “participant in judicial proceedings” by virtue her being interviewed by a court appointed evaluator (i.e., “expert”) PAE *in the ongoing judicial proceeding* and Murdoch’s statements were included in the expert “report” submitted by Hedrick to Brown’s counsel before in court testimony was taken.

Murdoch was a “participant in the judicial proceedings” in the context of her giving statements in an RCW 26.09.220 interview conducted by an expert (Dr. Hedrick) appointed by the court in the active parenting plan modification proceedings. The use of her statements in Hedrick report later was made an exhibit in the proceedings.<sup>1</sup> Brown made no objections.

Finally, the Bruce court distinguished the holding of Twelker v. Shannon & Wilson, Inc., 88 Wn.2d 473, 564 P.2d 1131 (1977) which denied absolute immunity because the statements at issue in Twelker were “uttered *before* the initiation of the judicial process.” Id. at 136 (emphasis added).

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<sup>1</sup> Brown is downplaying that Murdoch was a “participant in the judicial proceedings” entitled to absolute witness immunity because she did not testify live. This seems to be an argument that the Murdoch PAE report statements were an insignificant part of the proceedings. If he is doing that, then Brown would be conceding the point of the *second* Chrysalis summary judgment dismissal granted by the trial court on causation issues – the evidence is that statements played no part in the *outcome* of the proceedings.

The Twelker decision relied on by Brown, did have dicta-like language from a Iowa case that touched on the application of immunity. See 88 Wn.2d at 476-477. To the extent this Twelker dicta reflects the standards of Washington absolute immunity law, those standards were met. The Murdoch statements were “uttered” as part the judicial process to a court-appointed expert asking (insisting) for the interview to fulfill the expert’s two fold role (under RCW 26.09.220(1)) of (1) acting as an investigator/fact-finder for the court and (2) preparing a report on her findings and conclusions.

The Murdoch statements in the PAE “report” exhibit were part of evidence that was being controlled and admitted under the watchful eye of the Hon. Cheryl B. Carey. Murdoch could have been subpoenaed by Brown to testify and be cross examined about the statements pursuant to RCW 26.09.220(3). Brown had the report before actual court proceedings went forward and in time to call and question Murdoch under oath.

Contrary to Brown’s position, Wynn v. Earin, 163 Wn.2d 361, 181 P.3d 806 (2008) does not stand for the proposition that actual testimony must be given by a witness on the alleged tortious statements for “adequate safeguards to be present” and absolute immunity afforded. The Wynn decision was cited by Chrysalis because it re-affirmed the important policies behind the absolute immunity rule.

Witnesses like Ms. Murdoch will be reluctant to give out-of-court interviews to RCW 26.09.220 GAL's and parenting evaluators (insisting on giving only live testimony instead) if absolute witness immunity is not afforded here. Chrysalis also strongly believes the effect of this witness reluctance will undermine the GAL's and court appointed evaluator's functioning and efficacy in the parenting plan modification process. Brown counters with the position that the Chrysalis assertion "is unsupported by any evidence at all. It is conjecture, nothing more than speculation." Response Brief, p. 30. Brown's position ignores and is an attack on the Supreme Court's similar recognition in Wynn of the undesired effect of witness reluctance to participate in judicial proceedings arising from denial of absolute witness immunity. See Wynn, 163 Wn.2d 361, 370 (witnesses "might be reluctant to come forward to testify.").

Finally, Brown's reliance on language and the holdings of Deatherage v. State of Washington, Examining Board of Psychology, 132 Wn.2d 131, 948 P.2d 600 (1985), Bender v. City of Seattle, 99 Wn.2d 582, 664 P.2d 492 (1983), Engelmohr v. Bache, 66 Wn.2d 103, 410 P.2d 346 (1965), Demopolis v. Seattle First Peoples Bank, 59 Wn.App. 105, 796 P.2d 839 (1990) and Tyner v. Department of Social and Health Services, Child Protective Services, 92 Wn.App. 504, 963 P.2d 215 (1998) to deny absolute witness immunity to Murdoch's statements is misplaced.

None these cases involve (1) a witness giving an interview *in* active judicial proceedings to a court-appointed expert/investigator and (2) the investigator's RCW 26.09.220 report containing statements admitted as an exhibit in the active proceedings, thereby subjecting the interviewee to possible testimony and cross-examination under RCW 26.09.220(3).

In Deatherage, the liability sought to be immunized by the application of absolute immunity *was professional discipline* against an expert witness in child custody cases— not tort liability to a plaintiff. The Deatherage court also pointed out that “a disciplinary proceeding is not a civil suit against the expert, and the policies that underscore witness immunity do not apply.” Id. at 138. The case is inapposite.

The statements at issue in Bender were made in an informal press conference given by the police (99 Wn. App. at 586), which is a far cry contextually from a police officer making statements to a court-appointed investigator in and for use in active judicial proceedings. Absent the active judicial proceedings context for the statements, it is not surprising that the Court in Bender agreed with the majority of courts which held that only a qualified privilege attaches to police officer statements or communications made in performance of official duties. Id. at 601.

Similarly, in Englemohr, the forum and context of the statements at issue are inapposite. In Englemohr, the statements were made in a hearing

held in Washington, D.C. by a “study group” appointed by the Securities and Exchange Commission (SEC). Id. at 104. Thus, the court in that case was entirely justified in not extending the scope of the absolute witness immunity to statements made in “a non-quasi-judicial administrative proceeding.” Id. at 107.

As noted in Chrysalis’s opening brief, the facts and holding of Demopolis denying the application of absolute immunity are distinguishable. The attorney in that case would never be allowed to give testimony or be cross-examined (as a witness) in the active judicial proceedings on the statements he made in a hallway in a break in the proceedings. Absolute *witness* immunity was properly denied in those unique circumstances.

Finally, the facts and holding of Tyner are not helpful to Brown’s “testimony is required” immunity position. The Court of Appeals in Tyner recognized that, unlike the engineer expert witness in Bruce, the CPS investigator did not “act” and make her statements because a potential litigant retained her in the anticipated need of expert testimony *in judicial proceedings*. The investigator in Tyner conducted her investigation *only because of her statutory duty to do so* as a social worker/investigator. This duty existed independently of the possibility that she may eventually testify in court about the results of the investigation.

Id. at 513. Thus, the statements were not made in and for the judicial process that triggered absolute witness immunity.

- D. A case cited by Brown actually stands for the proposition that a person communicating with a governmental agency (like Murdoch did with a court-appointed expert) does *not* have to testify at all for absolute immunity to apply.

Brown argues that “[t]he pivotal circumstance in analyzing the propriety of the grant of absolute privilege is whether the statement at issue was offered in court by a witness.” Response Brief. p. 26. Brown cites the case of Story v. Shelter Bay Co. as a case Chrysalis ignores in its “participation in judicial proceedings” immunity analysis.

Story is a case not addressed previously by Chrysalis in its briefing. Ironically, however, its facts and holding support *Chrysalis’s position* that live testimony is *not* needed for absolute immunity to apply (and thereby rejects Brown’s position to the contrary). In Story v. Shelter Bay Co., 52 Wn.App. 334, 760 P.2d 368 (1998), the Court *extended* the absolute privilege, recognized in Twelker as “apply[ing] to statements made during the course and relevant to quasi-judicial administrative proceedings,” to the plaintiff “Story’s initial complaints and subsequent informal communications to HUD and the Department of Licensing[.]” Story at 341. Neither the initial complaints nor the subsequent statements

were made in sworn testimony. (See description of the statements -- 52 Wn. App. at 336-337). Yet they were protected.

The Story court noted that HUD “*can* require written statements, administer oaths and affirmations, subpoena witnesses, and conduct hearings. Implicit in these powers is the power to invoke perjury sanctions against those who testify falsely.” Id. at 338. (emphasis added). The available hearings “conducted by HUD under the act must adhere to the requirements of the Administrative Procedure Act (APA) . . . [and the ] APA empowers hearing officers to strike evidence from the record.” Id. The Department of Licensing was found to have similar procedural protections available. Id. at 339.

In light of this, the Court “conclude[d] that both HUD and the Department of Licensing have authority to discipline citizen complainants for false or malicious statements and to strike improper statements from the record” and “[held] that HUD and Department of Licensing can adequately safeguard against abuse of an absolute privilege.” Id.

Given the compelling facts and holding of Story and that the Murdoch statements were subject to the adequate safeguards afforded by RCW 26.09.220(1)-(3), Brown’s cross-appeal “testimony is required” argument fails.

E. Chrysalis was entitled to a dismissal of the Brown action based on operation of a conditional privilege to the Murdoch statements, *as an alternative defense*.

Qualified (or conditional) privilege was an alternative and additional defense which exists and can be triggered independently of the application of the absolute witness immunity. See Kauzlarich v. Yarborough, 105 Wn.App. 632, 642, 20 P.3d 946 (2001) (the defense of absolute immunity was not necessary for the Court of Appeals to resolve the case because qualified privilege applied).

Second, Brown did not produce to the trial court the quality of evidence needed to establish an abuse of the privilege. In Hitter v. Bellevue School Dist. No. 405, 66 Wn. App. 391, 400-401, 832 P.2d 130 (1992), the court held that a conditional or qualified privileged applied “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.

Like the principal and mother in Hitter, Murdoch and Dr. Hedrick had a common interest: the safety and well-being of the Brown children. The qualified privilege was triggered by the common interest context of the Murdoch statements and should have been applied.

The Hitter 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 (emphasis added). Like in Hitter, there were no relevant facts presented to the trial court by Brown that could constitute "clear and convincing" evidence Murdoch made these statements knowing that they were false or malicious 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.)

Washington cases have held there are actually *three* ways available to prove actual malice -- "[t]o prove actual malice a party must establish that the speaker [1] knew the statement was false, or [2] acted with a high degree of awareness of its probable falsity, or [3] in fact entertained serious doubts as to the statement's truth." Story v. Shelter Bay Company, 52 Wn.App. 334, 343, 760 P.2d 368 (1988). These must be proved by clear and convincing evidence, which has been described as "requir[ing] 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).

At no place in the section of the brief addressing abuse of privilege did Brown set forth “clear and convincing” evidence that it was “highly probable” that “[Murdoch] knew the statement[s about Ashley Brown’s reaction to a gift dropped off by her father and not wanting to have her father present for a college planning meeting were] false, or [Murdoch] acted with a high degree of awareness of [the statements’] probable falsity, or [Murdoch] in fact entertained serious doubts as to the statement[s’] truth.” Story, supra.

Brown simply presented the declaration of his daughter (prepared 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 Hitter, and Story, supra.

The only way Ashley Brown would have anything relevant to testify to regarding Murdoch’s state of mind for “actual malice” was if Ashley testified that Murdoch made an “admission” to Ashley Brown. The admission would have to be that “[Murdoch] knew the statement[s about Ashley Brown’s reaction to a gift dropped off by her father and not wanting to have her father present for a college planning meeting were] false, or [Murdoch] acted with a high degree of awareness of [the statements’] probable falsity, or [Murdoch] in fact entertained serious

doubts as to the statement[s'] truth.” Story, supra.

Brown now attempts to backfill the “actual malice” argument by citing generically to “evidence” in his own declaration (cited now on page 33 of the Response Brief as additional evidence of Murdoch’s “actual malice”) to prove Murdoch’s state of mind. Brown’s declaration is just as irrelevant to the Court’s assessment of “clear and convincing” evidence of Murdoch’s subjective actual malice as was his daughter’s.

In Brown’s declaration, there is no admission made by Murdoch that “[Murdoch] knew the statement[s were] false, or [Murdoch] acted with a high degree of awareness of [the statements’] probable falsity, or [Murdoch] in fact entertained serious doubts as to the statement[s’] truth.” Story, supra. Only that type of evidence, if present, would be relevant.

Finally, the language excerpted from Kauzlarich v. Yarborough, 105 Wn.App. 632, 642, 20 P.3d 946 (2001) by Brown, regarding “any evidence reasonably tending to show actual malice” being presented by a plaintiff allowing a jury to decide the issue of “malicious excess of privilege,” is taken out of context by Brown.

In Kauzlarich, the Court of Appeals actually “held that [plaintiff] presented *no evidence* that [the declarant] knew or recklessly disregarded the falsity of the statements about the death threats [asserted to have been made by plaintiff.]” Id. at 644 (emphasis added). Thus, the better

language to rely on from that decision to explain the plaintiff's burden on abuse of privilege is from the part of the decision discussing the proper granting of summary judgment in the absence of the required evidence –

Unsupported allegations of malice, where a plaintiff alleges mere falsity and possible corrupt motives, and no other bad faith activity on the part of the defendant, would make the determination of the existence of a qualified privilege by the court of little or no importance and force every defamation case to trial.

Kauzlarich v. Yarborough, 105 Wn.App. 632, 647, 20 P.3d 946 (2001).

This “assessment” of the lack of evidence needed to prove actual malice for an abuse of privilege in Kauzlarich is an appropriate description of the illusory abuse of privilege “evidence” submitted by Brown.

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 the qualified privilege. This Court should independently confirm the application of a qualified privilege to the Murdoch statements at issue and dismiss all claims on this independent defense as well.

### III. CONCLUSION

Chrysalis's cross-appeal on absolute witness immunity issues is an appeal of right. It should be decided with a *de novo* standard of review.

Absolute witness immunity should be extended to Murdoch's interview statements in Dr. Hedrick's RCW 26.09.220 PAE “report” used

in the parenting plan modification proceedings. All safeguards were available to Keith Brown.

Statements from witnesses like Ms. Murdoch should be given absolute witness immunity because: (1) the witness statements are given as part of a court-ordered investigation by a GAL or parental evaluator; (2) prior notice is given to the parties in upcoming court proceedings that the “report” containing the statements will be used in the proceeding; (3) use of or reliance on the report in the proceedings; and (4) the ability of the parties to subpoena the witness for a deposition or for trial and for cross-examination. All of these absolute witness immunity boundaries are encompassed by the procedural protections and adequate safeguards afforded in RCW 26.09.220(1), (2) and (3).

Finally, qualified privilege is an independent defense which applied here. It should have been utilized by the trial court as an additional reason to dismiss Brown’s action with prejudice. For all of these reasons, this court should reverse the trial court’s denial of Chrysalis *first* motion for summary judgment.

RESPECTFULLY SUBMITTED this 25<sup>th</sup> day of February, 2011.

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**CERTIFICATE OF SERVICE**

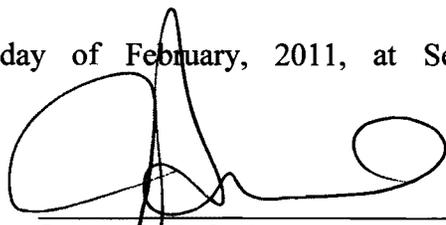
The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, 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:

Gary Randall  
Law Office of Gary E. Randall  
17311 135th Avenue NE,  
Suite B-350  
Woodinville, WA 98072-4310  
Fax: 425-402-0883  
( ) Via U.S. Mail  
( ) Via Facsimile  
() Via Hand Delivery

Bernard G. Lanz  
The Lanz Firm, P.S.  
1200 Westlake Ave. N., Suite 809  
Seattle, WA 98109-3590  
Fax: 206-682-5288  
( ) Via U.S. Mail  
( ) Via Facsimile  
() Via Hand Delivery

SIGNED this 25<sup>th</sup> day of February, 2011, at Seattle, Washington.

  
\_\_\_\_\_  
Jeannie Beth O. Asuncion

2011 FEB 28 11:11 AM '11

